THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gallery

University of London

4 JUN 1991

THE ALL ENGLAND LAW REPORTS ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS THE PRIVY COUNCIL
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1944

VOLUME 2

Consulting Editor:
ROLAND BURROWS, K.C.
Recorder of Cambridge.
Managing Editor of Halsbury's Laws of England, Hailsham Edition.

Consulting Editor for Chancery Cases
HAROLD CHRISTIE, K.C.
Bencher of Lincoln's Inn.

General Editor:
P. F. SKOTTOWE, LL.B,
of Middle Temple, Barrister-at-Law.

[*For full list of Editors and Reporters see overleaf*]

Published by the Proprietors of
THE LAW JOURNAL, 11 & 12 BELL YARD, TEMPLE BAR,
LONDON, W.C.2.

ALL ENGLAND LAW REPORTS ANNOTATED

CONSULTING EDITOR :
ROLAND BURROWS, ESQ., LL.D., K.C.,
Recorder of Cambridge.
MANAGING EDITOR OF HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

CONSULTING EDITOR FOR CHANCERY CASES :
HAROLD CHRISTIE, ESQ., K.C.,
Bencher of Lincoln's Inn.

GENERAL EDITOR :
P. F. SKOTTOWE, ESQ., LL.B.,
of Middle Temple, Barrister-at-Law.

REPORTERS :

House of Lords	C. ST. JOHN W. NICHOLSON, B.A. (OXON.)	*Barrister-at-Law*
Privy Council	HUBERT B. FIGG	*Barrister-at-Law*
Court of Appeal, No. 1 ..	W. K. SCRIVENER, LL.B.	*Barrister-at-Law*
Court of Appeal, No. 2 ..	C. ST. JOHN W. NICHOLSON, B.A. (OXON.)	*Barrister-at-Law*
Court of Appeal, No. 3 ..	R. BOSWELL	*Barrister-at-Law*
Chancery Division ..	HUBERT B. FIGG A. E. BLACK	*Barristers-at-Law*
King's Bench Division ..	C. ST. JOHN W. NICHOLSON, B.A. (OXON.) HUBERT B. FIGG M.D. CHORLTON, M.A. (OXON.) R. BOSWELL P. J. JOHNSON GWYNEDD LEWIS	*Barristers-at-Law*
Court of Criminal Appeal, and Railway and Canal Commission Cases	R. BOSWELL	*Barrister-at-Law*
Probate and Divorce ..	J. F. COMPTON MILLER, M.A. (OXON.) D. ARMSTEAD FAIRWEATHER, B.A.	*Barristers-at-Law*
Ecclesiastical Cases ..	J. F. COMPTON MILLER, M.A. (OXON.) D. ARMSTEAD FAIRWEATHER, B.A.	*Barristers-at-Law*

These reports are cited thus:
## [1944] 2 All E. R.

CASES REPORTED IN VOLUME 2

PAGE

Abbott, *Re*, Public Trustee *v.* St. Dunstan's, British Home and Hospital for Incurables and Trustees of Western Ophthalmic Hospital, and Lady Ruby Lilian Dugan [C.A.] .. 457
Adams *v.* Naylor [K.B.D. Liverpool Autumn Assizes] [C.A.] .. 21
Adel Muhammed El Dabbah *v.* A.-G. of Palestine [P.C.] .. 139
Admiralty, *Re* a dispute between N. G. Nicolaou and, [K.B.D.] .. 322
Anglo-American Oil Co., Ltd., Battersby *v.* [C.A.] .. 387
Arabian *v.* Tuffnall & Taylor, Ltd. [K.B.D.] 317
Arnell *v.* Harris [K.B.D.] .. 522
Associated Insulation Products, Ltd. *v.* H. Golder (Inspector of Taxes) [C.A.] .. 203
A.-G., Barclays Bank, Ltd. *v.* [H.L.] .. 208
——, *v.* Daimler Co., Ltd. [C.A.] .. 214
——, *v.* Lloyds Bank, Ltd. (Executor of Lillicrap) [K.B.D.] .. 157
——, *v.* Randall [C.A.] .. 179
A.-G. of Palestine, Adel Muhammed El Dabbah *v.* [P.C.] .. 139
Austin *v.* Zurich General Accident and Liability Insurance Co., Ltd. [K.B.D.] .. 243
Austin (Leyton), Ltd., Nicholls *v.* [C.A.] .. 485
B. A. Collieries, Ltd., Heaney *v.* [C.A.] .. 289
Baker, Annie Amelia *v.* Bethnal Green (Mayor, Aldermen and Burgesses) [K.B.D.] 301
Barclay, James Macara, Ltd. *v.* [K.B.D.] .. 31
——, [C.A.] .. 589
Barclays Bank, Ltd. *v.* A.-G. [H.L.] .. 208
Barker *v.* Barker (Divl.] .. 446
Barnet Instruments, Ltd., Bowmakers, Ltd. *v.* [C.A.] .. 579
Baroda (Bank of), Ltd. *v.* Punjab National Bank, Ltd. [P.C.] .. 83
Barter, Inspector of Taxes *v.* [K.B.D.] .. 154
Barwell, National Provincial Bank, Ltd. *v.* *Re* Palmer [C.A.] .. 406
Battersby *v.* Anglo-American Oil Co., Ltd. [C.A.] .. 387
Baynes, *Re*, Public Trustee *v.* Provost, Magistrates and Councillors of the Burgh of Leven [Ch.D.] .. 597
Bean, *In the Estate of* [Prob]. .. 348
Bean (Inspector of Taxes) *v.* Doncaster Amalgamated Collieries, Ltd. [C.A.] .. 279
Beasley *v.* Burberrys, Ltd. [C.A.] .. 205
Bell and Goddard, Tallents *v.* [C.A.] .. 474
Bents Brewery Co., Ltd., and Gartsides (Brookside Brewery), Ltd. *v.* Upper Agbrigg Assessment Committee, Saddleworth Rating Authority and West Riding of Yorkshire County Valuation Committee [K.B.D.Divl. Ct.] .. 37
Berkeley, *Re*, Borrer *v.* Berkeley [C.A.] .. 395
Bethnal Green (Major, Aldermen and Burgesses), Annie Amelia Baker *v.* [K.B.D.] .. 301
Billings *v.* Reed [C.A.] .. 415
Blundells & T. Albert Crompton & Co., Ltd., Lovell *v.* [K.B.D.] .. 53
Blyth *v.* Lord Advocate [H.L.] .. 375
Bonham *v.* Zurich General Accident and Liability Insurance Co., Ltd. [K.B.D.] .. 573
Borrer *v.* Berkeley, *Re* Berkeley [C.A.] .. 395
Bowmakers, Ltd. *v.* Barnet Instruments, Ltd. [C.A.] .. 579
Brentnall & Cleland, Ltd. *v.* The London County Council [K.B.D.] .. 552
Bresler and H. Bresler & Sons, Ltd., and Sorsky, R. *v.* [C.C.A.] .. 333
Bresler (I.), Ltd., Moore *v.* [K.B.D.] .. 515
Bretherton, *Ex parte*, R. *v.* Sir Bertrand Watson [K.B.D.] .. 562

PAGE

Bristol Aeroplane Co., Ltd., Young *v.* [C.A.] 293
Broughton *v.* Whittaker [K.B.D.] .. 544
Burberrys, Ltd., Beasley *v.* [C.A.] .. 205
Butler, Capital and Counties Properties, Ltd. *v.* [C.A.] .. 223
Camberwell (Mayor, Aldermen and Councillors), Kinder *v.* [K.B.D.] .. 315
Capital and Counties Properties, Ltd. *v.* Butler [C.A.] .. 223
Carr *v.* Inland Revenue Comrs. [C.A.] .. 163
Carr, Land Settlement Association, Ltd. *v.* [C.A.] .. 126
Carrimore Six Wheelers, Ltd. *v.* Inland Revenue Comrs. [K.B.D.] .. 158
——, [C.A.] .. 503
Caverswall Stone Co., Ltd., Rothwell *v.* [C.A.] 350
Chichester Diocesan Fund and Board of Finance (Incorporated) *v.* Simpson [H.L.] .. 60
Clarkson, Grant, Peel, Ley, Pearce and Trueman, R. *v.* [Warwick Summer Assizes: Birmingham Division] .. 311
Clifton *v.* Palumbo [C.A.] .. 497
Colebrook *v.* Watson Investment Co. [Ch.D.] 115
Collins Arden Products, Ltd., Johnston & Son (London), Ltd., and Henderson & Liddell, Ltd., Sopers of Harrow, Ltd. *v.* [K.B.D.] .. 42
——, [C.A.] .. 586
Comrs. of Police and McGee, Marsh *v.* [C.A.] 392
Compton, *Re*, Powell *v.* Compton [Ch.D.] .. 255
Constantine *v.* Imperial London Hotels, Ltd. [K.B.D.] .. 171
Court Line, Ltd., *Re* Petition of Right of, The Lavington Court [K.B.D.] .. 249
Courtman *v.* Talbot [K.B.D.Divl.Ct.] .. 3
Coutts & Co., Mellors Basden & Co. *v.*, *Re* Viscount Rothermere [Ch.D.] .. 593
Cramp (G. A.) & Sons, Ltd. *v.* Frank Smythson, Ltd. [H.L.] .. 92
Croft, R. *v.* [C.C.A.] .. 483
Crompton (T. Albert) & Co., Ltd., and Blundells, Lovell *v.* [K.B.D.] .. 53
Cunningham-Reid *v.* Public Trustee and Underwood [C.A.] .. 6
Cutter, R. *v.* [C.C.A.] .. 337
Daimler Co., Ltd., A.-G. *v.* [C.A.] .. 214
Daley *v.* Lloyds Bank, Ltd. *Re* Dupree's Trusts [Ch.D.] .. 443
Danziger *v.* Thompson [K.B.D.] .. 151
Debtor, The, *Re* Debtors (Nos. 2 and 3 of 1944), *Ex parte* The Petitioning Creditors *v.* [Ch.D.] 525
Debtors (Nos. 2 and 3 of 1944), *Re*, *Ex parte* The Petitioning Creditors *v.* The Debtor [Ch.D.] .. 525
Dennistoun *v.* Charles E. Greenhill, Ltd. [K.B.D.] .. 434
Director of Public Prosecutions, Stirland *v.* [H.L.] .. 13
Doncaster Amalgamated Collieries, Ltd., Bean (Inspector of Taxes) *v.* [C.A.] .. 279
Dugan (Lady Ruby Lilian), St. Dunstan's, British Home and Hospital for Incurables and Trustees of Western Ophthalmic Hospital, Public Trustee *v.*, *Re* Abbott [C.A.] .. 457
Duncan, R. *v.* [C.C.A.] .. 220
Dupree's Trusts, *Re*, Daley *v.* Lloyds Bank, Ltd. [Ch.D.] .. 443
Durham Justices and Keeper of the Peace, *Ex parte* Laurent, R. *v.* [K.B.D.] .. 530
Easson *v.* London & North Eastern Ry. Co. [C.A.] .. 425
Egerton *v.* Shirley [C.A.] .. 583
Essex Rivers Catchment Board, Port of London Authority *v.* [C.A.] .. 507
Everett, *Re*, Prince *v.* Hunt [Ch.D.] .. 19

PAGE

Fisher *v.* Ruislip-Northwood Urban District Council and County Council of Middlesex [K.B.D.] .. 149
Fitzgerald *v.* Inland Revenue Comrs. [K.B.D.] 153
Fitzhardinge's Lease, *Re*, Mackenzie *v.* Samuel Estates, Ltd. [Ch.D.] .. 145
——, [C.A.] .. 535
Gartsides (Brookside Brewery), Ltd., and Bents Brewery Co., Ltd. *v.* Upper Agbrigg Assessment Committee, Saddleworth Rating Authority and West Riding of Yorkshire County Valuation Committee [K.B.D.Divl. Ct.] .. 37
Goddard and Bell, Tallents *v.* [C.A.] .. 474
Golder (Inspector of Taxes), Associated Insulation Products, Ltd. *v.* [C.A.] .. 203
Goodger, Oliver *v.* [K.B.D.] .. 481
Grant, Peel, Ley, Pearce, Trueman and Clarkson, R. *v.* [Warwick Summer Assizes: Birmingham Division] .. 311
Great Western Ry. Co. *v.* Port Talbot Dry Dock Co., Ltd. [K.B.D.] .. 328
Greenfield *v.* London and North Eastern Ry. Co. [C.A.] .. 438
Greenhill (Charles E.), Ltd., Dennistoun *v.* [K.B.D.] .. 434
Grimmer, Marine Insurance Co., Ltd. *v.* [C.A.] 197
Gurney, Warren *v.* [C.A.] .. 472
Gyton *v.* Palmour [K.B.D.] .. 540
Hammerton (Charles) & Co., Ltd., Lucas (Inspector of Taxes) *v.* [K.B.D.] .. 133
Harland and Wolff, Ltd., Hill *v.* [C.A.] .. 219
Harris, Arnell *v.* [K.B.D.] .. 522
Harwood-Stamper, Reliance Permanent Building Society *v.* [Ch.D.] .. 75
Hastings (Mayor), Woodward *v.* [K.B.D.] .. 119
——, [C.A.] .. 565
Haston, Tearse, Lee and Keen, R. *v.* [C.C.A.] 403
Heaney *v.* B. A. Collieries, Ltd. [C.A.] .. 289
Henderson & Liddell, Ltd., Collins Arden Products, Ltd. and Johnston & Son (London), Ltd., Sopers of Harrow, Ltd. *v.* [K.B.D.] .. 42
——, [C.A.] .. 586
Hill *v.* Harland and Wolff, Ltd. [C.A.] .. 219
Hind, Hollyhomes *v.* [K.B.D.Divl.Ct.] .. 8
Hirad, (Galos) *v.* R. [P.C.] .. 50
Holford's Settlement, *Re*, Lloyds Bank, Ltd. *v.* Holford [Ch.D.] .. 462
Hollyhomes *v.* Hind [K.B.D.Divl.Ct.] .. 8
Houndsditch Warehouse Co., Ltd. *v.* Waltex, Ltd. [K.B.D.] .. 518
Hulland *v.* William Saunders & Son [C.A.] .. 568
Hunt, Prince *v.*, *Re* Everett [Ch.D.] .. 19
Huntbach, R. *v.*, *Ex parte* Lockley [K.B.D.] .. 453
Hurle-Hobbs, *Re* Decision of [C.A.] .. 261
Hutter *v.* Hutter (otherwise Perry) [Div.] 368
Imperial London Hotels, Ltd., Constantine *v.* [K.B.D.] .. 171
Inland Revenue Comrs., Carr *v.* [C.A.] .. 163
——, Carrimore Six Wheelers, Ltd. *v.* [K.B.D.] 158
——, [C.A.] .. 503
——, Fitzgerald *v.* [K.B.D.] .. 153
——, Jenkins *v.* [K.B.D.] .. 160
——, [C.A.] .. 491
——, Lever Bros. and Unilever, Ltd. *v.* [K.B.D.] .. 285
——, Pinner & Willis, Ltd. *v.* [K.B.D.] .. 320
——, *v.* Rolls-Royce, Ltd. [K.B.D.] .. 340
——, Russell *v.* [C.A.] .. 192
Inspector of Taxes *v.* Barter [K.B.D.] .. 154
——, *v.* Williamson [K.B.D.] .. 154
Jenkins *v.* Inland Revenue Comrs. [K.B.D.] .. 160
——, [C.A.] .. 491
Jesson *v.* Jesson [Div.] .. 124
Johnston & Son (London), Ltd., Henderson & Liddell, Ltd., and Collins Arden Products, Ltd., Sopers of Harrow, Ltd. *v.* [K.B.D.] .. 42
——, [C.A.] .. 586
Keen, Tearse, Lee and Haston, R. *v.* [C.C.A.] 403
Keeper of the Peace and Durham Justices, *Ex parte* Laurent, R. *v.* [K.B.D.] .. 530
Kinder *v.* Camberwell (Mayor, Aldermen and Councillors) [K.B.D.] .. 315
King, Turley *v.* [K.B.D.] .. 489
Land Settlement Association, Ltd. *v.* Carr [C.A.] .. 126
Laurent, *Ex parte*, R. *v.* Keeper of the Peace and Durham Justices [K.B.D.] .. 530
Lavington Court, The, *Re* Petition of Right of Court Line, Ltd. [K.B.D.] .. 249
Lee, Haston, Tearse and Keen, R. *v.* [C.C.A.] 403

PAGE

Leven, Burgh of, Provost, Magistrates and Councillors of, Public Trustee *v.*, *Re* Baynes [Ch.D.] .. 597
Lever Bros. and Unilever, Ltd. *v.* Inland Revenue Comrs. [K.B.D.] .. 285
Ley, Pearce, Trueman, Clarkson, Grant and Peel, R. *v.* [Warwick Summer Assizes: Birmingham Division] .. 311
Lloyds Bank, Ltd. (Executor of Lillicrap), A.-G. *v.* [K.B.D.] .. 157
——, Daley *v.*, *Re* Dupree's Trusts [Ch.D.] .. 443
——, *v.* Holford., *Re* Holford's Settlement [Ch.D.] .. 462
——, *v.* Lory. *Re* Rogers [C.A.] .. 1
Lockley, *Ex parte*, R. *v.* Huntbach [K.B.D.] .. 453
London & North Eastern Ry. Co., Easson *v.* [C.A.] .. 425
——, Greenfield *v.* [C.A.] .. 438
London Computator, Ltd. *v.* Seymour [K.B.D. Divl.Ct.] .. 11
London County Council, Brentnall & Cleland, Ltd. *v.* [K.B.D.] .. 552
London Passenger Transport Board, Watford (Mayor, Aldermen and Burgesses) *v.* [K.B.D.] 400
Looker *v.* R. [K.B.D.] .. 513
Lord Advocate, Blyth *v.* [H.L.] .. 375
Lory, Lloyds Bank, Ltd. *v.* *Re* Rogers [C.A.] 1
Lovell *v.* Blundells & T. Albert Crompton & Co., Ltd. [K.B.D.] .. 53
Lucas (Inspector of Taxes) *v.* Charles Hammerton & Co., Ltd. [K.B.D.] .. 133
Lyons (J.) & Co., Ltd., Read *v.* [K.B.D.] .. 98
Macara (James), Ltd. *v.* Barclay [K.B.D.] .. 31
——, [C.A.] .. 589
McGee and Comrs. of Police, Marsh *v.* [C.A.] 392
Mackenzie *v.* Samuel Estates, Ltd. *Re* Fitzhardinge's Lease [Ch.D.] .. 145
McMorran *v.* A. E. Marrison (Contractors), Ltd. [K.B.D.] .. 448
——, [C.A.] .. 535
Maitland *v.* Raisbeck [C.A.] .. 272
Mardon, *In the Estate of* [Prob.] .. 397
Marine Insurance Co., Ltd. *v.* Grimmer [C.A.] 197
Marrison, A. E., (Contractors), Ltd., McMorran *v.* [K.B.D.] .. 448
Marsh *v.* Comrs. of Police and McGee [C.A.] 392
Martin *v.* Nolan [K.B.D.] .. 342
——, Vickery *v.* [C.A.] .. 167
Mellors Basden & Co. *v.* Coutts & Co., *Re* Viscount Rothermere [Ch.D.] .. 593
Middlesex County Council and Ruislip-Northwood Urban District Council, Fisher *v.* [K.B.D.] .. 149
Midland Bank Executor and Trustee Co., Ltd. *v.* Noad, *Re* Noad [C.A.] .. 470
Miller, Winchester Court, Ltd. *v.* [C.A.] .. 106
Minister of Pensions, Young *v.* [K.B.D.] .. 308
Moore *v.* I. Bresler, Ltd. [K.B.D.] .. 515
Mosley *v.* George Wimpey & Co., Ltd. [K.B.D.] 135
Municipal Mutual Insurance, Ltd., *Re* an Arbitration between the Mayor, Aldermen and Burgesses of the Borough of Willesden and [K.B.D.] .. 600
National Provincial Bank, Ltd. *v.* Barwell. *Re* Palmer [C.A.] .. 406
Naylor, Adams *v.* [K.B.D. Liverpool Autumn Assizes] [C.A.] .. 21
Neale *v.* Roberts, *Re* John Powell (*deceased*) [Ch.D.] .. 528
Nicholls *v.* Austin (Leyton), Ltd. [C.A.] .. 485
Nicol, *Re*, Nicol *v.* Nicol [C.A.] .. 181
Nicolaou (N.G.), *Re* a dispute between Admiralty and [K.B.D.] .. 322
Noad, *Re*, Midland Bank Executor and Trustee Co., Ltd. *v.* Noad [C.A.] .. 470
Nolan, Martin *v.* [K.B.D.] .. 342
Office Cleaning Services, Ltd. *v.* Westminster Office Cleaning Association [C.A.] .. 269
Oliver *v.* Goodger [K.B.D.] .. 481
Ostime (Inspector of Taxes) *v.* Pontypridd and Rhondda Joint Water Board [C.A.] .. 237
Oxley *v.* Regional Properties, Ltd. [C.A.] .. 510
Palmer, *Re*, National Provincial Bank, Ltd. *v.* Barwell [C.A.] .. 406
Palmour, Gyton *v.* [K.B.D.] .. 540
Palumbo, Clifton *v.* [C.A.] .. 497
Park, Thompson *v.* [C.A.] .. 477
Pearce, Trueman, Clarkson, Grant, Peel & Ley, R. *v.* [Warwick Summer Assizes: Birmingham Division] .. 311
Peel, Ley, Pearce, Trueman, Clarkson and Grant, R. *v.* [Warwick Summer Assizes: Birmingham Division] .. 311

PAGE
Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd., Sidey *v.* [P.C.] 225
Petitioning Creditors, *Ex parte*, *Re* Debtors (Nos. 2 and 3 of 1944), *v.* The Debtor [Ch.D.] 525
Pinner & Willis, Ltd. *v.* Inland Revenue Comrs. [K.B.D.] 320
Pontypridd and Rhondda Joint Water Board, Ostime (Inspector of Taxes) *v.* [C.A.] 237
Port of Liverpool Stevedoring Co., Ltd., Porter *v.* [Liverpool Assizes] 411
Port of London Authority *v.* Essex Rivers Catchment Board [C.A.] 507
Port Talbot Dry Dock Co., Ltd., Great Western Ry. Co. *v.* [K.B.D.] 328
Porter *v.* Port of Liverpool Stevedoring Co., Ltd. [Liverpool Assizes] 411
Powell *v.* Compton, *Re* Compton [Ch.D.] 255
Powell (*deceased*), *Re* Neale *v.* Roberts [Ch.D.] 528
Prince *v.* Hunt. *Re* Everett [Ch.D.] 19
Public Trustee *v.* Provost, Magistrates and Councillors of the Burgh of Leven *Re* Baynes [Ch.D.] 597
——, *v.* Sebright, *Re* Sebright [Ch.D.] .. 547
——, *v.* St. Dunstan's, British Home and Hospital for Incurables and Trustees of Western Ophthalmic Hospital, and Lady Ruby Lilian Dugan, *Re* Abbott [C.A.] .. 457
Public Trustee and Underwood, Cunningham-Reid *v.* [C.A.] 6
Punjab National Bank, Ltd., Bank of Baroda, Ltd. *v.* [P.C.] 83
R. *v.* Croft [C.C.A.] 483
——, *v.* Cutter [C.C.A.] 337
——, *v.* Duncan [C.C.A.] 220
——, Galos Hirad *v.* [P.C.] 50
——, *v.* Grant, Peel, Ley, Pearce, Trueman and Clarkson [Warwick Summer Assizes: Birmingham Division] 311
——, *v.* Huntbach, *Ex parte* Lockley [K.B.D.] 453
——, *v.* Keeper of the Peace and Durham Justices, *Ex parte* Laurent [K.B.D.] 530
——, Looker *v.* [K.B.D.] 513
——, *v.* Sorsky, Bresler and H. Bresler & Sons, Ltd. [C.C.A.] 333
——, *v.* Tearse, Lee, Haston and Keen [C.C.A.] 403
——, *v.* Treacy [C.C.A.] 229
——, *v.* Sir Bertrand Watson, *Ex parte* Bretherton [K.B.D.] 562
Raisbeck, Maitland *v.* [C.A.] 272
Randall, A.-G. *v.* [C.A.] 179
Read *v.* Lyons (J.) & Co., Ltd. [K.B.D.] 98
Reed, Billings *v.* [C.A.] 415
Regional Properties, Ltd., Oxley *v.* [C.A.] .. 510
Reliance Permanent Building Society *v.* Harwood-Stamper [Ch.D.] 75
Ring Springs, Ltd's Patents, *Re* [Ch.D.] 421
Ripstein (*since deceased*), Trower & Sons, Ltd. *v.* [P.C.] 274
Roberts, Neale *v.*, *Re* John Powell (*deceased*) [Ch.D.] 528
Rogers, *Re*, Lloyds Bank, Ltd. *v.* Lory [C.A.] 1
Rolls-Royce, Ltd., Inland Revenue Comrs. *v.* [K.B.D.] 340
Rothermere, Viscount, *Re*, Mellors Basden & Co. *v.* Coutts & Co. [Ch.D.] 593
Rothwell *v.* Caverswall Stone Co., Ltd. [C.A.] 350
Rowson, *In the Estate of* [Prob.] 36
Ruislip-Northwood Urban District Council and County Council of Middlesex, Fisher *v.* [K.B.D.] 149
Russell *v.* Inland Revenue Comrs. [C.A.] .. 192
Saddleworth Rating Authority and West Riding of Yorkshire County Valuation Committee and Upper Agbrigg Assessment Committee, Gartsides (Brookside Brewery), Ltd., and Bents Brewery Co., Ltd. *v.* [K.B.D.Divl.Ct.] 37
St. Dunstan's, British Home and Hospital for Incurables and Trustees of Western Ophthalmic Hospital, and Lady Ruby Lilian Dugan, Public Trustee *v.*, *Re* Abbott [C.A.] 457
Samuel Estates, Ltd., Mackenzie *v.* *Re* Fitzhardinge's Lease [Ch.D.] 145
——, [C.A.] 535
PAGE
Saunders (William) & Son, Hulland *v.* [C.A.] 568
Sebright, *Re*, Public Trustee *v.* Sebright [Ch.D.] 547
Seymour, London Computator, Ltd. *v.* [K.B.D. Divl.Ct.] 11
Shirley, Egerton *v.* [C.A.] 583
Sidey *v.* Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd. [P.C.] .. 225
Sim *v.* Sim [Div.] 344
Simpson, Chichester Diocesan Fund and Board of Finance (Incorporated) *v.* [H.L.] 60
Smythson (Frank), Ltd., G. A. Cramp & Sons, Ltd. *v.* [H.L.] 92
Solicitor, *Re* A [K.B.D.] 432
Sopers of Harrow, Ltd. *v.* Johnston & Son (London), Ltd., Henderson & Liddell, Ltd., and Collins Arden Products, Ltd. [K.B.D.] 42
——, [C.A.] 586
Sorsky, Bresler and H. Bresler & Sons, Ltd., R. *v.* [C.C.A.] 333
Stirland *v.* Director of Public Prosecutions [H.L.] 13
Talbot, Courtman *v.* [K.B.D.Divl.Ct.] 3
Tallents *v.* Bell and Goddard [C.A.] 474
Tearse, Lee, Haston and Keen, R. *v.* [C.C.A.] 403
Thompson, Danziger *v.* [K.B.D.] 151
——, [C.A.] 586
——, *v.* Park [C.A.] 477
Tovarishestvo Manufacture Liudvig Rabenek *Re* [Ch.D.] 556
Treacy, R. *v.* [C.C.A.] 229
Trower & Sons, Ltd. *v.* Ripstein (*since deceased*) [P.C.] 274
Trueman, Clarkson, Grant, Peel, Ley and Pearce, R. *v.* [Warwick Summer Assizes: Birmingham Division] 311
Tuffnall & Taylor, Ltd., Arabian *v.* [K.B.D.] 317
Turley *v.* King [K.B.D.] 489
Underwood and Public Trustee, Cunningham-Reid *v.* [C.A.] 6
Upper Agbrigg Assessment Committee, Saddleworth Rating Authority and West Riding of Yorkshire County Valuation Committee, Gartsides (Brookside Brewery), Ltd., and Bents Brewery Co., Ltd. *v.* [K.B.D.Divl.Ct.] 37
Vickery *v.* Martin [C.A.] 167
Waltex, Ltd., Houndsditch Warehouse Co., Ltd. *v.* [K.B.D.] 518
Warren *v.* Gurney [C.A.] 472
Watford (Mayor, Aldermen and Burgesses) *v.* London Passenger Transport Board [K.B.D.] 400
Watson, Sir Bertrand, R. *v.* *Ex parte* Bretherton [K.B.D.] 562
Watson Investment Co., Colebrook *v.* [Ch.D.] 115
West Riding of Yorkshire County Valuation Committee and Upper Agbrigg Assessment Committee and Saddleworth Rating Authority, Gartsides (Brookside Brewery), Ltd., and Bents Brewery Co., Ltd. *v.* [K.B.D.Divl.Ct.] 37
Western Ophthalmic Hospital (Trustees of), St. Dunstan's, British Home and Hospital for Incurables and Lady Ruby Lilian Dugan, Public Trustee *v.*, *Re* Abbott [C.A.] 457
Westminster Office Cleaning Association, Office Cleaning Services, Ltd. *v.* [C.A.] .. 269
Whittaker, Broughton *v.* [K.B.D.] 544
Willesden, *Re* an Arbitration between the Mayor, Aldermen and Burgesses of the Borough of, and Municipal Mutual Insurance, Ltd. [K.B.D.] 600
Williamson, Inspector of Taxes *v.* [K.B.D.] .. 154
Wimpey (George) & Co., Ltd., Mosley *v.* [K.B.D.] 135
Winchester Court, Ltd. *v.* Miller [C.A.] .. 106
Woodward *v.* Mayor of Hastings [K.B.D.] .. 119
——, [C.A.] 565
Young *v.* Bristol Aeroplane Co., Ltd. [C.A.] 293
——, *v.* Minister of Pensions [K.B.D.] 308
Zurich General Accident and Liability Insurance Co., Ltd., Austin *v.* [K.B.D.] .. 243
——, Bonham *v.* [K.B.D.] 573

INDEX

PAGE

Acceptance, of cheque .. 83

Actual military service, Women's Auxiliary Air Force .. 36

Agent, fraud of, liability of principal .. 515

Agreement with local authority for maintenance of lunatic, preferable to take order of Divorce Court .. 124

AGRICULTURE

Agricultural tenancy—Letting for successive periods of 364 *days—Term of years or from year to year—Agricultural Holdings Act*, 1923 (*c.* 9), *ss.* 25 (1), 57 [LAND SETTLEMENT ASSOCIATION, LTD. v. CARR] .. 126

Air-raid shelter, lighting, obstruction .. 149

ANIMALS

Dogs—Damage to rabbits—Whether rabbits kept for commercial purposes "cattle"—Dogs Act, 1906 (*c.* 32), *ss.* 1, 7 [TALLENTS *v.* BELL AND GODDARD] .. 474

Annuity, computation of capital sum .. 528

Appeal, criminal, no substantial miscarriage of justice, assumption that jury not perverse 13

Apportionment costs, private street works .. 400

Audit, surcharge, increase in contractor's remuneration given on account of war costs 261

BANKRUPTCY

Imprisonment for debt—Crown debt—Whether Debtors Act, 1869, *applies to the Crown—Debtors Act*, 1869 (*c.* 62), *s.* 4 [A.-G. v. RANDALL] .. 179

Benevolent, charitable purpose .. 60

Boarding-house, dwellinghouse within rent Acts .. 167

Borstal prosecutions, quarter sessions, procedure .. 342

Building operations, emergency legislation, necessity for certificate, employment not as master man .. 3

BUILDING SOCIETIES

Mortgage—Exercise of power of sale—Ensuring sale at best price—Law of Property Act, 1925 (*c.* 20), *ss.* 101, 106 (3) *—Building Societies Act*, 1939 (*c.* 55), *s.* 10 [RELIANCE PERMANENT BUILDING SOCIETY *v.* HARWOOD-STAMPER] .. 75

Business, distinguished from profession .. 163

Capital expenditure, contribution to scheme releasing mine-owner from statutory obligation .. 279

CARRIERS

Negligence — Railway — Infant passenger's fall through door of corridor train in motion—Opening of door unexplained—Whether doctrine of res ipsa loquitur applicable—Burden of proof [EASSON v. LONDON & NORTH EASTERN RY. CO.] .. 425

Cause of action, county court, arising in district, parcel posted in London .. 205

Charge on assets of partnership, whether charge on land .. 181

Charitable or benevolent, charitable purpose, validity .. 60

CHARITIES

Bequest of money on educational trusts —Asset representing testator's rights under agreement for dissolution of partnership—Whether "a charge or incumbrance affecting or to affect" land—Charitable Uses Act, 1735, *s.* 3 [*Re* NICOL, NICOL *v.* NICOL] 181

Charitable gift—Gift for encouragement of chess playing by boys or young men under the age of 21 years—Definite geographical limitation — Educational value [*Re* DUPREE'S TRUSTS, DALEY *v.* LLOYDS BANK, LTD.] .. 344

Charitable purposes — Education of class—Twenty-eight members of the class—Relatives of testatrix — Validity [*Re* COMPTON, POWELL *v.* COMPTON] .. 255

——, *Such charitable institution or institutions or other charitable or benevolent object or objects—"Or benevolent"—Validity* [CHICHESTER DIOCESAN FUND AND BOARD OF FINANCE (INCORPORATED) *v.* SIMPSON AND OTHERS] .. 60

Validity—Bequest to the "Common Good Fund of the Leven Town Council"—Meaning of the "Common Good Fund"—Asset held under control of borough authorities for the benefit of borough and its inhabitants—Freedom of town council to spend income and capital—Perpetuity—Benefit of particular class and specified public purpose—Valid gift—[*Re* BAYNES, PUBLIC TRUSTEE *v.* PROVOST, MAGISTRATES AND COUNCILLORS OF THE BURGH OF LEVEN AND OTHERS] .. 597

Charterparty, time charter, ship torpedoed, constructive total loss .. 249

Cheque, marked and post-dated, acceptance 83

Chess, bequest for encouragement of .. 443

Children, following ball into minefield .. 21

Coal, delivery of short weight .. 552

Coal mine, capital or revenue expense for income tax purposes .. 279

Committee rooms, tenancy of, liability for rent 6

Common soldier, who is .. 375

COMPANIES

Winding up—Unregistered foreign company—Company dissolved by Russian law—Business formerly carried on in England—No principal place of business—Periodic visits by directors—Assets in England—Jurisdiction to wind up—Companies Act, 1929 (*c.* 23), *ss.* 337, 338 [*Re* TOVARISHESTVO MANUFACTUR LIUDVIG RABENEK] .. 556

Company, petrol, liability of company for false return by officials .. 11

CONFLICT OF LAWS

Jurisdiction — Nullity — Non-consummation — Wilful refusal — Petitioner domiciled in America — Both parties resident in England—Ceremony in England [HUTTER *v.* HUTTER (OTHERWISE PERRY)] 368

Conjuration of spirits, witchcraft .. 220

Constructive total loss, ship torpedoed but not sinking for 14 days .. 249

COPYRIGHT

Infringement — Diary — Copyright in tables contained in diary—Knowledge, labour and judgment involved—Copyright Act, 1911 (*c.* 46), *s.* 1 (1) [G. A. CRAMP & SONS, LTD. *v.* FRANK SMYTHSON, LTD.] .. 92

Cordial, meaning of .. 42, 544

CORONER

Inquest — Verdict of suicide — No evidence to support verdict—Inquisition quashed — Fresh inquest ordered before another coroner—Coroners Act, 1887 (*c.* 71), *s.* 6 (1) (*b*), (2)*—Coroners (Amendment) Act*, 1926 (*c.* 59), *s.* 19 [*R. v.* HUNTBACH, *Ex parte* LOCKLEY] .. 453

COUNTY COURTS

Jurisdiction—Cause of action arising wholly or in part in the district—Parcel posted in London—Not registered—Parcel lost—Jurisdiction of court at Bakewell—County Court Rules, 1936, *Ord.* 2, *r.* 1 (1) (*b*) [BEASLEY *v.* BURBERRYS, LTD.] .. 205

Court of appeal, decisions of, when binding on itself .. 293

CRIMINAL LAW

Appeal—No substantial miscarriage of justice—Assumption that jury not perverse—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1) [STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 13

——, *Reference to previous conviction on indictment given to jury—Counsel given opportunity to ask for discharge of jury—Counsel electing to appeal—Appellant deprived of right to appeal—Criminal Appeal Act*, 1907 (*c.* 23), *s.* 4 (1) [R. *v.* CUTTER] 337

Conspiracy to contravene provisions of statute—Plea of absence of mens rea—Limitation of Supplies (Miscellaneous) Order, 1940 (*S.R. & O.*, 1940, *No.* 874) [R. *v.* SORSKY, BRESLER AND H. BRESLER & SONS, LTD.] 333

Criminal liability — Corporations — Intention of servants to defraud company [MOORE *v.* I. BRESLER, LTD.] 515

Evidence—Admissibility—Evidence by one prisoner against another jointly charged with same offence—Evidence by one prisoner against another charged on same indictment with different offence [R. *v.* FREDERICK GRANT, ROBERT GOODACRE PEEL, WILFRED JOHN LEY, EDWARD PEARCE, JOSEPH TRUEMAN AND GEORGE HENRY CLARKSON] 311

——, ——, *Good character—Accusation of dishonesty not made subject of charge—Criminal Evidence Act*, 1898 (*c.* 36), *s.* 1 (*f*) [STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 13

——, *Cross-examination — Murder — Evidence of forgery to show motive introduced in cross-examination — Cross-examination to inadmissible statement by accused* [R. *v.* TREACY] 229

——, *Demonstration of spiritualistic powers—Admissibility* [R. *v.* DUNCAN] .. 220

Loitering—Found upon premises for an unlawful purpose—In entrance hall of flats—Charged as upon premises in occupation of one of the tenants—Surplusage—Vagrancy Act, 1824 (*c.* 83), *s.* 4 [HOLLYHOMES *v.* HIND] 8

Murder—Agreement to commit suicide—Survivor not present when suicide committed by other party—Whether accessory before the fact—Countermanding of agreement—Conduct required [R. *v.* CROFT] .. 483

Practice—Duty of judge to disallow inadmissible question without objection by counsel [STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 13

Quasi-criminal offences—Mens rea—Responsibility for act of agent—Weights and Measures Act, 1889 (*c.* 21), *s.* 29 (2) *—Sale of Food (Weights and Measures) Act*, 1926 (*c.* 63), *s.* 12 (2) [BRENTNALL & CLELAND, LTD. *v.* LONDON COUNTY COUNCIL] 552

Witchcraft—Pretence to exercise conjuration of spirits—Witchcraft Act, 1735 (*c.* 5), *s.* 4 [R. *v.* DUNCAN] 220

Cross-examination, based on inadmissible statement 229

Crown debt, liability of debtor to imprisonment 179

DAMAGES

Duty to minimise loss—Breach of warranty—Beverage misdescribed as "cordial"—Whether purchaser required to replace label or add sufficient sugar to sell as cordial [SOPERS OF HARROW, LTD. *v.* JOHNSTON & SON (LONDON), LTD, AND HENDERSON & LIDDELL, LTD., AND COLLINS ARDEN PRODUCTS, LTD.] 42

Damages, general, no need to prove where guest wrongly refused accommodation by inn 171

Dangerous article, bursting shell in factory, non-natural user of premises 98

Dangerous machinery, absolute duty to fence 434

——, compliance with regulation, no common law liability 485

——, unfenced hand-operated paper compressing machine 315

Deposit, recovery of, specific performance action 31

Diary, infringement of copyright, tables of information 92

Disclaimer, multiple lease, right to disclaim part and retain remainder 145

——, notice giving wrong date for operation of disclaimer 214

DIVORCE

Insanity—Alimony pendente lite and maintenance—Agreement under seal by petitioner to pay for respondent's maintenance—Undesirable as court has power to make and vary order according to circumstances [JESSON *v.* JESSON] 124

Judicial separation—Jurisdiction—Domicil — Residence — Wife petitioner — Both parties domiciled in Scotland—Wife resident in Scotland—Husband resident in England [SIM *v.* SIM] 344

Separate income of guilty wife—Settlement for benefit of child of marriage during minority—Child in custody and care of father—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 191 [BARKER *v.* BARKER] 446

EDUCATION

Grammar school—Negligence of cleaner—Liability—Governors—Public authority—Limitation of time—Infancy—Endowed Schools Act, 1869 (*c.* 56), *s.* 45*—Public Authorities Protection Act*, 1893 (*c.* 61), *s.* 1*—Limitation Act*, 1939 (*c.* 21), *s.* 21 [WOODWARD *v.* MAYOR OF HASTINGS] 119, 565

Education, charity, mainly for relatives of testator 255

Election, alternative remedies, workmen's compensation and common law action 293, 317

EMERGENCY LEGISLATION

Bankruptcy — Petition — Stay of proceedings—Inability to pay arising from "circumstances . . attributable to war"—Material transactions entered into after outbreak of war—Conditions of stay varied—Courts (Emergency Powers) Acts, 1943 (*c.* 19), *s.* 1 (5) [*Re* DEBTORS (NOS. 2 AND 3 OF 1944), *Ex parte* THE PETITIONING CREDITORS *v.* THE DEBTOR] 525

Building—"No person shall carry out any work in the course of a building undertaking carried on by him unless there is in force a certificate . . . under this regulation"—Appellant employed as a servant to build a barn—No certificate issued to appellant under the regulation—"Carry out"—"In the course of a building undertaking carried on by him"—Defence (General) Regulations, reg. 56AB [COURTMAN *v.* TALBOT] 3

Compensation—Artificial menopause resulting in highly nervous and hysterical condition—Nervous and hysterical condition aggravated by sight of bombed home—"War injury" — Hysteria functional disorder but not organic disease—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 1, 2, 8 (1) (*b*)*—Pensions (Mercantile Marine) Act*, 1942 (*c.* 26), *s.* 5 *—Pension, Personal Injuries (Civilians) Scheme, S.R. & O.*, 1944, *No.* 369, *Part IV, art* 12 (2) [FLORENCE YOUNG *v.* MINISTER OF PENSIONS] 308

——, *House requisitioned by military authorities — Agreement with tenant — Compensation payable in respect of house and in respect of storage of furniture—Disclaimer of lease by tenant—Whether tenant still entitled to compensation in respect of storage of furniture—Construction of agreement—Compensation (Defence) Act*, 1939 (*c.* 75), *s.* 2*—Landlord and Tenant (Requisitioned Land) Act*, 1942 (*c.* 13), *ss.* 1, 2 [LOOKER *v.* R.] 513

——, *Personal injuries—Child injured in following ball into minefield—"In combating the enemy"—Personal Injuries (Emergency Provisions) Act*, 1939 (*c.* 82), *ss.* 3, 8 [ADAMS *v.* NAYLOR] 21

Conditions of employment—Building trade—Rates of wages settled by collective bargaining—Failure to pay recognised rate—Agreement to pay recognised rate in future

—Right of workman to recover past wages at recognised rate—Matter not referred to National Arbitration Tribunal—No implied term in contract of service—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927 *as amended*), *reg.* 58AA—*Conditions of Employment and National Arbitration Order*, 1940 (*S.R. & O.*, 1940, *No.* 1305), *arts.* 1, 2, 5, 7 [HULLAND *v.* WILLIAM SAUNDERS & SON] 568

Controlled goods—Quota—Agreement by registered person to sell goods to quota holder and then to sell goods as agent of quota holder—Goods supplied in excess of quota "supply"—Limitation of Supplies (Miscellaneous) Order, 1940 (*S.R. & O.*, 1940, *No.* 874), *art.* 2 (R. *v.* SORSKY, BRESLER AND H. BRESLER & SONS, LTD.] 333

Essential work—Unauthorised dismissal of employee—"Specified person"—Essential Work (Building and Civil Engineering) Order, 1942 (*S.R. & O.*, 1942, *No.* 2044) [MCMORRAN *v.* A. E. MARRISON (CONTRACTORS), LTD.] 448

Landlord and tenant—Multiple lease—War damage—Disclaimer and retention of lease—Lease comprising two separate buildings—One building rendered unfit for occupation—Whether tenant entitled to disclaim as to one building and retain as to other—Jurisdiction of the court—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 15 (3), (4)—*Landlord and Tenant (War Damage) (Amendment) Act*, 1941 (*c.* 41), *Sched.* [*Re* FITZHARDINGE'S LEASE, MACKENZIE *v.* SAMUEL ESTATES, LTD.] 145, 535

——, *War damage — Disclaimer — Notice of disclaimer served one year after damage but ante-dated for purposes of repayment of rent—Validity—Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *ss.* 4, 5, 8—*Landlord and Tenant (War Damage) (Amendment) Act*, 1941 (*c.* 41), *s.* 13 [A.-G. *v.* DAIMLER CO., LTD.] 214

Personal injury—Fatal injury to engine-driver by reason of bomb crater on track—"War injury"—Whether direct and substantial connection between enemy act and injury—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3 (1), 8 [GREENFIELD *v.* LONDON AND NORTH EASTERN RY. CO.] 438

——, "*War injury*"*—Fatal injury—Cases unprovided for by scheme—Partial dependency—Funeral expenses—Claim in trespass—Personal Injuries (Emergency Provisions) Act*, 1939 (*c.* 82), *ss.* 3, 8—*Personal Injuries (Civilians) Scheme*, 1944 *S.R. & O.*, 1944, *No.* 369), *arts.* 1 (8), 29 [BILLINGS *v.* REED] 415

Petrol—Application by employee for allocation—Untrue statements—Letter by employers certifying accuracy of information furnished—Statements not known to be untrue by employers—Whether "knows" to be interpreted as "ought to have known"—Defence (General) Regulations, reg. 82 (2) [LONDON COMPUTATOR, LTD. *v.* SEYMOUR] 11

Purchase tax — False returns with intent to deceive made by servant of company in fraud of company—Liability of company [MOORE *v.* I. BRESLER, LTD.] 515

ESTATE DUTY

Exemptions—Property of "common soldier"—Member of the Home Guard killed while undergoing course of instruction—Finance Act, 1894 (*c.* 30), *s.* 8 (1)—*Stamp Act*, 1815 (*c.* 184), *Sched., Pt. III Army Act*, 1881 (*c.* 58), *ss.* 176, 190—*Defence (Local Defence Volunteers) Regulations*, 1940 (*S.R. & O.*, 1940, *No.* 748), *reg.* 2 (3), *as amended by S.R. & O.*, 1940, *No.* 1383 [BLYTH *v.* LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMRS.)] 375

Property passing on death—Policies of assurance—Policies transferred to trustees—Separate fund provided for payment of premiums — Appointment — Death of assured—Whether policies kept up for donee's benefit—Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38—*Customs and Inland Revenue Act*, 1889 (*c.* 7), *s.* 11—*Finance Act*, 1894 (*c.* 30), *s.* 2 (1) (*c*) [BARCLAYS BANK, LTD. *v.* A.-G.] 208

Estoppel, recorded agreement for compensation, infant's right to bring common law action 317

EVIDENCE

Admissibility — Contemporaneous declarations of donor sufficient to rebut presumption of advancement even if uncorroborated—Subsequent declarations of donor only admissible when against his interest [WARREN *v.* GURNEY] 472

——, *Document—Extrinsic evidence—Tenancy agreement—Person called tenant mere nominee of actual tenant* [DANZIGER *v.* THOMPSON] 151

Evidence, admissibility, evidence of one prisoner against another 311

——, cross-examination, inadmissible statement 229

——, demonstration of spiritualistic powers 220

——, good character, accusation of dishonesty 13

——, inadmissible question, duty of judge to disallow 13

Excess profits tax, calculation of profits of company 320

——, computation of capital 285

——, income received from investments, royalties 340

EXECUTORS

Administration — Protective trust — Annuity free of income tax—Death of covenantor—Estate actuarially insolvent—Valuation of annuity—Bankruptcy Act, 1914 (*c.* 59), *s.* 30 (3), (4)—*Administration of Estates Act*, 1925 (*c.* 23), *First Sched., Part* 1, *para.* 2—*Trustees Act*, 1925 (*c.* 19), *s.* 33 (1) (i)—*Finance Act*, 1941 (*c.* 30), *ss.* 25, 26 [*Re* VISCOUNT ROTHERMERE. MELLORS BASDON & CO. *v.* COUTTS & CO.] 593

Probate—Dispositive document attested but not signed—Document enclosed in envelope signed by intending testator—Wills Act, 1837 (*c.* 26), *s.* 9—*Wills Act Amendment Act*, 1852 (*c.* 24). *s.* 1 [*In the Estate of* BEAN] 348

FACTORIES AND WORKSHOPS
FACTORIES

Dangerous machinery—Absolute duty—Circular saw—Guard complying with Woodworking Machinery Regulations, 1922, *reg.* 10—*Operator injured—Whether any residual duty under Factories Act*, 1937, *s.* 14—*Factory and Workshop Act*, 1901 (*c.* 22)—*Factories Act*, 1937 (*c.* 67), *ss.* 14, 60, 159—*Woodworking Machinery Regulations*, 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10 [NICHOLLS *v.* AUSTIN (LEYTON), LTD.] 485

——, ——, *Cutting machine—Guard provided—Machine accidentally set in operation—Failure to use clearing tool—Operator injured—Factories Act*, 1937 (*c.* 67), *ss.* 14 (1), (2), 133 [DENNISTOUN *v.* CHARLES E. GREENHILL, LTD.] 434

——, *Fencing — Unfenced hand-operated paper compressing machine—Criterion by which danger determined—"Adapting for sale . . ."—Factories Act*, 1937 (*c.* 50), *s.* 151 [KINDER *v.* MAYOR ALDERMEN AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF CAMBERWELL] 315

Shipbuilding yard—Wet dock—Boiler repairs—Safety of staging—Factories Act, 1937 (*c.* 67), *ss.* 60, 106, 159—*Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133) [LOVELL *v.* BLUNDELLS & T. ALBERT CROMPTON & CO., LTD.] 53

Floating charge, on assets of partnership .. 181

FOOD AND DRUGS

Express warranty—Nature substance or quality demanded — "Cordial" — Whether cordial must contain substantial percentage of sugar—Implied warranty on sale by description—Sale of Goods Act, 1893 (*c.* 71), *s.* 13—*Food and Drugs Act*, 1938 (*c.* 56), *s.* 3 [SOPERS OF HARROW, LTD. *v.* JOHNSTON & SON (LONDON), LTD., AND HENDERSON & LIDDELL, LTD., AND COLLINS ARDEN PRODUCTS, LTD.] 42, 586

Food not of nature, substance or quality demanded — "Cordial" — Character of article—No statutory or recognised standard —Certificate of public analyst—Evidence not contradicted—Article sold to prejudice of purchaser—Food and Drugs Act, 1938 (*c.* 56), *s.* 3 (1) [BROUGHTON *v.* WHITTAKER] 544

Milk—Milk tested while standing at appointed collecting point—Contract completely executed by producer—Whether milk still in producer's possession — Possession—Food and Drugs Act, 1938 (*c.* 56), *s.* 24 [OLIVER *v.* GOODGER] 481

GIFTS INTER VIVOS

Property bought by father—Conveyance in name of daughter—Title deeds retained by father—Presumption of advancement—Claim by daughter to be beneficial owner of property—Claim for possession of title deeds against executors of father's estate [WARREN *v.* GURNEY] 472

Governors, endowed school, public authority 119

Grammar school, liability of governors, public authority 119

GUARANTEE OR INDEMNITY

Contract by defendants to repair plaintiffs' ship — Indemnity clause — Whether applicable to subject-matter of contract [GREAT WESTERN RY. CO. *v.* PORT TALBOT DRY DOCK CO., LTD.] .. 328

Guest, refusal to accept, right to general damages 171

HIGHWAYS

Obstructions—Air-raid shelter in roadway—Lighting—Shelter sometimes illuminated—Trap [FISHER *v.* RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL AND COUNTY COUNCIL OF MIDDLESEX] 149

Private street works—Apportionment of cost—Objection—Persons protected under statute required to give notice of objection—Private Street Works Act, 1892 (*c.* 57), *ss.* 7, 22 [MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WATFORD *v.* LONDON PASSENGER TRANSPORT BOARD] 400

Hire, cessor of, ship torpedoed, not sinking for 14 days 249

Home Guard, position of, in relation to death duties 375

Hotel, wrongful refusal to receive guest, right to general damages 171

Imprisonment for debt, Crown debt, Debtors Act, 1869, not binding on Crown 179

INCOME TAX

Covenant to pay annuity free of tax—Supplemental deed made after Act—Principal deed to have effect as if s. 25 *had never become law—Variation after Act came into force—Whether includes a variation made after the Act—Finance Act,* 1941 (*c.* 30), *s.* 25 [FITZGERALD *v.* INLAND REVENUE COMRS.] 153

Deduction against profits—Coal mine —Statutory obligation to remedy damage to district drainage system resulting from subsidence—Contribution to scheme releasing mine owner from statutory obligation—Contribution payable by instalments—Whether capital or revenue expense [J. H. BEAN (INSPECTOR OF TAXES) *v.* DONCASTER AMALGAMATED COLLIERIES, LTD.] 279

Dispositions in favour of children—Payments returned to taxpayer—Effective payment under disposition [RUSSELL *v.* INLAND REVENUE COMRS.; INLAND REVENUE COMRS. *v.* RUSSELL] 192

Dividends—Dividends of foreign corporation—Dividend payable four years after declaration—Whether shareholders assessable in year of declaration or in year of payment [ASSOCIATED INSULATION PRODUCTS, LTD. *v.* H. GOLDER (INSPECTOR OF TAXES]) 203

Licence to take surface gravel—Income tax deducted from money due under licence —Whether gravel pit a "concern" within Income Tax Act, 1918, *Sched. A, No.* 111, *rr.* 1, 2, 3—*Income Tax Act,* 1918 (*c.* 40), *All Schedules Rules, r.* 19, *Sched. A, No.* 111, *rr.* 1, 2, 3—*Finance Act,* 1934 (*c.* 32), *s.* 21 [MOSLEY *v.* GEORGE WIMPEY & CO., LTD.] 135

Penal provisions — False returns — Taxpayer entitled to same relief even if he had made true returns—Whether penalties applicable—Income Tax Act, 1918 (*c.* 40), *s.* 30 [ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY) *v.* LLOYDS BANK, LTD. (EXECUTOR OF LILLICRAP, *deceased*)] .. 157

Returns—Income from hereditament taxable under Sched. A included in return under Sched. D, Case 1—*Application for relief—Case stated by Commissioners for the opinion of the court—Whether "point of law arising in connection with the computation of profits or income"—Limitation of jurisdiction of court—Income Tax Act,* 1918 (*c.* 40), *s.* 149—*Finance Act,* 1923 (*c.* 14), *s.* 24 (5) [CARRIMORE SIX WHEELERS, LTD. *v.* INLAND REVENUE COMRS.] 158, 503

Schedule B — Nurseries and market gardens—Watercress beds—Assessment—Income Tax Act, 1918 (*c.* 40), *Sched. B, rr.* 1, 8 [INSPECTOR OF TAXES *v.* H. S. BARTER. INSPECTOR OF TAXES *v.* C. W. WILLIAMSON] 154

Sur-tax — Settlements — Avoidance of tax—Irrevocable settlements—Trust fund invested in companies controlled by settlor —Winding up by settlor destroying trust fund—"Income payable to settlor in any circumstances whatsoever"—Loan by settlor repaid out of income by trustees—Finance Act, 1936 (*c.* 34), *s.* 21—*Finance Act,* 1938 (*c.* 46), *s.* 38 [JENKINS *v.* INLAND REVENUE COMRS.] 160, 491

"Tied houses"—Premium paid by tenant—Brewery acquiring tied houses from another company—Whether premiums payable by tenants to be taken into account—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I* [A. S. LUCAS (INSPECTOR OF TAXES) *v.* CHARLES HAMMERTON & CO., LTD.] 133

Trade expenses—Sums paid by water board to body of which it is constituent member—Sums part of price payable for water supplied to board's own consumers —Whether allowable as deductions—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I* [OSTIME (INSPECTOR OF TAXES)*v.* PONTYPRIDD AND RHONDDA JOINT WATER BOARD] 237

Trade receipt—Sums received by water board under precepts issued to constituent authorities—Sums provided out of general rate—Whether trade receipt—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case I* [OSTIME (INSPECTOR OF TAXES) *v.* PONTYPRIDD AND RHONDDA JOINT WATER BOARD] 237

Indemnity clause in contract to repair ship, extent of operation 328

Indictment, witnesses named on, whether prosecution must call all 139

Infancy, custody of parent, defence to statute of limitations 119

INJUNCTION

Interim injunction—Contract—Schoolmaster—Licensee on premises—Revocation of licence—Forcible re-entry—Trespass [THOMPSON *v.* PARK] 477

INNS AND INNKEEPERS

Hotel—Refusal to accommodate guest —No special damage—Right to general damages [CONSTANTINE *v.* IMPERIAL LONDON HOTELS, LTD.) 171

Innkeeper's lien — Luggage — Ring handed to innkeeper as security for bill [MARSH *v.* COMRS. OF POLICE AND MCGEE] 392

INSURANCE

Fire insurance—Insurance against damage by explosion of boilers used for domestic purposes only—Boiler used for heating building—Certain rooms in building used for business purposes—" Domestic purposes only " [*Re* An Arbitration between the Mayor, Aldermen and Burgesses of the Borough of Willesden and Municipal Mutual Insurance Ltd.] 600

Marine insurance — Re-insurance — Named ships " and/or steamers held covered at premiums to be arranged "—Cargo in fact carried by another ship which was lost at date of re-insurance—Whether policy effective to cover loss [Marine Insurance Co., Ltd. *v.* Grimmer] 197

Motor insurance—Passenger in private car—Voluntary contribution towards expenses—Policy not covering use for hiring—Road Traffic Act, 1930 (*c.* 43), *ss.* 35, 36, 38 [Bonham *v.* Zurich General Accident and Liability Insurance Co., Ltd.] 573

——, *Permitted driver—Insurers of permitted driver indemnifying driver—Whether entitled to contribution from insurers of owner—Road Traffic Act*, 1930 (*c.* 43), *s.* 36 (4) [Austin *v.* Zurich General Accident and Liability Insurance Co., Ltd.] 243

Insurance, policy, keeping up 208

Joint tenancy, liability of survivor for rent .. 6

Jointure, income tax on 547

JUDGMENTS

Judicial decisions as authorities—Court bound by its previous decision—Full Court of Appeal has no greater power than division of the court—Decisions given per incuriam [Young *v.* Bristol Aeroplane Co., Ltd.] 293

Judicial separation, jurisdiction, petitioner resident outside jurisdiction 344

Jurisdiction, county court, cause of action arising in the district, parcel posted in London 205

LANDLORD AND TENANT

Liability of landlord for repairs—Roofs of houses in state of disrepair—Damage to roofs caused by enemy action—Statutory nuisance—Abatement notice served on landlord—Failure to carry out repairs—Whether landlord entitled to relief from obligation in case of war damage—Public Health Act, 1936 (*c.* 49), *ss.* 91-94—*Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *s.* 1 [Turley *v.* King] 489

Rent — Joint tenancy — Tenancy of committee rooms—Death of one of two joint tenants—Liability of executors for contribution towards payment of rent—Law of Property Act, 1925 (*c.* 20), *s.* 34 (2), 36 [Cunningham-Reid *v.* Public Trustee and Underwood] 6

Rent restriction—Letting at less than standard rent—No clause allowing deduction from standard rent—Right of landlord to increase rent to standard rent [Capital and Counties Properties, Ltd. *v.* Butler] 223

——, *Permitted increase—Transfer to landlord of liability to repair previously borne by the tenant—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 2 (3) [Winchester Court, Ltd. *v.* Miller] 106

——, *Premises within the Acts—Boarding-house—Tenant reserving for own use certain rooms according to requirements—Whether subject to control—Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (3) [Vickery *v.* Martin] .. 167

Tenancy agreement allowing bonus on punctual payment of rent—Agreement terminated by notice—Statutory tenancy—Whether proviso for bonus imported into statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 15 (1) [Oxley *v.* Regional Properties, Ltd.) 510

Tenancy—Terms of years or from year to year—Letting for successive periods of 364 days [Land Settlement Association, Ltd. *v.* Carr] 126

Lien, innkeeper's, when attaching 392

LOCAL GOVERNMENT

Audit—Surcharge on councillors—Contract to dispose of refuse—Decision to increase remuneration of contractor—Whether the contractor is a person " aggrieved "—Local Government Act, 1933 (*c.* 51), *ss.* 228 (1), 229 [*Re* Local Government Act, 1933, and *Re* the Decision of C. R. H. Hurle-Hobbs, District Auditor] 261

Loitering, in dwelling-house, no need to specify occupier, surplusage 8

Lunacy, lodgment order, effected on dividend mandates 406

Lunatic, order for maintenance, in preference to agreement with local authority .. 124

MAGISTRATES

Jurisdiction — " Person charged " — Money taken from person without any charge preferred—Subsequent charge of theft of articles in postal packets not including money—Direction by magistrates at trial for return of money—Summary Jurisdiction Act, 1879 (*c.* 49), *s.* 44 [Arnell *v.* Harris] 522

Practice — Jurisdiction — Appeal — Court of summary jurisdiction—Recognisance forfeited—Whether order of forfeiture a conviction in respect of an offence—Right of appeal to quarter sessions—No appeal open—Summary Jurisdiction Act, 1879 (*c.* 49), *ss.* 9 (1), (2), 19—*Criminal Justice Administration Act*, 1914 (*c.* 58), *s.* 37—*Criminal Justice Act*, 1925 (*c.* 86), *s.* 26 (1) [R. *v.* Keeper of the Peace and Durham Justices, *Ex parte* Laurent] 530

Quarter sessions—Borstal prosecutions—Offender previously convicted or previously discharged on probation—Offender placed on probation—Failure to observe recognisance — Conviction for offence for which offender placed on probation—Whether liable to be sent to Borstal—Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10—*Criminal Justice Act*, 1925 (*c.* 86), *s.* 46 (1) [Martin *v.* Nolan] 342

Summary jurisdiction—Application for case stated—Refusal—Point of law involved previously decided by judgment in Chancery Division—Judgment not final and binding—Duty to state a case—Mandamus—Summary Jurisdiction Act, 1879 (*c.* 49), *s.* 33 (1)—*Administration of Justice (Miscellaneous Provisions) Act*, 1938 (*c.* 63), *ss.* 8, 19 [R. *v.* Sir Bertrand Watson, *Ex parte* Bretherton] 562

Maintenance, gift for, no liability to account, vesting of gift to infant 1

Marine insurance, re-insurance, ship lost at date of slip 197

MASTER AND SERVANT

Duty of master—Provision of safe system of working—Adaptation to changing circumstances — Unloading of cargo — Change over from discharging by means of a derrick to hauling up by straight lift—Breaking of rope [Porter *v.* Port of Liverpool Stevedoring Co., Ltd.] .. 411

Liability of master—Provision of safe system of working [Lovell *v.* Blundells & T. Albert Crompton & Co., Ltd.] .. 53

Mens rea, in quasi-criminal offence 552

Milk, adulterated, possession of 481

Minefield, children following ball, liability of military authority 21

Minimising damage, replacing label, adding sugar to goods supplied 42

Mortgage, building society, exercise of power of sale, duty to get best price 75

Mortgagee, sale under power, consent of mortgagor, validity under 1914 Emergency legislation 115

Motor insurance, contribution from insurers of owner 243

Multiple lease, right to retain part and disclaim remainder 145

Named ship, "and/or steamers," ship lost at date of re-insurance 197

NEGLIGENCE

Air-raid shelter — Stairway uneven, inadequately illuminated and no centre hand rail—Concealed danger—"War injury"—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8 [Annie Amelia Baker *v.* Mayor, Aldermen and Burgesses of Bethnal Green] 301

Bomb crater on railway track—Engine-driver ordered to proceed "at caution"—Fatal injury—Assessment of damages [Greenfield *v.* London & North Eastern Ry. Co.] 438

Dangerous article—High explosive—No escape from premises—Bursting of high explosive shell injuring employee—Non-natural user of premises [Norah Read *v.* J. Lyons & Co., Ltd.] 98

Fatal injury by aeroplane—"War injury"—Cases unprovided for by scheme—Partial dependency—Funeral expenses—Claim in trespass—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3, 8—*Personal Injuries (Civilians) Scheme*, 1944 (*S.R. & O.*, 1944, *No.* 369), *arts.* 1 (8), 29 [Billings *v.* Reed] 415

Trespassers — Minefield laid by military authorities in war-time—Children playing—Fence obliterated by natural causes [Adams *v.* Naylor] 21

Volenti non fit injuria—Employee directed to employment by Minister of Labour and National Service [Norah Read *v.* J. Lyons & Co., Ltd.] 98

Nominee, described as tenant, evidence to show actual facts 151

Notice, disclaimer, wrong date given for operation of disclaimer 214

Novus actus interveniens, defective medical treatment as 350

NUISANCE

Unlighted vehicle on road in darkness—No negligence—Not ipso facto a nuisance [Maitland *v.* Raisbeck] 272

Nuisance, liability for war damage 489

Nullity, jurisdiction in, whether exclusively in court of domicil 368

Optician, whether business or profession .. 163

Partnership, agreement for payment of commission, whether constituting 274

Passing-off, damages, absence of fraud 269

PATENTS

Extension or term—Patents acquired from German company—English company paying under agreement one-quarter of moneys received under patents to German company—German company majority shareholders in English company—Loss or damage suffered due to hostilities—Whether English company carried on wholly or mainly for benefit of German company—Custodian of enemy property—Vesting order—Shares sold by Custodian to directors of English company—Patents and Designs Acts, 1907-1942, *s.* 18 (6) [*Re* Ring Springs, Ltd's. Patents] 421

Permitted driver, contribution from insurers of owner 243

Permitted increase, transfer of burden of repair 106

Perpetuity, contingent charge on assets of partnership 181

Personal injury, child following ball into minefield 21

Petrol, untrue statements by official, liability of company 11

Policy, insurance, keeping up 208

POWERS

Special powers and general power to appoint—Exercise—Whether intention to exercise expressed in will [*Re* Holford's Settlement, Lloyds Bank, Ltd. *v.* Holford] 462

PRACTICE

Security for costs—Appeal—Common law action by workman against employer—Workman unable to give security—Effect, if order made, on right to workmen's compensation—Whether order made—R.S.C., Ord. 58, *r.* 15 [Hill *v.* Harland and Wolff, Ltd.] 219

Time for appeal—Appeal entered late—Overruling decision by superior court in an analogous case—Whether relevant ground for application to enlarge time for appeal—Discretion of court to extend time—Finance Act, 1941 (*c.* 30), *s.* 25 (1)—*R.S.C., Ord.* 58, *r.* 15, *Ord.* 64, *r.* 7 [*Re* Berkeley, Borrer *v.* Berkeley] .. 395

——, *Leave to appeal—Interlocutory or final order—Order granting leave to proceed under the Courts (Emergency Powers) Act*, 1943—*Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *ss.* 31 (1) (i), (2), 68 (2)—*Courts (Emergency Powers) Act*, 1943 (*c.* 19), *s.* 1—*R.S.C., Ord.* 58, *r.* 15 [Egerton *v.* Shirley] 583

Writ—Extension of time for service—Action under Fatal Accidents Act, 1846—*Writ issued within the* 12 *months limited by the Act—Not served within* 12 *months of date of issue—Discretion of court to extend time for service—R.S.C., Ord.* 8, *rr.* 1, 2—*R.S.C., Ord.* 64, *r.* 7 [Battersby *v.* Anglo-American Oil Co., Ltd.] .. 387

PRIVY COUNCIL

India—Bills of Exchange—Cheque—Post-dated cheque marked "Good for Payment"—No ostensible authority of manager to certify post-dated cheques—Certification not an acceptance—Estoppel—Custom—Bills of Exchange Act, 1882 (*c.* 61), *s.* 13 (2)—*Indian Negotiable Instruments Act*, 1881, *s.* 7 [Bank of Baroda, Ltd. *v.* Punjab National Bank, Ltd.] 83

New Zealand—Wills—Construction—Gift to surviving descendants on death of last survivor of testator's children—Gift divisible per stirpes—Whether children or grandchildren to be the stirpes [Sidey *v.* Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.] .. 225

Palestine—Criminal law—Discretion of prosecuting counsel to call witnesses named on indictment or information—Constitution of Court of Criminal Assize—Order made by the High Commissioner—Ultra vires — Palestine Interpretation Ordinance, 1933 (1933), *No.* 69, *s.* 7—*Palestine Criminal Code Ordinance*, 1936, *ss.* 214, 216—*Emergency Powers (Defence) Act*, 1939 (*c.* 62), *s.* 1—*Palestine Defence (Judicial) Regulations*, 1942, *reg.* 3 [Adel Muhammed El Dabbah *v.* Attorney-General of Palestine] 139

Quebec—Partnership—Agreement for payment of commission on orders obtained—Whether partnership agreement [Trower & Sons, Ltd. *v.* Ripstein (*since deceased*)] 274

——, *Practice—Writ of summons—Jurisdiction—Breach of a contract made in London—Action brought in Montreal—Writ not personally served—Code of Civil Procedure (Quebec), art.* 94 [Trower & Sons, Ltd. *v.* Ripstein (*since deceased*) .. 274

Somaliland—Criminal law—Counsel retained by government to appear for defendants—Unavoidable absence of counsel on appeal — Hearing without counsel — Appeal not effectively heard—Poor Persons Defence Ordinance, 1939 (*Ordinance*, 1939, *No.* 26), *s.* 3 (2) [Galos Hirad *v.* R.] .. 50

Profession, distinguished from business 163

Prosecution, witnesses named on indictment, whether all must be tendered for cross-examination 139

PUBLIC AUTHORITIES

Limitation of actions—What bodies protected—Governors of grammar school—Pupil slipping on worn step on snowy day—Infancy of plaintiff—Endowed Schools Act, 1869 (*c.* 56), *s.* 45—*Public Authorities Protection Act*, 1893 (*c.* 61), *s.* 1—*Limitation Act*, 1939 (*c.* 12), *s.* 12 [Woodward *v.* Mayor of Hastings] 119, 565

Quota, supply of goods in excess of 333

Rabbits, whether cattle 474

RATES AND RATING

Rateable occupation — Possession — Blocks of flats owned by companies—Tenants paying rent inclusive of rates—Rates in arrears—Order appointing receiver and manager—Receiver entered in rate-book of borough council as new rateable occupier —No appeal against entry—Whether change of occupation of premises—Liability to be rated—Poor Rate Assessment and Collection Act, 1869 (*c.* 41), *s.* 16 [GYTON *v.* PALMOUR] 540

Valuation list—Proposed amendment to valuation list—Appeal—Appellants not entitled but invited to attend hearing—Whether appellants had a locus standi in the matter—Grounds of proposed amendment—" Annual revision "—Sufficiency—Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1), (2), (4), (5), (7), (8) [GARTSIDES (BROOKSIDE BREWERY) LTD., AND BENTS BREWERY CO., LTD. *v.* UPPER AGBRIGG ASSESSMENT COMMITTEE, RATING AUTHORITY FOR THE URBAN DISTRICT OF SADDLEWORTH AND COUNTY VALUATION COMMITTEE OF THE WEST RIDING OF YORKSHIRE] 37

Receiver, rateable occupier, as 540

Recognisance, forfeiture of, appeal 530

Relatives, trust for education of, charity .. 255

Rent, joint tenancy, committee rooms 6

Rent restriction, boarding-house, within the Acts 167

——, letting at less than standard rent, right to increase up to standard rent 223

——, permitted increase, transfer of burden of repair 106

Repair, transfer of burden, rent restriction, permitted increase 106

Requisition, of vessel by government, whether order to discharge requisitioned cargo amounts to 323

Res ipsa loquitur, application to opening of railway carriage door 425

Retention, right of, multiple lease, retaining part and disclaiming remainder 145

REVENUE

Excess profits tax—Capital employed in chargeable accounting period—Contribution to superannuation fund to equalise benefits for employees—Whether company had acquired an asset in consideration of contribution—" Asset "—Finance (No. 2), Act, 1939 (*c.* 109), *s.* 13 (3), *Sched.* 7, *Pt. II, para.* 1 [LEVER BROS. AND UNILEVER, LTD. *v.* INLAND REVENUE COMRS.] 285

——, *Computation of standard profits —Appointment of directors with transfers of shares to enable them to become " working proprietors "—Whether valid for purposes of excess profits tax—Finance Act*, 1941 (*c.* 30), *s.* 35 [PINNER & WILLIS, LTD. *v.* INLAND REVENUE COMRS.] 320

——, *Profits of profession dependent wholly or mainly on personal qualifications —Optician—Finance (No. 2) Act*, 1939 (*c.* 109), s. 12 (3) [CARR v. INLAND REVENUE COMRS.] 163

——, *Royalties received from licences of patented inventions—Inventions made by research department—" Income received from investments "—Finance (No. 2) Act*, 1939 (*c.* 109), *Sched. VII, para.* 6 (1), (2) [INLAND REVENUE COMRS. *v.* ROLLS-ROYCE, LTD.] 340

Revival, codicil, by, absence of express confirmation 397

Safe system of working, defective staging .. 53

Sale, by building society, duty to get best price 75

——, by mortgagee, under power with consent of mortgagor, validity under 1914 emergency legislation 115

SALE OF GOODS

Contract—Sale by sample—Breach of condition as to quality—Offer by defendants to accept return of undisposed stock—Offer rejected—Damages—Mitigation—Duty of plaintiffs to ascertain precise meaning of offer—Sale of Goods Act, 1893 (*c.* 71), *ss.* 35, 36 [HOUNDSDITCH WAREHOUSE CO., LTD. *v.* WALTEX, LTD.] 518

Machine-tools—Hire-purchase agreement—Conversion of goods by hirers—Claim by owners for damages—Owners' property in goods originally obtained in contravention of controlled price order—Whether illegality vitiated hire-purchase agreement — Public policy — Defence (General) Regulations, regs. 55 *and* 98—*Control of Machine Tools (No. 3) Order*, 1940 (*S.R. & O.*, 1940, *No.* 1374)—*Control of Machine Tools (No. 5) Order*, 1940 (*S.R. & O.*, 1940, *No.* 1784) [BOWMAKERS, LTD. *v.* BARNET INSTRUMENTS, LTD.] .. 579

SALE OF LAND

Offer—Letter by proposed vendor—Whether amounting to an offer [CLIFTON *v.* PALUMBO] 497

Recovery of deposit—Statement by vendor to requisitioning authority that he was prepared to accept requisition notice and that he intended to reside on the property—Whether requisition notice effective for the purpose of exercising power to enter into possession of property—Repudiation of contract by purchaser—Whether purchaser entitled to recover deposit—Law of Property Act, 1925 (*c.* 20), *s.* 49 (2)—*Defence (General) Regulations*, 1939, *reg.* 51 [JAMES MACARA, LTD. *v.* BARCLAY] 31, 589

Sale by mortgagee—Statutory restrictions on mortgagee's powers under 1914 *legislation—Sale with consent of mortgagor —Validity—Courts (Emergency Powers) Act*, 1914 (*c.* 78) [COLEBROOK *v.* WATSON INVESTMENT CO.] 115

Security for costs, effect of order to deprive appellant of workmen's compensation .. 219

SETTLEMENTS

Jointure rent-charge—Annual sums in arrears—Income subsequently available for payment of arrears—Deduction of income tax—Rate of tax to be deducted—" Standard rate for the year in which the amount payable becomes due "—Payment of jointures " without any deduction " —Exoneration from succession and estate duties—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 19—*Finance Act*, 1927 (*c.* 10), *s.* 39 (1) [*Re* SEBRIGHT, PUBLIC TRUSTEE *v.* SEBRIGHT] 547

SEWERS AND DRAINS

Land drainage—Drainage rates—Annual value of premises for purposes of drainage rates determined by drainage board —Whether board required to make fresh valuation in each year—Land Drainage Act, 1930 (*c.* 44), *ss.* 24, 26, 29 [PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD] 507

Shell, bursting in factory, liability of owners, non-natural user of premises 98

SHIPPING

Charterparty—Time charter—Hire—Ship torpedoed but sinking 14 days later—When hire ceases to be payable—Actual total loss — Constructive total loss — Abandonment—Marine Insurance Act, 1906 (*c.* 41), *ss.* 57 (1), 60 [*Re* PETITION OF RIGHT OF COURT LINE, LTD., THE LAVINGTON COURT] 249

Emergency legislation—Compensation —Requisition—Ship ordered by Minister of Shipping to proceed from Belfast to Manchester to discharge requisitioned cargo—Whether requisitioning of cargo amounts to requisitioning of ship — Compensation (Defence) Act, 1939 (*c.* 75), *ss.* 4, 7—*Defence (General) Regulations, reg.* 53 (2) [*Re* A DISPUTE BETWEEN N. G. NICOLAOU AND THE MINISTER OF WAR TRANSPORT AND N. G. NICOLAOU AND THE ADMIRALTY] 322

Signature, of will, on envelope.. 348

Soldier's will, Women's Auxiliary Air Force 36

SOLICITOR

Practice—Order to strike name off roll —Refusal of Disciplinary Committee to suspend publication of findings pending appeal—Provision under rules for suspending order—Whether court has inherent jurisdiction to prevent publication—Solicitors

(*Disciplinary Proceedings*) *Rules*, 1942 (*S.R. & O.*, 1942, *No.* 1831/*L.*25), *r.* 29 (1) [*Re* A SOLICITOR] 432
Spiritualistic powers, demonstration of 220
Staging, safety of, in wet dock 53
Standard rent, letting at lower rent, rise to increase up to standard rent 223

STATUTES

Construction — Enforcement — Non-observance of " recognised terms and conditions "—Private remedies [HULLAND *v.* WILLIAM SAUNDERS & SON] 568
Stirpes, whether children or grandchildren to be *stirps* 225
Stocks and shares, meaning of, whether includes investments in other than limited companies 19
Suicide, agreement to commit 483
——, whether presumed 453
Surcharge, increase in contractor's remuneration given on account of war costs 261
Tables, of information, copyright 92
Tenancy, agricultural, letting for periods of 364 days 126
——, yearly, letting for periods of 364 days 126
Tenant, nominee described as tenant, evidence to show actual facts 151
Term of years, letting for periods of 364 days 126
Title deeds, retention of, effect on presumption of advancement 472

TRADE NAMES

Passing off—Name merely descriptive of business—Fraud expressly negatived—Office Cleaning Services—Office Cleaning Association [OFFICE CLEANING SERVICES, LTD. *v.* WESTMINSTER OFFICE CLEANING ASSOCIATION] 269

TRADE UNIONS

Illegal strike—Acts committed before commencement of illegal strike—Whether acts " in furtherance of " strike—Trade Disputes and Trade Unions Act, 1927 (*c.* 22), *s.* 1 [R. *v.* TEARSE, LEE AND HASTON AND KEEN] 403
Trespassers, children following ball into minefield 21
Valuation list, amendment, party not entitled but invited to attend hearing, right of appeal 37
——, annual revision, sufficiency as reason for amendment 37
Vehicle, unlighted, on highway, not *ipso facto* nuisance 272
Vesting, gift for maintenance, no liability to account 1
Volenti non fit injuria, employee directed to work 98
War, increase in costs, lump sum given to contractor, surcharge 261
War damage, disclaimer, notice giving wrong date for operation of disclaimer 214
——, multiple lease, right to disclaim part and retain remainder 145
War injury, accident on stairway to air-raid shelter as 301
——, case unprovided for by scheme, effect on liability for negligence 415
——, engine falling in bomb crater 438
——, hysteria due to bombing as 308
Warranty, food and drugs, cordial 42

WEIGHTS AND MEASURES

Coal — Weight of sack — Carman delivering sacks of less weight than that represented—Delivery delegated by coal merchants to agents—Mens rea—Whether agents under control of coal merchants—Weights and Measures Act, 1899 (*c.* 21), *s.* 29 (2)—*Sale of Food* (*Weights and Measures*) *Act*, 1926 (*c.* 63), *s.* 12 (2) [BRENTNALL AND CLELAND, LTD. *v.* THE LONDON COUNTY COUNCIL] 552
Wet dock, whether factory 53
Wife, residence of 344

WILLS

Bequest—All stocks, shares and moneys in the care, custody or possession of bank—Bank holding only dividend mandates for stocks inscribed at the Bank of England—Testatrix afterwards of unsound mind—Order in lunacy for transfer of stocks to the name of Accountant-General—Effect of order on dividend mandates—Lunacy Act, 1890 (*c.* 5), *s.* 116—*Lunacy Act*, 1922 (*c.* 60), *s.* 2 (8) [*Re* PALMER, NATIONAL PROVINCIAL BANK, LTD. *v.* BARWELL] .. 406
Construction — Annuity — " Clear yearly sum "—Computation of capital sum —Statutory variation of tax burden—Finance Act, 1941 (*c.* 30), *s.* 25 (1) [*Re* JOHN POWELL (*deceased*), NEALE *v.* ROBERTS] 528
—, *Bequest—" All other contents of my home or at the bank "—Whether choses in action included—" To be sold "—Whether cash included* [*Re* ABBOTT, PUBLIC TRUSTEE *v.* ST. DUNSTAN'S, BRITISH HOME AND HOSPITAL FOR INCURABLES AND TRUSTEES OF WESTERN OPHTHALMIC HOSPITAL, AND LADY RUBY LILIAN DUGAN] 457
—, *Direction for payment of death duties out of residuary estate—" Gifts or settlements made in my lifetime "—Whether annuities payable by third parties under contracts with testator included—Testator " economic source " of benefits—Prima facie meaning of " gifts or settlements," unless restricted by context, sufficient to cover any benefaction* [*Re* NOAD, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* NOAD] 470
——, *Legacies—" All my stocks and shares "—Whether bequests included investments other than stocks and shares of limited companies* [*Re* EVERETT, PRINCE *v.* HUNT] 19
——, *Vesting—Gift of fund to child on attaining the age of 21 years—Direction to executors to pay income during infancy and after death of life tenant to mother of child to be applied for advancement and education of child* [*Re* ROGERS, LLOYDS BANK, LTD. *v.* LORY] 1
Revival — Three wills — Later will revoking earlier—Subsequent codicil altering main portions of first will—Absence of express confirmation of first will—Intention to revive first will—Wills Act, 1837 (*c.* 26), *s.* 22 [*In the Estate of* MARDON] 397
Soldier's will—Actual military service —Women's Auxiliary Air Force—Wills Act, 1837 (*c.* 26), *s.* 11 [*In the Estate of* ROWSON] 36
Wills, gift *per stirpes*, children as *stirps* 225
Witchcraft, conjuration of spirits 220
Witnesses, named on indictment, whether prosecution must tender all 139

WORKMEN'S COMPENSATION

Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 29 (1) [YOUNG *v.* BRISTOL AEROPLANE CO., LTD.] 293
——, ——, ——, *Recorded agreement for compensation—Benefit of infant —Estoppel by record—Workmen's Compensation Act*, 1925 (*c.* 84), *ss.* 23, 25 (4), 29 (1) [ARABIAN *v.* TUFFNALL & TAYLOR, LTD.] 317
Injury due to accident—Defective medical treatment—Injury not discovered until too late for successful treatment—Incapacity due to defective medical treatment—Novus actus interveniens—Workman not entitled to compensation—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 9 (1), 12 (3), 19 (4) [ROTHWELL *v.* CAVERSWALL STONE CO., LTD.] 350
Partial incapacity—Workman called up for military service—Pay and allowance in army less than pre-accident wages but probably more than in civil employment—Compensation only for actual loss—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (3) (i) [HEANEY *v.* B. A. COLLIERIES, LTD.] 289
Yearly tenancy, letting for periods of 364 days 126

CASES REFERRED TO

PAGE

A. *v.* B. (1868), L.R. 1 P. & D. 559 ; 27 Digest 266, *2334* ; *sub nom.* P. *v.* S., 37 L.J.P. & M. 80 ; *sub nom.* —— *v.* ——, 19 L.T. 22 .. 368
A. *v.* B., [1940] 1 K.B. 217 ; [1939] 4 All E.R. 169 ; Digest Supp. ; 109 L.J.K.B. 43 ; 161 L.T. 325 .. 525, 527
Ackerley, *Re*, Chapman *v.* Andrew, [1913] 1 Ch. 510 ; 37 Digest 454, *562* ; 82 L.J.Ch. 260; 108 L.T. 712 .. 462, 465, 466
Adams *v.* Naylor, [1944] 2 All E.R. 21 ; 171 L.T. 105 .. 416, 439, 441
Addie (Robert) & Sons (Collieries) *v.* Dumbreck, [1929] A.C. 358 ; Digest Supp. ; 98 L.J.P.C. 119 ; 140 L.T. 650 .. 21, 22, 25, 29
Addie (Robert) & Sons Collieries *v.* Inland Revenue Comrs., [1924] S.C. 231 ; Digest Supp. ; 8 Tax Cas. 671 .. 280, 282
Aerators, Ltd. *v.* Tollitt, [1902] 2 Ch. 319 ; 9 Digest 64, *196* ; 71 L.J.Ch. 727 ; 86 L.T. 651 269, 270, 271
Alexander *v.* Rayson, [1936] 1 K.B. 169 ; Digest Supp. ; 105 L.J.K.B. 148 ; 154 L.T. 205 580, 582
Alexander *Re*, Alexander *v.* Alexander, [1919] 1 Ch. 371 ; 44 Digest 998, *8561* ; 88 L.J.Ch. 242 ; 120 L.T. 692 .. 225, 228
Allchin *v.* Coulthard, [1942] 2 K.B. 228 ; [1942] 2 All E.R. 39 ; 111 L.J.K.B. 609 ; 167 L.T. 18 : on appeal [1943] A.C. 607 ; [1943] 2 All E.R. 352 ; 169 L.T. 328 .. 548, 551
Anchor Trust Co. *v.* Bell, [1926] Ch. 805 ; 35 Digest 512, *2425* ; 95 L.J.Ch. 564 ; 135 L.T. 311 115, 117, 118
Anghinelli *v.* Anghinelli, [1918] P. 247 ; 11 Digest 426, *918* ; 87 L.J.P. 175 ; 119 L.T. 227 344, 347, 368, 371
Anglo-Persian Oil Co., Ltd. *v.* Dale (1931), 16 Tax Cas. 253 ; *on appeal*, [1932] 1 K.B. 124 ; Digest Supp. ; 100 L.J.K.B. 504 ; 145 L.T. 529 ; 16 Tax Cas. 253 .. 280, 282
Armytage *v.* Armytage, [1898] P. 178 ; 11 Digest 426, *917* ; 67 L.J.P. 90 ; 78 L.T. 689 344, 346, 347, 368, 371
Ashby *v.* White (1703), 2 Ld. Raym. 938 ; 17 Digest 81, *20* ; Holt K.B. 524 ; 6 Mod. Rep. 45 ; 1 Salk. 19 ; *revsd. on other grounds* (1704), 1 Bro. Parl. Cas. 62 172, 173, 175, 176, 177, 178
Ashworth *v.* Munn (1880), 15 Ch.D. 363 ; 8 Digest 273, *397* ; 50 L.J.Ch. 107 ; 43 L.T. 553 181, 182, 188, 189
Atherton *v.* British Insulated and Helsby Cables, Ltd., [1926] A.C. 205 ; Digest Supp. ; 10 Tax Cas. 155 .. 280, 281, 282, 283, 284, 285
A.-G. *v.* Bowman (1791), 2 Bos. & P. 532, n ; 14 Digest 361, *3818* .. 14, 17
A.-G. *v.* Edison Telephone Co. of London (1880), 6 Q.B.D. 244 ; 42 Digest 885, *1* ; 50 L.J.Q.B. 145 ; 43 L.T. 697 .. 375, 379
A.-G. *v.* Edmunds (1870), 22 L.T. 667 ; 16 Digest 41, *422* .. 179, 180
A.-G. *v.* Hancock, [1940] 1 K.B. 427 ; 1 All E.R. 32 ; Digest Supp. ; 109 L.J.K.B. 243 .. 179, 180
A.-G. *v.* Lonsdale (Earl) (1827), 1 Sim. 105 ; 8 Digest 312, *932* .. 599
A.-G. *v.* National Provincial & Union Bank of England, Ltd., [1924] A.C. 262 ; Digest Supp. ; 93 L.J.Ch. 231 ; 131 L.T. 34 ; *affg.* S.C. *sub nom. Re* Tetley, National Provincial & Union Bank of England, Ltd. *v.* Tetley, [1923] 1 Ch. 258 .. 61, 65, 68
A.-G. *v.* Northumberland (Duke) (1877), 7 Ch.D. 745 ; 8 Digest 306, *856* ; 47 L.J.Ch. 569 ; *varied without affecting this point* (1878), 38 L.T. 245 .. 255, 257
A.-G. *v.* Price (1810), 17 Ves. 371 ; 8 Digest 242, *12* .. 255, 257
A.-G. *v.* Sidney Sussex College (1869), 4 Ch. App. 722 ; 8 Digest 332, *1171* ; 38 L.J.Ch. 656 255, 257, 258, 259
A.-G. *v.* Weymouth (Lord) (1743), Amb. 20 ; 8 Digest 266, *281* ; 27 E.R. 11 .. 182
A.-G. for New Zealand *v.* Brown, [1917] A.C. 393 ; 8 Digest 298, *748* ; 86 L.J.P.C. 132 ; 116 L.T. 624 .. 61, 63, 69, 71
A.-G. for New Zealand *v.* New Zealand Insurance Co., Ltd., [1936] 3 All E.R. 888 ; Digest Supp. .. 61, 63, 71
Attree *v.* Hawe (1878), 9 Ch.D. 337 ; 8 Digest 272, *384* ; 47 L.J.Ch. 863 ; 38 L.T. 733 .. 182
Ayr. *v.* St. Andrew's Ambulance Assocn., [1918] S.C. 158 ; 38 Digest 125, *p* .. 119, 122

Baker *v.* James, [1921] 2 K.B. 674 ; 36 Digest 97, *647* ; 90 L.J.K.B. 1190 ; 125 L.T. 414 .. 99, 100
Baldock *v.* Westminster City Council (1918), 88 L.J.K.B. 502 ; 26 Digest 392, *1190* ; 120 L.T. 470 .. 150, 151
Barber, *Re*, *Ex p.* Stanford (1886), 17 Q.B.D. 259 ; 7 Digest 51, *272* ; 55 L.J.Q.B. 341 ; 54 L.T. 894 .. 294, 299
Barnard Castle Urban District Council *v.* Wilson, [1902] 2 Ch. 746; 43 Digest 1080, *147*: 71 L.J.Ch. 825 ; 87 L.T. 279 .. 602
Barnes *v.* Lucille, Ltd. (1907), 96 L.T. 680 ; 2 Digest 245, *290* .. 475, 476
Barr *v.* Gibson (1838), 3 M. & W. 390 ; 41 Digest 170, *107* ; 1 Horn. & H. 70 ; 7 L.J.Ex. 124 198, 199
Batey, *Re*, *Ex p.* Neal (1880), 14 Ch.D. 579 ; 4 Digest 297, *2778* ; 43 L.T. 264 .. 595
Bath's (Bp.) Case (1605), 6 Co. Rep. 34 b ; 31 Digest 59, *2065* ; *sub nom.* Fish *v.* Bellamy, Cro. Jac. 71 .. 126, 129, 132
Beauchamp *v.* National Mutual Indemnity Insurance Co., Ltd., [1937] 3 All E.R. 19; Digest Supp. .. 574, 576
Beaumont, *Re*, Beaumont *v.* Ewbank, [1902] 1 Ch. 889 ; 6 Digest 10, *14* ; 71 L.J.Ch. 478 ; 86 L.T. 410 .. 84, 91
Beecham's Settlement, *Re*, Johnson *v.* Beecham, [1934] Ch. 183 ; Digest Supp. ; 103 L.J.Ch. 33 ; 150 L.T. 351 .. 595
Belton *v.* Bass, Ratcliffe & Gretton, Ltd., [1922] 2 Ch. 449 ; 35 Digest 508, *2399* ; 91 L.J.Ch. 216 ; 127 L.T. 357 .. 75, 78
Bender *v.* Zent (Owners), [1909] 2 K.B. 41 ; 34 Digest 328, *2676* ; 78 L.J.K.B. 533 ; 100 L.T. 639 ; 2 B.W.C.C. 22 .. 453, 457
Beresford's Will Trusts, *Re*, Sturges *v.* Beresford, [1938] 3 All E.R. 566 ; Digest Supp. 463, 468, 469
Berkeley *v.* Swinburne (1834), 6 Sim. 613 ; 28 Digest 242, *1004* ; 3 L.J.Ch. 165 .. 1, 2
Berkley *v.* Thompson (1884), 10 App. Cas. 45 ; 3 Digest 393, *312* ; 54 L.J.M.C. 57 ; 52 L.T. 1 275, 277
Besozzi *v.* Harris (1858), 1 F. & F. 92 ; 2 Digest 238, *241* .. 99, 103
Best, *Re*, Jarvis *v.* Birmingham Corpn., [1904] 2 Ch. 354 ; 8 Digest 297, *744* ; 73 L.J.Ch. 808 61, 66, 69, 71
Beyfus *v.* Lodge, [1925] Ch. 350 ; 40 Digest 45, *284* ; 95 L.J.Ch. 27 ; 133 L.T. 265 .. 31, 32
Bird *v.* Holbrook (1828), 4 Bing 628 ; 36 Digest 94, *629* ; 6 L.J.O.S.C.P. 146 .. 21, 26, 30
Blair *v.* Duncan, [1902] A.C. 37 ; 8 Digest 295, *721* ; 71 L.J.P.C. 22 ; 86 L.T. 157 61, 63, 68, 597, 599
Blakey *v.* Latham (1889), 43 Ch.D. 23 ; 30 Digest 131, *94* .. 584, 585
Bomford *v.* Osborne, [1942] A.C. 14 ; [1941] 2 All E.R. 426 ; 110 L.J.K.B. 462 ; 165 L.T. 205 ; 23 Tax Cas. 642 .. 155, 156
Bonner *v.* Basset Mines, Ltd. (1912), 6 Tax Cas. 146 ; 28 Digest 48, *248* ; 108 L.T. 764 .. 280, 282
Boulter *v.* Peplow (1850), 9 C.B. 493 ; 12 Digest 536, *4457* ; 19 L.J.C.P. 190 .. 6
Bourne *v.* Keane, [1919] A.C. 815 ; 8 Digest 251, *106* ; 89 L.J.Ch. 17 ; 121 L.T. 426 .. 61, 64
Bowater *v.* Rowley Regis Corpn., [1944] 1 All E.R. 465 .. 99, 100

PAGE

Bower *v.* Meggitt & Jones (1916), 86 L.J.K.B. 463 ; 34 Digest 343, *2773* ; 116 L.T. 178 ; 10 B.W.C.C. 146 .. 351, 359, 361, 367
Bowker *v.* Woodroffe, Bowker *v.* Premier Drug Co., [1928] 1 K.B. 217 ; Digest Supp. ; 96 L.J.K.B. 750 ; 137 L.T. 347 .. 545, 546, 547
Bowmaker *v.* Tabor, [1941] 2 K.B. 1 ; [1941] 2 All E.R. 72 .. 115, 117, 118
Bowman *v.* Secular Society, Ltd., [1917] A.C. 406 ; 8 Digest 265, *270* ; 86 L.J.Ch. 568 ; 117 L.T. 161 .. 61, 69, 74
Boyce *v.* Whitwick Colliery Co., Ltd., Coalville Urban District Council *v.* Boyce (1934), 18 Tax Cas. 655 ; Digest Supp. ; 151 L.T. 464 .. 280, 282
Bozson *v.* Altrincham Urban District Council, [1903] 1 K.B. 547 ; 30 Digest 135, *137*; 72 L.J.K.B. 271 .. 584, 585
Bradford *v.* Symondson (1881), 7 Q.B.D. 456 ; 29 Digest 75, *346* ; 50 L.J.Q.B. 582 ; 45 L.T. 364 .. 198, 199
British Vacuum Cleaner Co., Ltd. *v.* New Vacuum Cleaner Co., Ltd., [1907] 2 Ch. 312 ; 9 Digest 65, *198* ; 76 L.J.Ch. 511 ; 97 L.T. 201 .. 269, 270
Brodie *v.* Brodie (1861), 2 Sw. & Tr. 259 ; 11 Digest 424, *896* ; 30 L.J.P.M. & A. 185 ; 4 L.T. 307 .. 368, 372
Brook *v.* Badley (1868), 3 Ch. App. 672 ; 8 Digest 273, *398* ; 37 L.J.Ch. 884 .. 182, 189
Brown *v.* Hamilton (William) & Co., Ltd., [1943] Session Notes 82 .. 294, 297
Brown *v.* Kent (George), Ltd., [1913] 3 K.B. 624 ; 34 Digest 347, *2795* ; 82 L.J.K.B. 1039 ; 109 L.T. 293 ; 6 B.W.C.C. 745 .. 351, 358, 360, 361, 366
Browne *v.* Brandt, [1902] 1 K.B. 696 ; 29 Digest 7, *75* ; 71 L.J.K.B. 367 ; 86 L.T. 625 .. 172, 178
Browne *v.* Paull (1850), 1 Sim. N.S. 92 ; 28 Digest 244, *1009* ; 20 L.J.Ch. 75 ; 16 L.T.O.S. 550 .. 1, 2
Bryanston Properties Co., Ltd. *v.* Edwards, [1944] 1 K.B. 32 ; [1943] 2 All E.R. 646 ; 113 L.J.K.B. 161 .. 223, 224, 510, 511, 512
Buckle *v.* Holmes, [1926] 2 K.B. 125 ; Digest Supp. ; 95 L.J.K.B. 547 ; 134 L.T. 743 .. 475
Burns *v.* Bryan (or Martin) (1887), 12 App. Cas. 184 ; 31 Digest 420, *5663* .. 6
Burns *v.* North British Ry. Co., [1914] S.C. 754 ; 8 Digest 79, *539 i* .. 425, 428

Capital and Counties Properties Co., Ltd. *v.* Butler, [1944] 2 All E.R. 223 .. 510, 511
Carlin *v.* Donaldson Atlantic Line, Ltd., [1943] S.C. 172 .. 416
Carlton, The, [1931] P. 186 ; Digest Supp. ; 100 L.J.P. 100 ; 145 L.T. 423 .. 328, 332
Carritt *v.* Godson, [1899] 2 Q.B. 193 ; 34 Digest 589, *96* ; 68 L.J.Q.B. 799 ; 80 L.T. 771 .. 563, 564
Cellular Clothing Co., Ltd. *v.* Maxton, [1899] A.C. 326 ; 43 Digest 276, *1090* ; 68 L.J.P.C. 72 ; 80 L.T. 809 .. 269, 271
Chamberlain *v.* Inland Revenue Comrs., [1943] 2 All E.R. 200 .. 160, 162
Champney's Executors *v.* Inland Revenue Comrs. (1934), 19 Tax Cas. 375 ; Digest Supp. .. 548, 551
Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co., [1914] 3 K.B. 772 ; 36 Digest 315, *189* ; 83 L.J.K.B. 1352 ; 111 L.T. 198 .. 99, 101, 103, 104
Chetti *v.* Chetti, [1909] P. 67 ; 11 Digest 416, *827* ; *sub nom.* Venugopal Chetti *v.* Venugopal Chetti, 78 L.J.P. 23 ; 99 L.T. 885 .. 344, 347, 348
Ching *v.* Surrey County Council, [1910] 1 K.B. 736 ; 19 Digest 556, *17* ; 79 L.J.K.B. 481 ; 102 L.T. 414 .. 119, 120, 565, 566
Clover Clayton & Co. *v.* Hughes, [1910] A.C. 242 ; 34 Digest 273, *2316* ; 79 L.J.K.B. 470 ; 102 L.T. 340 ; 3 B.W.C.C. 275 .. 351, 352
Coker *v.* Bolton, [1912] 3 K.B. 315 ; 29 Digest 289, *2348* ; 82 L.J.K.B. 91 ; 107 L.T. 54 .. 250, 254
Cole *v.* De Trafford (No. 2), [1918] 2 K.B. 523 ; 34 Digest 198, *1621* ; 87 L.J.K.B. 1254 ; 119 L.T. 476 .. 425, 430
Coleman's Depositories, Ltd., *Re v.* Life & Health Assurance Assocn., [1907] 2 K.B. 798 ; 29 Digest 406, *3200* ; 76 L.J.K.B. 865 ; 97 L.T. 420 .. 244, 249
Collins Arden Products, Ltd. *v.* Barking Corpn. [1943] 1 K.B. 419; [1943], 2 All E.R. 249; 112 L.J.K.B. 406 ; 169 L.T. 12 .. 545, 547
Colls *v.* Parnham, [1922] 1 K.B. 325 ; 31 Digest 559, *7060* ; 91 L.J.K.B. 335 ; 126 L.T. 480 .. 167, 170
Consett Iron Co., Ltd. *v.* Durham County Assessment, etc., [1931] A.C. 396 ; Digest Supp. ; 100 L.J.K.B. 242 ; 144 L.T. 649 .. 507, 509
Conway *v.* Wade, [1909] A.C. 506 ; 43 Digest 120, *1237* ; 78 L.J.K.B. 1025 ; 101 L.T. 248 .. 403, 405
Cook *v.* Taylor, [1942] Ch. 349 ; [1942] 2 All E.R. 85 .. 31, 35
Cooke *v.* Gill (1873), L.R. 8 C.P. 107 ; 1 Digest 13, *106* ; 42 L.J.C.P. 98 ; 28 L.T. 32 .. 275, 278
Cooke *v.* Midland and Great Western Ry. of Ireland, [1909] A.C. 229 ; 36 Digest 70, *450* ; 78 L.J.P.C. 76 ; 100 L.T. 626 .. 21, 26, 28
Corcoran, *Re*, Corcoran *v.* Riddell (1892), 62 L.J.Ch. 267 ; 8 Digest 274, *418* ; 67 L.T. 754 .. 181, 186, 191
Costello *v.* Pigeon (Owners), [1913] A.C. 407 ; 34 Digest 243, *2069* ; *sub nom.* Costello *v.* Kelsall Bros., 82 L.J.K.B. 873 ; 108 L.T. 929 ; 6 B.W.C.C. 480 .. 351, 352
Cotton, *Re*, Wood *v.* Cotton (1889), 40 Ch.D. 41 ; 37 Digest 451, *539* ; 58 L.J.Ch. 174 .. 462, 466, 467, 468, 469
Cramp *v.* Henry Hughes & Son, Ltd., unreported .. 31, 35
Croft *v.* Sywell Aerodrome, Ltd., [1942] 1 K.B. 317 ; [1942] 1 All E.R. 110 ; 111 L.J.K.B. 215 ; 24 Tax Cas. 126 .. 136, 138
Cross *v.* London and Provincial Trust, Ltd., [1938] 1 K.B. 792 ; [1938] 1 All E.R. 428 ; Digest Supp. ; 107 L.J.K.B. 423 ; 158 L.T. 217 ; 21 Tax Cas. 705 .. 203, 204, 205
Currie *v.* Inland Revenue Comrs., Durant *v.* Inland Revenue Comrs., [1921] 2 K.B. 332 ; Digest Supp. ; 90 L.J.K.B. 499 ; 125 L.T. 33 ; 12 Tax Cas. 245 .. 164, 166

Daglish *v.* Barton, [1900] 1 Q.B. 284 ; 2 Digest 633, *2604* ; 68 L.J.Q.B. 1044 ; 81 L.T. 551 .. 294, 299
Dance *v.* Goldingham (1873), 8 Ch. App. 902 ; 43 Digest 912, *3531* ; 42 L.J.Ch. 777 ; 29 L.T. 166 .. 75, 79
Davies *v.* Owen (Thomas) & Co., Ltd., [1919] 2 K.B. 39 ; 24 Digest 908, *68* ; 88 L.J.K.B. 887 ; 121 L.T. 156 .. 434, 435, 436, 437
Dawson, *Re*, Pattisson *v.* Bathurst, [1915] 1 Ch. 626 ; 8 Digest 273, *391* ; 84 L.J.Ch. 476 ; 113 L.T. 19 .. 181, 182, 188, 190
Deane *v.* Clayton (1817), 7 Taunt. 489 ; 43 Digest 411, *345* .. 21, 26
Debtor, A, *Re*, (No. 2 of 1943), unreported .. 525, 528
Dent *v.* Commondale Overseers (1891), 56 J.P. 519 ; 18 Digest 399, *1401* .. 541, 544
Dering, *Re*, Neall *v.* Beale (1911), 105 L.T. 404 ; 44 Digest 998, *8560* .. 225, 228
Digby *v.* General Accident, Fire & Life Assurance Corpn., Ltd., [1943] A.C. 121 ; [1942] 2 All E.R. 319 .. 244, 249
Director of Public Prosecutions *v.* Kent and Sussex Contractors, Ltd., [1944] 1 K.B. 146 ; [1944] 1 All E.R. 119 ; 113 L.J.K.B. 88 ; 170 L.T. 41 .. 515, 518
Dodds, *Re*, *Ex p.* Vaughan's Executors (1890), 25 Q.B. 529; *sub nom. Re* Dodds, *Ex p.* Pritchard 59 L.J.Q.B. 403 ; 4 Digest 299, *2807* .. 595
Doe d. Plumer *v.* Mainby (1847), 10 Q.B. 473 ; 2 Digest 6, *6* ; 16 L.J.Q.B. 303 .. 126, 128
Dolan *v.* MacDermot (1868), 3 Ch. App. 676 ; 8 Digest 298, *751* .. 61, 68
Doncaster Amalgamated Collieries *v.* Leech, [1941] 1 K.B. 649 ; [1941] 2 All E.R. 7 ; 110 L.J.K.B. 676 ; 165 L.T. 338 ; 34 B.W.C.C. 88 .. 290, 292

PAGE

Donegal *v.* Donegal (1821), 3 Phillim. 597; 16 Digest 117, *157*; *sub nom.* Chichester *v.* Donegal, 6 Madd. 375; *subsequent proceedings* (1822), 1 Add. 5 .. .. 344, 348
Doolan *v.* Hope (Henry) & Sons, Ltd. (1918), 87 L.J.K.B. 671; 34 Digest 345, *2782*; 119 L.T. 14; 11 B.W.C.C. 93 .. .. 351, 359, 365
Douglas, *Re*, Obert *v.* Barrow (1887), 35 Ch.D. 472; 8 Digest 298, *751*; 56 L.J.Ch. 913; 56 L.T. 786 .. .. 61, 66
Doyle *v.* Kaufman (1877), 3 Q.B.D. 7, 340; Digest, Practice 845, *3921*; 47 L.J.Q.B. 26 388, 389, 390
Drughorn (Fred), Ltd. *v.* Rederiaktiebolaget Transatlantic, [1919] A.C. 203; 17 Digest 322, *1333*; 88 L.J.K.B. 233; 120 L.T. 70; *affg.* S.C. *sub nom.* Rederi Aktienbolaget Transatlantic *v.* Drughorn (Fred), [1918] 1 K.B. 394 152
Ducker *v.* Rees Roturbo Development Syndicate, etc., [1928] A.C. 132; Digest Supp.; 97 L.J.K.B. 317; 138 L.T. 598; *sub nom.* Rees Roturbo Development Syndicate, Ltd. *v.* Ducker, etc., 13 Tax Cas. 366; *revsg.*, [1928] 1 K.B. 506 .. .. 280, 284
Dunham *v.* Clare, [1902] 2 K.B. 292; 34 Digest 341, *2759*; 71 L.J.K.B. 683; 86 L.T. 751; 4 W.C.C. 102 .. .. 351, 356, 357, 358, 359, 360, 361, 362, 363, 366, 367
Dunlop Pneumatic Tyre Co. *v.* Act. fur Motor und Motorfahrzeugbau vorm Cudell & Co., [1902] 1 K.B. 342; 13 Digest 430, *1532*; 71 L.J.K.B. 284; 86 L.T. 472 .. .. 557, 560
Durham Brothers *v.* Robertson, [1898] 1 Q.B. 765; 8 Digest 444, *196*; 67 L.J.Q.B. 484; 78 L.T. 438 182
East Midland Traffic Area Traffic Comrs. *v.* Tyler, [1938] 3 All E.R. 39; Digest Supp. 574, 576, 577

Easterbrook *v.* Easterbrook, [1944] P. 10: [1944] 1 All E.R. 90; 60 T.L.R. 60 .. .. 368, 369
Edinburgh Southern Cemetery Co. *v.* Kinmont (Surveyor of Taxes) (1889), 2 Tax Cas. 516; 28 Digest 10, *d* 136, 138
Egmont's (Earl) Settled Estates, *Re*, Lefroy *v.* Egmont, [1912] 1 Ch. 251; 21 Digest 105, *774*; 81 L.J.Ch. 250; 106 L.T. 292 .. .. 548, 551
Elderton *v.* The United Kingdom Totalisator Co., Ltd., [1935] Ch. 373; Digest Supp.; 104 L.J.Ch. 105; 152 L.T. 549 562
Ellis *v.* Fulham Borough Council, [1938] 1 K.B. 212; Digest Supp.; [1937] 3 All E.R. 454; 107 L.J.K.B. 84; 157 L.T. 380 .. .. 301, 305
Ellis *v.* Selby (1836), 1 My. & Cr. 286; 8 Digest 295, *726*; 5 L.J.Ch. 214 .. .. .. 61, 67, 71
Embrey *v.* Owen (1851), 6 Exch. 353; 17 Digest 84, *37*; 20 L.J.Ex. 212; 17 L.T.O.S. 79.. 172, 177
English, Scottish & Australian Bank, Ltd. *v.* Inland Revenue Comrs., [1932] A.C. 238; Digest Supp.; 101 L.J.K.B. 193; 146 L.T. 330 .. .. 294, 297
Epsom Grand Stand Assocn., Ltd. *v.* Clarke (1919), W.M. 170; 35 T.L.R. 525; 31 Digest 581, *7296* 167, 169, 170, 171
Evans (Richard) & Co., Ltd. *v.* Astley, [1911] A.C. 674; 34 Digest 331, *2693*; 80 L.J.K.B. 1177; 105 L.T. 385; 4 B.W.C.C. 319; *affg.*, [1911] 1 K.B. 1036 .. .. .. 453, 456
Excelsior Wire Rope Co., Ltd. *v.* Callan, [1930] A.C. 404; Digest Supp.; 99 L.J.K.B. 380; 142 L.T. 531 .. .. 21, 25, 30

Farrar *v.* Farrars, Ltd. (1888), 40 Ch.D. 395; 35 Digest 492, *2229*; 58 L.J.Ch. 185; 60 L.T. 121 .. .. 75, 77, 78
Fell *v.* Knight (1841), 8 M. & W. 269; 29 Digest 6, *60*; 10 L.J.Ex. 277 .. .. .. 172, 173
Fenton *v.* Thorley & Co., Ltd., [1903] A.C. 443; 34 Digest 266, *2264*; 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1 .. .. 351, 352
Ferrier *v.* Jay (1870), L.R. 10 Eq. 550; 37 Digest 451, *537*; 39 L.J.Ch. 686; 23 L.T. 302 462, 466
Fife's (Duke) Trustees *v.* George Wimpey & Co., Ltd., [1944] S.L.T. 41 .. .. .. 136, 138
Filburn *v.* People's Palace & Aquarium Co., Ltd. (1890), 25 Q.B.D. 258; 2 Digest 238, *243*; 59 L.J.Q.B. 471 .. .. 99, 103
Fitzpatrick *v.* C. & H. Crichton (1921), Ltd. (1941), unreported 54, 58
Fitzwilliam's (Earl) Collieries Co. *v.* Phillips, [1943] A.C. 570; [1943] 2 All E.R. 346; 112 L.J.K.B. 554; 169 L.T. 242 136
Flood's Case (1616), Hob. 136; 8 Digest 246, *58*; *sub nom.* Jesus College, Oxford, Case, Duke 78 .. .. 255, 259
Formby Brothers *v.* Formby (1910), 102 L.T. 116; 1 Digest 638, *2595* 152
Forster *v.* Mackreth (1867), L.R. 2 Ex. 163; 6 Digest 52, *398*; 30 L.J.Ex. 94; 16 L.T. 23.. 84, 91
Fox *v.* Newcastle-upon-Tyne Corpn., [1941] 2 K.B. 120; [1941] 1 All E.R. 563 150
France Fenwick & Co. *v.* R., [1927] 1 K.B. 458; 41 Digest 987, *8733*; 96 L.J.K.B. 144; 136 L.T. 358 .. .. 323, 325, 326, 327
Fry *v.* Salisbury House Estate, Ltd., Jones *v.* City of London Real Property Co., Ltd., [1930] A.C. 432; Digest Supp.; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; *affg.*, [1930] 1 K.B. 304 .. .. 136, 138
Furness Shipbuilding Co. *v.* London & North Eastern Ry. (1934), 103 L.J.K.B. 180; Digest Supp.; *sub nom.* London & North Eastern Ry. Co. *v.* Furness Shipbuilding Co., Ltd., 150 L.T. 382 .. .. 328, 332

Gaden *v.* Newfoundland Savings Bank, [1899] A.C. 281; 3 Digest 225, *591*; 68 L.J.P.C. 57; 80 L.T. 329 .. .. 84, 88
Gale *v.* Motor Union Insurance Co., Ltd., Loyst *v.* General Accident, Fire & Life Assurance Corpn., Ltd., [1928] 1 K.B. 359; Digest Supp.; 96 L.J.K.B. 199; 138 L.T. 712 .. 244, 247
Galene *v.* Galene (otherwise Galice), [1939] P. 237; [1939] 2 All E.R. 148; Digest Supp.; 108 L.J.P. 82 .. .. 368, 372, 374
Garcia *v.* Harland & Wolff, Ltd., [1943] 2 All E.R. 477 .. .. 54, 58
Gatti *v.* Shoosmith, [1939] Ch. 841; [1939] 3 All E.R. 916; Digest Supp.; 108 L.J.Ch. 380; 161 L.T. 208 .. .. 395, 397
Gee *v.* Metropolitan Ry. Co. (1873), L.R. 8 Q.B. 161; 8 Digest 78, *533*; 42 L.J.Q.B. 105; 28 L.T. 282 .. .. 425, 428, 429, 430, 431
George *v.* Mitchell and King, [1943] 1 All E.R. 233 .. .. 448, 450, 452
Gibson *v.* Fisher (1867), L.R. 5 Eq. 51; 44 Digest 998, *8554*; 37 L.J.Ch. 67 .. .. 225, 228
Glasgow Corpn. *v.* Farie (1888), 13 App. Cas. 657; 34 Digest 604, *12*; 58 L.J.P.C. 33; 60 L.T. 274 .. .. 136, 137
Glasgow Corpn. Water Comrs. *v.* Miller (Surveyor of Taxes) (1886), 2 Tax Cas. 131; 28 Digest 21, *107 m* 237, 240
Glasgow Corpn. Waterworks, *Re* (1875), 1 Tax Cas. 28; 28 Digest 21, *107 o*.. 237, 239, 240, 241, 242
Goldie *v.* Adam, [1938] P. 85; Digest Supp.; 107 L.J.P. 106; 158 L.T. 359; 54 T.L.R. 422; *sub nom.* *Re* Taylor's Estate, Goldie *v.* Adam, [1938] 1 All E.R. 586.. .. .. 398, 399
Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; 8 Digest 327, *1099*; 52 L.J.Q.B. 193; 48 L.T. 293; *revsg.* S.C. *sub nom.* Saltash Corpn. *v.* Goodman (1881), 7 Q.B.D. 106 61, 65, 597, 599, 600
Goodwin *v.* Robarts (1875), L.R. 10 Ex. 337; 17 Digest 7, *31*; 44 L.J.Ex. 157; 33 L.T. 272; *affd.* (1876), 3 App. Cas. 476 .. .. 84, 86, 87, 89
Gordon *v.* Silber (1890), 25 Q.B.D. 491; 29 Digest 20, *259*; 59 L.J.Q.B. 507; 63 L.T. 283.. 392, 393
Graham *v.* Peat (1801), 1 East 244; 31 Digest 47, *1953* 21, 25

Gramophone & Typewriter, Ltd. *v.* Stanley, [1908] 2 K.B. 89; 28 Digest 30, *153*; 77 L.J.K.B. 834; 99 L.T. 39; *sub nom.* Stanley *v.* Gramophone & Typewriter, Ltd., 5 Tax Cas. 358 .. 193, 194
Great Western Ry. Co. *v.* Durnford (James) & Sons, Ltd. (1928), 1939 L.T. 145; 33 Com. Cas. 251; Digest Supp.; *affg.* S.C. *sub nom.* Durnford & Sons, Ltd. *v.* Great Western Ry. Co. (1927), 138 L.T. 137 .. 328, 332
Greenwood *v.* Atherton, [1939] 1 K.B. 388; [1938] 4 All E.R. 686; Digest Supp.; 108 L.J.K.B. 165; 160 L.T. 37 .. 119, 122, 123, 565, 566
Grey, *In the Estate of*, [1922] P. 140; 39 Digest 334, *196*; 91 L.J.P. 111; 126 L.T. 799 .. 36
Grey *v.* Pearson (1857), 6 H.L. Cas. 61; 44 Digest 533, *3502*; 26 L.J.Ch. 473; 29 L.T.O.S. 67 .. 61, 70
Griffiths *v.* Smith, [1941] A.C. 170; [1941] 1 All E.R. 66; 110 L.J.K.B. 156; 164 L.T. 386 119, 120, 121, 122, 565, 566
Grime *v.* Fletcher, [1915] 1 K.B. 734; 34 Digest 331, *2691*; 84 L.J.K.B. 847; 112 L.T. 840; 8 B.W.C.C. 69 .. 351, 361
Grimond *v.* Grimond, [1905] A.C. 124; 8 Digest 296, *734*; 74 L.J.P.C. 35; 92 L.T. 477 .. 61, 72
Grove *v.* Search (1906), 22 T.L.R. 290; 43 Digest 910, *3156* .. 75, 79
Gutsell *v.* Reeve, [1936] 1 K.B. 272; Digest Supp.; 105 L.J.K.B. 213; 154 L.T. 1 .. 569, 573

Hadow *v.* Hadow (1838), 9 Sim. 438; 28 Digest 243, *1005* .. 1, 2
Hamilton, *Re*, Cadogan *v.* Fitzroy, [1896] 2 Ch. 617; 8 Digest 274, *419*; 65 L.J.Ch. 815; 75 L.T. 113 .. 181, 186
Hardy *v.* Central London Ry., [1920] 3 K.B. 459; 36 Digest 71, *457*; 89 L.J.K.B. 1187; 124 L.T. 136 .. 21, 28
Harris *v.* Irvine Corpn. (1900), 4 Tax Cas. 221; 28 Digest 21, *107 n*; 65 J.P. 663 .. 237, 240
Harrison *v.* Richards (1881), 45 J.P. 552; 25 Digest 78, *76* .. 545, 546
Harvey *v.* Harvey (1739), 9 Mod. Rep. 253; *sub nom.* Hervey *v.* Hervey (1739), 1 Atk. 561; 40 Digest 592, *1270* .. 545, 551
Harwood *v.* Wyken Colliery Co., [1913] 2 K.B. 158; 34 Digest 348, *2803*; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225 .. 351, 357, 360, 361, 366
Haseldine *v.* C. A. Daw & Son, Ltd., [1941] 2 K.B. 343; [1941] 3 All E.R. 156; 111 L.J.K.B. 45; 165 L.T. 185 .. 566, 567
Hawthorn *v.* Hammond (1844), 1 Car. & Kir. 404; 29 Digest 6, *52* .. 172, 173
Hay’s Trustees *v.* Baillie, [1908] S.C. 1224; 8 Digest 296, *c* .. 61, 63, 70, 71
Henderson *v.* Glasgow Corpn. (1900), 2 F. 1127; 24 Digest 900, *p* .. 315, 316
Hewett *v.* Barr, [1891] 1 Q.B. 98; Digest, Practice, 311, *362*; 60 L.J.Q.B. 268 .. 388, 390
Hicks *v.* Snook (1928), 93 J.P. 55; Digest Supp .. 167, 169, 170, 171
Higgins *v.* Dawson, [1902] A.C. 1; 44 Digest 646, *4862*; 71 L.J.Ch. 132; 85 L.T. 763 .. 19, 20
Higgins, *Re*, Day *v.* Turnell (1885), 31 Ch.D. 142; 21 Digest 112, *845*; 55 L.J.Ch. 235; 54 L.T. 199 .. 548, 551
Hill *v.* Gregory, [1912] 2 K.B. 61; 28 Digest 8, *28*; 81 L.J.K.B. 730; 106 L.T. 603; 6 Tax Cas. 39 .. 136, 138
Hindle *v.* Birtwistle, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 76 L.T. 159; *sub nom.* Birtwistle *v.* Hindle, 66 L.J.Q.B. 173 .. 315, 316
Hiscock, *In the Goods of*, [1901] P. 78; 39 Digest 334, *202*; 70 L.J.P. 22; 84 L.T. 61 .. 375, 378
Hoare & Co., Ltd. *v.* Collyer, [1932] A.C. 407; Digest Supp.; 101 L.J.K.B. 274; 146 L.T. 469; 17 Tax Cas. 169 .. 133, 134, 135
Hollins, *Re*, Hollins *v.* Hollins, [1918] 1 Ch. 503; 43 Digest 777, *2175*; 87 L.J.Ch. 326; 118 L.T. 672 .. 596
Holman *v.* George Elliot & Co., Ltd., [1944] 1 K.B. 591; [1944] 1 All E.R. 639 .. 388, 389, 390, 391
Holman *v.* Johnson (1775), 1 Cowp. 341; 12 Digest 279, *2288* .. 579, 582
Holywell Union and Halkyn Parish *v.* Halkyn Drainage Co., [1895] A.C. 117; 38 Digest 424, *7*; 64 L.J.M.C. 113; 71 L.T. 818 .. 541, 543
Honeywill & Stein, Ltd. *v.* Larkin Bros. (London’s Commercial Photographers), Ltd., [1934] 1 K.B. 191; Digest Supp.; 103 L.J.K.B. 74; 150 L.T. 71 .. 99, 105
Houston *v.* Burns, [1918] A.C. 337; 8 Digest 297, *739*; 87 L.J.P.C. 99; 118 L.T. 462 61, 63, 68, 71, 597, 599, 500
Howard *v.* Furness Houlder, Argentine Lines, Ltd., and Brown, Ltd., [1936] 2 All E.R. 781; Digest Supp. .. 99, 105
Humber Conservancy Board *v.* Bater, [1914] 3 K.B. 449; 28 Digest 9, *37*; 83 L.J.K.B. 1745; 111 L.T. 856; 6 Tax Cas. 555 .. 237, 240
Humber Towing Co., Ltd. *v.* Barclay (1911), 5 B.W.C.C. 142; 34 Digest 351, *2824* .. 350, 351, 352, 355, 357, 360, 361, 362, 363, 364, 365, 367
Humble *v.* Hunter (1848), 12 Q.B. 310; 1 Digest 639, *2606*; 17 L.J.Q.B. 350; 11 L.T.O.S. 265 .. 152
Hunt (Chas.), Ltd. *v.* Palmer, [1931] 2 Ch. 287; Digest Supp.; 100 L.J.Ch. 356; 145 L.T. 630 .. 31, 32
Hunter *v.* A.-G., [1899] A.C. 309; 8 Digest 291, *687*; 68 L.J.Ch. 449; 80 L.T. 732; *revsg.* S.C. *sub nom. Re* Hunter, Hood *v.* A.-G., [1897] 2 Ch. 105 .. 61, 66, 71, 74
Hussein (otherwise Blitz) *v.* Hussein, [1938] P. 159; [1938] 2 All E.R. 344; Digest Supp.; 107 L.J.P. 105 .. 368, 374

Ilott *v.* Wilkes (1820), 3 B. & Ald. 304; 36 Digest 94, *627* .. 21, 26
Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621; 3 Tax Cas. 53 .. 61, 65, 66, 67, 597, 600
Industrial and Commercial Co., Vladimir Alexeew (not reported) .. 557, 562
Inglis *v.* London, Midland & Scottish Ry. Co., [1941] S.C. 551 .. 425, 429
Inland Revenue Comrs. *v.* Blott, Inland Revenue Comrs. *v.* Greenwood, [1921] 2 A.C. 171; 28 Digest 107, *663*; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101 .. 203, 204
Inland Revenue Comrs. *v.* Fisher’s Executors, [1926] A.C. 395; 28 Digest 107, *661*; 94 L.J.K.B. 310; 132 L.T. 278 .. 203, 204
Inland Revenue Comrs. *v.* Forth Conservancy Board, [1931] A.C. 540; 16 Tax Cas. 103; Digest Supp.; 100 L.J.P.C. 193; 145 L.T. 121 .. 237, 240
Inland Revenue Comrs. *v.* Maxse, [1919] 1 K.B. 647; Digest Supp.; 88 L.J.K.B. 752; 120 L.T. 680; 12 Tax Cas. 41 .. 164, 166
Inland Revenue Comrs. *v.* Rolls-Royce, Ltd. (1941), L. (N.D.C.) 5; 58 T.L.R. 73 .. 340, 341, 342
Inland Revenue Comrs. *v.* Sangster, [1920] 1 K.B. 587; Digest Supp.; 89 L.J.K.B. 673; 122 L.T. 374; 12 Tax Cas. 208 .. 340, 341
Insurance Co. *v.* Folsom (1873), 18 Wallace 237 .. 197, 199
Inverclyde (otherwise Tripp) *v.* Inverclyde, [1931] P. 29; Digest Supp.; 100 L.J.P. 16; 144 L.T. 212 .. 368, 369, 370, 372, 373, 374
Isaac *v.* Defriez (1754), Amb. 595; 44 Digest 890, *7479*; 17 Ves. 373, *n* .. 255, 257

Jackson *v.* Smithson (1846), 15 M. & W. 563; 2 Digest 243, *273*; 15 L.J.Ex. 311; 7 L.T.O.S. 231 .. 99, 103
James *v.* Allen (1817), 3 Mer. 17; 8 Digest 293, *708* .. 61, 67, 70

Jarman's Estate, *Re*, Leavers *v.* Clayton (1878), 8 Ch.D. 584 ; 8 Digest 295, *727* ; 47 L.J.Ch. 675 ; 39 L.T. 89 61, 69, 71, 74
Johannesburg, The, [1907] P. 65 ; 38 Digest 103, *738* ; 76 L.J.P. 67 ; 96 L.T. 464 119, 122
Jones, *Re*, Eyre *v.* Cox (1877), 46 L.J.Ch. 316 ; Digest, Practice 311, *359* 388, 390
Jones *v.* Amalgamated Anthracite Collieries, Ltd., [1944] A.C. 14 ; [1944] 1 All E.R. 1 ; 112 L.J.K.B. 120 ; 36 B.W.C.C. 195 ; *affg.*, [1943] 1 K.B. 145 ; [1942] 2 All E.R. 600 290, 291, 292
Jones *v.* Cwmorthen Slate Co. (1879), 5 Ex.D. 93 ; 28 Digest 8, *29* ; 49 L.J.Q.B. 110 ; 41 L.T. 575 ; 1 Tax Cas. 267 136, 137
Jones *v.* Festiniog Ry. Co. (1868), L.R. 3 Q.B. 733 ; 38 Digest 350, *562* ; 37 L.J.Q.B. 214 ; 18 L.T. 902 99, 103
Jones *v.* Jones, [1916] 2 A.C. 481 ; 32 Digest 28, *177* ; 85 L.J.K.B. 1519 ; 115 L.T. 432 172, 174
Jones *v.* Williams (1767), Amb. 651 ; 8 Digest 256, *172* 61, 65
Jorden *v.* Money (1854), 5 H.L. Cas. 185 ; 21 Digest 292, *1041* ; 23 L.J.Ch. 865 ; 24 L.T.O.S. 160 ; *revsg.* S.C. *sub nom.* Money *v.* Jorden (1852), 2 De G.M. & G. 318 84, 91
Keene *v.* Beard (1860), 8 C.B.N.S. 372 ; 6 Digest 10, *10* ; 29 L.J.C.P. 287 ; 2 L.T. 240 84, 89

Kelly & Co. *v.* Kellond (1888), 20 Q.B.D. 569 ; 30 Digest 195, *628* ; 57 L.J.Q.B. 330 ; 58 L.T. 263 ; *on appeal sub nom.* Thomas *v.* Kelly, 13 App. Cas. 506 294, 299
Kennedy *v.* De Trafford, [1896] 1 Ch. 762 ; *affd.*, [1897] A.C. 180 ; 35 Digest 504, *2356* ; 66 L.J.Ch. 413 ; 76 L.T. 427 75, 77
Kerrison *v.* Smith, [1897] 2 Q.B. 445 ; 30 Digest 512, *1675* ; 66 L.J.Q.B. 762 ; 77 L.T. 344 477, 479
Kewley *v.* Ryan (1794), 2 Hy. Bl. 343 ; 29 Digest 100, *577* 198, 202
King *v.* Port of London Authority, [1920] A.C. 1 ; 34 Digest 434, *3548* ; 88 L.J.K.B. 889 ; 121 L.T. 587 ; 12 B.W.C.C. 260 351, 352
King *v.* Victoria Insurance Co., [1896] A.C. 250 ; 19 Digest 53, *159* ; 65 L.J.P.C. 38 ; 74 L.T. 206 244, 246
Kinneil Cannel & Coking Coal Co., Ltd. *v.* Sneddon (or Waddell), [1931] A.C. 575 ; Digest Supp. ; 100 L.J.P.C. 113 ; 145 L.T. 289 ; 24 B.W.C.C. 181 294, 296, 297
Knightsbridge Estates Trust, Ltd. *v.* Byrne, [1940] A.C. 613 ; [1940] 2 All E.R. 401 ; Digest Supp. ; 109 L.J.Ch. 200 ; 162 L.T. 388 182, 183
Knowles *v.* Mellor, [1917] cited Annual Practice, 1920, p. 1336 115, 117
Lakey *v.* Blair & Co., Ltd. (1916), 10 B.W.C.C. 58 ; 34 Digest 351, *2828* 351, 359, 360, 363, 366, 367
Lalandia, The [1933] P. 56 ; Digest Supp. ; 102 L.J.P. 11 ; 148 L.T. 97 557, 561
Lambe *v.* Inland Revenue Comrs., [1934] 1 K.B. 178 ; Digest Supp. ; 103 L.J.K.B. 69 ; 150 L.T. 190 ; 18 Tax Cas. 212 548, 551
Lancaster Motor Co. (London), Ltd. *v.* Bremith, Ltd. Barclays Bank, Ltd. (Garnishees), [1941]1 K.B. 675 ; [1941] 2 All E.R. 11 ; 110 L.J.Ch. 398 ; 165 L.T. 134 294, 300
Lavarick *v.* Gray (William) & Co., Ltd. (1919), 121 L.T. 289 ; 34 Digest 345, *2783* ; 12 B.W.C.C. 177 351, 358, 365
Lavelle, *Re*, Concannon *v.* A.-G., [1914] 1 I.R. 194 ; 8 Digest 246, *644* 255, 258, 259
Laverty *v.* Laverty, [1907] 1 I.R. 9 ; 8 Digest 252, *d* 255, 258
Le Mesurier *v.* Le Mesurier, [1895] A.C. 517 ; 11 Digest 422, *885* ; 64 L.J.P.C. 97 ; 72 L.T. 873 368, 373
Leigh *v.* Inland Revenue Comrs., [1928] 1 K.B. 73 ; Digest Supp. ; 96 L.J.K.B. 853 ; 137 L.T. 303 ; 11 Tax Cas. 590 548, 551
Leanse *v.* Egerton, [1943] 1 K.B. 323 ; [1943] 1 All E.R. 489 ; 112 L.J.K.B. 273 ; 168 L.T. 218 439, 442
Leslie *v.* Young & Sons, [1894] A.C. 335 ; 13 Digest 172, *85* 93, 96, 98
Lewis *v.* Denye, [1940] A.C. 921 ; [1940] 3 All E.R. 299 ; Digest Supp. ; 109 L.J.K.B. 817 ; 163 L.T. 249 486, 488
Liddle *v.* North Riding of Yorkshire County Council, [1934] 2 K.B. 101 ; Digest Supp. ; 103 L.J.K.B. 527 ; 151 L.T. 202 21, 24
Lloyd Generale Italiano, *Re*, (1885) 29 Ch.D. 219 ; 13 Digest 1208, *8549* ; 54 L.J.Ch. 748 557, 561
London County Council *v.* A.-G., [1901] A.C. 26 ; 28 Digest 73, *392* ; 70 L.J.Q.B. 77 ; 83 L.T. 605 ; 4 Tax Cas. 265 ; *revsg.* S.C. *sub nom.* A.-G. *v.* London County Council, [1900] 1 Q.B. 192 158, 159
Londonderry (Lady) *v.* Wayne (1763), Amb. 424 ; 40 Digest 593, *1286* ; 27 E.R. 284 548, 551
Lord Advocate *v.* Huron and Erie Loan and Savings Co., [1911] S.C. 612 ; 10 Digest 1198, *m* 557, 560
Ludlow, *Re*, Bence-Jones *v.* A.-G. (1923), 93 L.J.Ch. 30 ; Digest Supp. 61, 71
Luipaard's Vlei Estate and Gold Mining Co., Ltd. *v.* Inland Revenue Comrs., [1930] 1 K.B. 593 ; Digest Supp. ; 99 L.J.K.B. 330 ; 142 L.T. 589 ; 15 Tax Cas. 573 548, 551
Luxor (Eastbourne), Ltd. (in Liquidation) and Others *v.* Cooper, [1941] A.C. 108 ; [1941] 1 All E.R. 33 ; 164 L.T. 313 513, 514
Lynch *v.* Nurdin (1841), 1 Q.B. 37 ; 36 Digest 24, *118* ; 10 L.J.Q.B. 73 21, 26

M'Alister (or Donoghue) *v.* Stevenson, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281 99, 104
Macbeth *v.* North & South Wales Bank, [1908] 1 K.B. 13 ; *affd.*, [1908] A.C. 137 ; 6 Digest 32, *209* ; 77 L.J.K.B. 464 ; 98 L.T. 475 84, 87
McCarthy *v.* British Oak Insurance Co., Ltd., [1938] 3 All E.R. 1; Digest Supp.; 159 L.T. 173 574
Macduff, *Re*, Macduff *v.* Macduff, [1896] 2 Ch. 451 ; 8 Digest 296, *731* ; 65 L.J.Ch. 700 ; 74 L.T. 706 61, 66
McEnery, *Re*, [1941] I.R. 323 255, 258
M'Geechan *v.* Glasgow Iron & Steel Co., Ltd., [1926] S.C. 4 ; 34 Digest 389, *l* 351, 354
Mackinnon's Trustees *v.* Mackinnon, [1909] S.C. 1041 ; 8 Digest 296, *e* 61, 63, 71
Macmillan *v.* Suresh Chunder Deb (1890), I.L.R. 17 Calc. 951 ; 13 Digest 168, *q* 93, 97
Macmillan & Co. *v.* Cooper (1923), L.R. 51 Ind. App. 109 ; 93 L.J.P.C. 113 ; Digest Supp. ; 130 L.T. 675 93, 94, 97, 98
Mabro *v.* Eagle Star and British Dominions Co., Ltd., [1932] 1 K.B. 485 ; Digest, Practice, 405, *1067* ; 101 L.J.K.B. 205 ; 146 L.T. 433 388, 390
Mallett *v.* Staveley Coal & Iron Co., Ltd., [1928] 2 K.B. 405 ; Digest Supp. ; 97 L.J.K.B. 475 ; 139 L.T. 241 ; 13 Tax Cas. 772 280, 282
Malone *v.* Cayzer, Irvine & Co., [1908] S.C. 479 ; 34 Digest 352, *2834 i* ; 1 B.W.C.C. 27 351, 357
Mann, *In the Goods of*, [1942] P. 146 ; 111 L.J. (P.) 86 ; 167 L.T. 189 ; 58 T.L.R. 400 ; *sub nom. In the Estate of* Mann, [1942] 2 All E.R. 193 348, 349, 350
Marriage Neave & Co., *In re*, North of England Trustee, Debenture and Assets Corpn. *v.* Marriage Neave & Co., [1896[2 Ch. 663 ; 39 Digest 55, *672* ; 65 L.J.Ch. 839 ; 75 L.T. 169 541, 542, 543, 544
Marstrand Fishing Co., Ltd. The Girl Pat *v.* Beer, [1937] 1 All E.R. 158 ; Digest Supp. ; 156 L.T. 196 250, 253
Marzetti *v.* Williams (1830), 1 B. & Ad. 415 ; 17 Digest 81, *21* ; 9 L.J.O.S.K.B. 42 172, 176
Maxwell *v.* Director of Public Prosecutions, [1935] A.C. 309 ; Digest Supp. ; 103 L.J.K.B. 501 ; 151 L.T. 477 14, 16, •17

PAGE

May *v.* Burdett (1846), 9 Q.B. 101 ; 2 Digest 237, *240* ; 16 L.J.Q.B. 64 ; 7 L.T.O.S. 253 .. 99, 102
Mayhew, *Re*, Spencer *v.* Cutbush, [1901] 1 Ch. 677 ; 37 Digest 452, *542* ; 70 L.J.Ch. 428 ; 84 L.T. 761 .. 463, 468
Merchants & Manufacturers Insurance Co., Ltd. *v.* Hunt & Others, [1941] 1 K.B. 293 ; [1940] 4 All E.R. 205 ; Digest Supp. .. 244
Metropolitan Water Board *v.* Avery, [1914] A.C. 118 ; 43 Digest 1080, *150*; 83 L.J.K.B. 178; 109 L.T. 762 *affg.*, [1914] 1 K.B. 221 ; *affg.*, [1913] 2 K.B. 257 .. 602, 604
Midland Ry. Co. & Kettering, Thrapstone & Huntingdon Ry. Co. *v.* Robinson (1889), 15 App. Cas. 19 ; 11 Digest 150, *328* ; 59 L.J.Ch. 442 ; 62 L.T. 194 .. 136, 137
Midwinter *v.* Midwinter, [1892] P. 28 ; 27 Digest 515, *5542* ; 61 L.J.P. 1 ; 65 L.T. 438 ; subsequent proceedings, [1893] P. 93 .. 446, 447
Miller *v.* William Boothman & Sons, Ltd., [1944] 1 K.B. 337 ; [1944] 1 All E.R. 333 ; 113 L.J.K.B. 206 ; 170 L.T. 187 .. 54, 59, 435, 436, 486, 487, 488
Mills *v.* Jennings (1880), 13 Ch.D. 639 ; *on appeal sub nom.* Jennings *v.* Jordan (1881), 6 App. Cas. 698 ; 43 Digest 793, *2303* ; 51 L.J.Ch. 129 ; 45 L.T. 593 .. 294, 300
Milner, *Re*, Bray *v.* Milner, [1899] 1 Ch. 563 ; 37 Digest 453, *551* ; *sub nom. Re* Milner, Milner *v.* Bray, 68 L.J.Ch. 255 ; 80 L.T. 151 .. 462, 466
Mitford *v.* Mitford and Von Kuhlmann, [1923] P. 130 ; Digest Supp. ; 92 L.J.P. 90 ; 129 L.T. 153 .. 368, 374
Mitford *v.* Reynolds (1842), 1 Ph. 185 ; 8 Digest 256, *179* ; 12 L.J.Ch. 40 ; subsequent proceedings (1846), 1 Ph. 706 ; (1848), 16 Sim. 105 .. 599
Mocatta *v.* Lousado, cited 7 Ves. 423 .. 255, 256, 257
Monro & Cobley *v.* Bailey (1933), 17 Tax Cas. 607 ; Digest Supp. ; 102 L.J.K.B. 471 ; 148 L.T. 505 .. 155, 156
Morgan, *Re*, Morgan *v.* Morgan, [1893] 3 Ch. 222 ; 44 Digest 540, *3577* ; 62 L.J.Ch. 789 ; 69 L.T. 407 .. 61, 70
Morice *v.* Bishop of Durham (1805), 10 Ves. 522 ; 8 Digest 293, *705* .. 61, 67, 74
Morrice *v.* Aylmer (1875), L.R. 7 H.L. 717 ; 44 Digest 704, *5465* ; 45 L.J.Ch. 614 ; 34 L.T. 218 .. 19, 20
Morris *v.* Carnarvon County Council, [1910] 1 K.B. 840 ; 19 Digest 556, *18* ; 79 L.J.K.B. 670 ; 102 L.T. 524 .. 119, 120, 566
Moss Steamship Co., Ltd. *v.* Whinney [1912], A.C. 254 ; 39 Digest 56, *677* ; 81 L.J.K.B. 674 ; 105 L.T. 305 .. 541, 542, 543
Mourton *v.* Poulter, [1930] 2 K.B. 183 ; Digest Supp. ; 99 L.J.K.B. 289 ; 143 L.T. 20 .. 21, 30
Mousell Brothers *v.* London and North Western Ry. Co., [1917] 2 K.B. 836 ; 14 Digest 44, *144* ; 87 L.J.K.B. 82 ; 118 L.T. 25 .. 553, 554
Municipal Mutual Insurance, Ltd. *v.* Hills (1932), 16 Tax Cas. 430 ; Digest Supp. ; 147 L.T. 62 .. 237, 240
Munster, *Re*, [1920] 1 Ch. 268 ; Digest Supp. ; 89 L.J.Ch. 138 ; 36 T.L.R. 173 .. 422, 424
Murray *v.* Schwachman, Ltd., [1938] 1 K.B. 130 ; [1937] 2 All E.R. 68 ; Digest Supp. ; 106 L.J.K.B. 354 ; 156 L.T. 407 ; 30 B.W.C.C. 466 .. 317, 319

Nash *v.* Eads (1880), 25 Sol. Jo. 95 ; 35 Digest 503, *2337* .. 75, 78
National Provincial Bank of England & Marsh, *Re*, [1895] Ch. 190 ; 40 Digest 78, *602* ; 64 L.J.Ch. 255 ; 71 L.T. 629 .. 31, 32
Neville *v.* London Express Newspaper, Ltd., [1919] A.C. 368 ; 17 Digest 155, *560* ; 88 L.J.K.B. 282 ; 120 L.T. 299 .. 172, 175, 176
Newell *v.* Cross, Newell *v.* Cook, Newell *v.* Plume, Newell *v.* Chenery, [1936] 2 K.B. 632 ; [1936] 2 All E.R. 203 ; Digest Supp. ; 105 L.J.K.B. 742 ; 155 L.T. 173 .. 574, 576, 578
Newsholme Brose. *v.* Road Transport & General Insurance Co., Ltd., [1929] 2 K.B. 356 ; Digest Supp. ; 98 L.J.K.B. 751 ; 141 L.T. 570 .. 294, 298, 299
Niboyet *v.* Niboyet (1878), 4 P.D. 1 ; 11 Digest 423, *894* ; 48 L.J.P. 1 ; 39 L.T. 486 .. 368, 373
Nightingale *v.* Goulburn (1847), 5 Hare 484 ; on appeal (1848), 2 Ch. 594 ; 8 Digest 259, *210*; 17 L.J.Ch. 296 .. 599, 600
Northwestern Utilities, Ltd. *v.* London Guarantee & Accident Co., Ltd., [1936] A.C. 108 ; Digest Supp. ; 105 L.J.P.C. 18 ; 154 L.T. 89 .. 99, 104
Norton *v.* Norton (1908), 99 L.T. 700 ; 30 Digest 132, *95* .. 584, 585

O'Connor's Case (1793), 27 State Tr. 31 .. 14, 18
Ogden *v.* Ogden, [1908] P. 46 ; 11 Digest 334, *228* ; 77 L.J.P. 34 ; 97 L.T. 827 .. 368, 373
Olympic, The, [1913] P. 92 ; 41 Digest 229, *680* ; 82 L.J.P. 41 ; 108 L.T. 592 .. 250, 254
Ounsworth *v.* Vickers, Ltd., [1915] 3 K.B. 267 ; 28 Digest 48, *251* ; 84 L.J.K.B. 2036 ; 113 L.T. 865 ; 6 Tax Cas. 671 .. 280, 282

Paddock *v.* Franklin Insurance Co. (1831), 11 Pick. 227 .. 197, 199
Page *v.* Scottish Insurance Corpn. Forster *v.* Page (1929), 98 L.J.K.B. 308 ; Digest Supp. ; 140 L.T. 571 .. 244, 245
Parker-Jervis, *Re*, Salt *v.* Locker, [1898] 2 Ch. 643 ; 21 Digest 41, *261* ; 67 L.J.Ch. 682 ; 79 L.T. 403 .. 548, 551
Pass of Ballater, The, [1942] P. 112 ; [1942] 2 All E.R. 79 ; 111 L.J.P. 61 ; 167 L.T. 290 .. 99, 105
Passmore *v.* Vulcan Boiler and General Insurance Co., Ltd. (1935), 154 L.T. 258; Digest Supp. 574, 577, 578
Paterson's Trustees *v.* Paterson, [1909] S.C. 485 ; 8 Digest 296, *d* .. 61, 63, 70, 71
Paul *v.* Hargreaves, [1908] 2 K.B. 289 ; 14 Digest 35, *58* ; 77 L.J.K.B. 535 ; 98 L.T. 751 .. 553, 554
Pearce *v.* Brooks (1866), L.R. 1 Exch. 213 ; 12 Digest 264, *2156* ; 4 H. & C. 358 ; 35 L.J.Ex. 134 ; 14 L.T. 288 .. 580, 582
Pearks, Gunston & Tee, Ltd. *v.* Ward, Hennen *v.* Southern Counties Dairies Co., [1902] 2 K.B. 1 ; 14 Digest 40, *102* ; 71 L.J.K.B. 656 ; 87 L.T. 51 .. 553
Perkins *v.* Stevenson (Hugh) & Sons, Ltd., [1940] 1 K.B. 56 ; [1939] 3 All E.R. 697 ; Digest Supp. ; 109 L.J.K.B. 1 ; 161 L.T. 149 ; 32 B.W.C.C. 181 .. 294, 296, 297, 300
Perrin *v.* Morgan, [1943] A.C. 399 ; [1943] 1 All E.R. 187 ; 112 L.J.Ch. 81 ; 168 L.T. 177 .. 294, 298
Perrin *v.* Perrin, Powell *v.* Powell, [1914] P. 135 ; 27 Digest 393, *3872* ; 83 L.J.P. 69 ; 111 L.T. 335 .. 368, 371
Phillips *v.* Copping, [1935] 1 K.B. 15 ; Digest Supp. ; 104 L.J.K.B. 78 ; 152 L.T. 175 .. 223, 224, 510, 511
Pickard *v.* Sears (1837), 6 Ad. & El. 469 ; 21 Digest 290, *1032* .. 84, 91
Pickard *v.* Smith (1861), 10 C.B.N.S. 470 ; 36 Digest 51, *312* ; 4 L.T. 470 .. 566, 567
Pigot's Case, 11 Co. Rep. 27 (*b*) ; 12 Digest 360, *2991* .. 61, 66
Polurrian S.S. Co., Ltd. *v.* Young, [1915] 1 K.B. 922 ; 29 Digest 273, *2213* ; 84 L.J.K.B. 1025 ; 112 L.T. 1053 .. 250, 253
Ponting *v.* Noakes, [1894] 2 Q.B. 281 ; 2 Digest 65, *415* ; 63 L.J.Q.B. 549 ; 70 L.T. 842 .. 99, 105
Port of London Authority *v.* Gray, [1919] 1 K.B. 65 ; 34 Digest 417, *3384* ; 88 L.J.K.B. 107 ; 120 L.T. 11 ; 11 B.W.C.C. 206 .. 290, 292
Porthcawl U.D.C. *v.* Brogden, [1917] 1 Ch. 534 ; 26 Digest 547, *2446* ; 86 L.J.Ch. 393 ; 116 L.T. 405 .. 400, 402

PAGE

Poyser *v.* Minors (1881), 7 Q.B.D. 329 ; 13 Digest 505, *562* ; 50 L.J.Q.B. 555 ; 45 L.T. 33 ; 46 J.P. 84 .. .. 375, 379
Produce Brokers Co., Ltd. *v.* Olympia Oil & Cake Co., Ltd. (1915), 21 Com. Cas. 320 ; *revsd.*, [1916] 1 A.C. 314 ; 2 Digest 475, *1187* ; 85 L.J.K.B. 160 ; 114 L.T. 94 .. .. 294, 297
Provincial Insurance Co. *v.* Morgan and Foxon, [1933] A.C. 240 ; Digest Supp. ; 102 L.J.K.B. 164 ; *sub nom.* Morgan *v.* Provincial Insurance Co., 148 L.T. 385 .. .. 574, 576
Purkis *v.* Walthamstow Borough Council (1934), 151 L.T. 30 ; Digest Supp. 301, 306

Quarman *v.* Burnett (1840), 6 M. & W. 499 ; 34 Digest 126, *966* ; 9 L.J.Ex. 308 .. .. 99, 105
Quartz Hill Gold Mining Co. *v.* Eyre (1883), 11 Q.B.D. 674 ; 33 Digest 468, *21* ; 52 L.J.Q.B. 488 ; 49 L.T. 249 .. .. 172, 174

R. *v.* Abbott (1903), 67 J.P. 151 ; 15 Digest 791, *8531* 483, 484
R. *v.* Alison (1838), 8 C. & P. 418 ; 15 Digest 790, *8528* 483, 484
R. *v.* Cassidy (1858), 1 F. & F. 79 ; 14 Digest 274, *2842* 140, 144
R. *v.* Clayton (1943), unreported 334, 336
R. *v.* D'Eyncourt (1888), 21 Q.B.D. 109 ; 33 Digest 315, *321* ; 57 L.J.M.C. 64 .. .. 522, 524
R. *v.* Dunkley, [1927] 1 K.B. 323 ; Digest Supp. ; 96 L.J.K.B. 15 ; 134 L.T. 632 .. .. 14, 17
R. *v.* Dyson (1823), Russ. & Ry. 523 ; 15 Digest 790, *8527* 483, 484
R. *v.* Ellis, [1910] 2 K.B. 746 ; 14 Digest 361, *3819* ; 79 L.J.K.B. 841 ; 102 L.T. 922 14, 19, 338, 339
R. *v.* Firth, [1938] 3 All E.R. 783 ; Digest Supp. ; 26 Cr. App. Rep. 148 .. .. 14, 18, 338, 339
R. *v.* Gee, R. *v.* Bibby, R. *v.* Dunscombe, [1936] 2 K.B. 442 ; [1936] 2 All E.R. 89 ; 105 L.J.K.B. 739 ; 155 L.T. 31 .. .. 311, 312
R. *v.* Haddy, [1944] 1 All E.R. 319 .. .. 14, 15
R. *v.* Harris (Dora), [1927] 2 K.B. 587 ; Digest Supp. ; 96 L.J.K.B. 1069 ; 137 L.T. 535 .. 140, 144
R. *v.* Jacobs, [1944] K.B. 417 ; [1944] 1 All E.R. 485 .. .. 334, 336
R. *v.* Jessop (1887), 16 Cox, C.C. 204 ; 15 Digest 790, *8529* 483, 484
R. *v.* Jones & Barry U.D.C., *Ex p.* Mein (1907), 71 J.P. 326 ; 26 Digest 542, *2401* ; 96 L.T. 723 400, 402
R. *v.* Leckey, [1943] 2 All E.R. 665 .. .. 483, 484
R. *v.* Nicholson (1937), unreported 140, 144
R. *v.* Rowton (1865), 34 L.J.M.C. 57 ; 14 Digest 363, *3835* ; Le. & Ca. 520 ; 5 New Rep. 428 ; 11 L.T. 745 .. .. 14, 17, 18
R. *v.* Shiel (1900), 19 Cox C.C. 507 ; 33 Digest 409, *1193* ; 82 L.T. 587 .. .. 563, 564
R. *v.* Sprague (1899), 63 J.P. 233 .. .. 172, 173
R. *v.* Stormonth (1897), 61 J.P. 729 ; 15 Digest 791, *8530* 483, 484
R. *v.* Symonds, not reported. See The Times, Dec. 19, 1922 .. .. 483, 484
R. *v.* Thanet & District Assessment Area Assessment Committee & Kent County Valuation Committee, *Ex p.* Isle of Thanet Gas Light & Coke Co., [1939] 2 K.B. 640 ; [1939] 2 All E.R. 489 ; Digest Supp. ; 108 L.J.K.B. 515 ; 160 L.T. 509 .. .. 37, 41, 42
R. *v.* Turner (1664), 6 State Tr. 565 ; 14 Digest 362, *3828* 14, 17
R. *v.* Turner, [1944] 1 All E.R. 599 .. .. 14, 18
R. *v.* Tyler and International Commercial Co., Ltd., [1891] 2 Q.B. 588 ; 14 Digest 30, *21* ; 61 L.J.M.C. 38 ; 65 L.T. 662 .. .. 553, 554
R. *v.* Wattam, [1942] 1 All E.R. 178 ; 28 Cr. App. Rep. 80 .. .. 14, 18, 338, 339
R. *v.* Woodhead (1847), 2 Car. & Kir. 520 ; 14 Digest 274, *2841* 140, 144
R. and S. Trailers, Ltd., and Others, Application, *Re* (1945), 60 R.P.C. 7 .. .. 145, 147
Rainham Chemical Works, Ltd. *v.* Belvedere Fish Guano Co., Ltd., [1921] 2 A.C. 465 ; 36 Digest 192, *332* ; 90 L.J.K.B. 1252 ; 126 L.T. 70 .. .. 99, 101, 103, 106
Ramchurn Mullick *v.* Luchmeechund Radakissen (1854), 9 Moo. P.C.C. 46 ; 6 Digest 10, *9* ; *sub nom.* Radakissen and Doss *v.* Ramchurn Mullick, 2 C.L.R. 1664 ; *sub nom.* Mullick *v.* Radakissen, 23 L.T.O.S. 25 .. .. 84, 87
Read *v.* Brown (1888), 22 Q.B.D. 128 ; 1 Digest 13, *107* ; 58 L.J.Q.B. 120 ; 60 L.T. 250 .. 275, 278
Reddaway *v.* Banham, [1896] A.C. 199 ; 43 Digest 277, *1098* ; 65 L.J.Q.B. 381 ; 74 L.T. 289 269, 270, 271
Reid's Trustees *v.* Cattanach's Trustees, [1929] S.C. 727 ; Digest Supp. 61, 63, 71
Rhodes *v.* Soothill Wood Colliery Co., [1909] 1 K.B. 191 ; 34 Digest 437, *3567* ; 78 L.J.K.B. 141 ; 100 L.T. 14 ; 2 B.W.C.C. 377 .. .. 317, 319
Rickards *v.* Forestal Land, Timber and Railways Co., Ltd. Robertson *v.* Middows, Ltd. Kahn *v.* W. H. Howard, Bros. & Co., Ltd., [1942] A.C. 50 ; [1941] 3 All E.R. 62 ; 110 L.J.K.B. 593 ; 165 L.T. 257 .. .. 250, 252
Rippon, *In the Estate of*, [1943] P. 61 ; [1943] 1 All E.R. 676 ; 112 L.J. (P.) 65 ; 168 L.T. 357 375, 378, 383
Roberts *v.* Brennan, [1902] P. 143 ; 11 Digest 428, *926* ; 71 L.J.P. 74 ; *sub nom.* Brennan (otherwise Roberts) *v.* Brennan, 86 L.T. 599 .. .. 368, 371
Roberts *v.* Roberts (1884), 13 Q.B.D. 794 ; 7 Digest 43, *223* ; 53 L.J.Q.B. 313 ; 50 L.T. 351 .. 294, 299
Robertson *v.* Norris (1857), 1 Giff. 421 ; 35 Digest 502, *2352* ; 30 L.T.O.S. 253 .. .. 75, 78
Robertson *v.* Petros M. Nomikos, Ltd., [1939] A.C. 371 ; [1939] 2 All E.R. 723 ; Digest Supp. ; 108 L.J.K.B. 433 ; 160 L.T. 542 .. .. 250, 252, 253
Robins & Co. *v.* Gray, [1895] 2 Q.B. 501 ; 29 Digest 19, *240* ; 65 L.J.Q.B. 44 ; 73 L.T. 252 .. 392, 393
Robinson *v.* Newman (1917), 86 L.J.K.B. 814 ; 25 Digest 78, *78* ; 117 L.T. 96 .. .. 545, 546
Robinson *v.* Shepherd (1863), 4 De G.J. & Sm. 129 ; 44 Digest 998, *8557* ; 9 L.T. 527 .. 225, 228
Robson *v.* Bennett (1810), 2 Taunt. 388 ; 6 Digest 60, *473* 84, 87, 89
Rocca *v.* Jones (Stanley) & Co., Ltd. (1914), 7 B.W.C.C. 101 ; 34 Digest 351, *2825* .. 351, 359, 360, 361, 363, 364, 365, 366, 367
Rochfort *v.* Fitzmaurice (1842), 1 I. Eq. R. 375 ; 43 Digest 608, [illegible] 255, 260
Rolls *v.* Miller (1884), 27 Ch.D. 71 ; 43 Digest 6, *10* ; 53 L.J.Ch. 682 ; 50 L.T. 597 .. 601, 603
Rose Smith & Co., Ltd. *v.* Inland Revenue Comrs. (1933), 17 Tax Cas. 586 ; Digest Supp. 503, 506
Rothfield *v.* North British Ry. Co., [1920] S.C. 805 ; 29 Digest 7, *72 i* ; 57 Sc.L.R. 661 171, 173, 177
Royal Choral Society *v.* Inland Revenue Comrs., [1943] 2 All E.R. 101 .. .. 193, 194
Russian and English Bank and Florance Montefiore Guedalla *v.* Baring Bros. & Co., Ltd., [1936] A.C. 405 ; [1936] 1 All E.R. 505 ; Digest Supp. ; 105 L.J.Ch. 174 ; 154 L.T. 602 557, 562
Russian and English Bank, *Re*, [1932] 1 Ch. 663 ; Digest Supp. ; 101 L.J.Ch. 226 ; 147 L.T. 57 557, 559, 562
Russian Bank for Foreign Trade, *Re*, [1933] Ch. 745 ; Digest Supp. ; 102 L.J.Ch. 309 ; 149 L.T. 65 .. .. 557, 559
Rylands *v.* Fletcher (1868), L.R. 3 H.L. 330 ; 36 Digest 187, *311* ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; *affg.* S.C. *sub nom.* Fletcher *v.* Rylands (1866), L.R. 1 Exch. 265 99, 101, 102, 103, 104, 105

Saddington *v.* Inslip Iron Co., Ltd. (1917), 10 B.W.C.C. 624 ; 34 Digest 272, *2307* ; 87 L.J.K.B. 184 ; 118 L.T. 138 .. .. 351, 358, 367
St. Albans Rubber Co., *Ex p.* (1942), unreported 37, 42
Salaman *v.* Warner, [1891] 1 Q.B. 734 ; 30 Digest 135, *136* ; 60 L.J.Q.B. 624 .. .. 584, 585
Salvesen (or Von Lorang) *v.* Administrator of Austrian Property, [1927] A.C. 641 ; Digest Supp. ; 96 L.J.P.C. 105 ; 137 L.T. 571 .. .. 368, 369, 373, 374
Sanderson, *Re*, Sanderson *v.* Sanderson (1912), 106 L.T. 26 ; 37 Digest 457, *585* .. 463, 468, 469

PAGE
Sandow, Ltd., *Re*, Skipworth *v.* Sandow, Ltd., [1916] W.N. 262 .. .. 115, 116, 117, 118
Saunders, *Re*, Saunders *v.* Gore, [1898] 1 Ch. 17 ; 21 Digest 105, *775* ; 67 L.J.Ch. 55 ; 77 L.T. 450 .. .. 548, 551
Savile *v.* Roberts (1698), Carth. 416 ; 33 Digest 507, *510* ; 1 Salk. 13 ; 5 Mod. Rep. 394 ; 12 Mod. Rep. 208 ; Holt. K.B. 150 .. .. 172, 174
Scarfe *v.* Morgan (1838), 4 M. & W. 270 ; 32 Digest 233, *180* 579, 582
Schebsman, *Re*, *ex parte* the Official Receiver, The Trustee *v.* Cargo Superintendents (London), Ltd., and Others, [1944] 1 Ch. 83 ; [1943] 2 All E.R. 768 ; *affg.*, S.C. [1943] Ch. 366 ; [1943] 2 All E.R. 387 .. .. 470, 471, 472
Scott *v.* Brown, Doering, McNab & Co., Slaughter & May *v.* Brown, Doering, McNab & Co., [1892] 2 Q.B. 724 ; 12 Digest 238, *1959* ; 61 L.J.Q.B. 738 ; 67 L.T. 782 .. .. 580, 582
Scott *v.* London Dock Co. (1865), 3 H. & C. 596 ; 36 Digest 91, *601* ; 5 New Rep. 420 ; 34 L.J.Ex. 220 ; 13 L.T. 148 .. .. 425, 428, 431
Scott & Alvarez's Contract, *Re*, Scott *v.* Alvarez, [1895] 1 Ch. 596 ; 40 Digest 72, *563* ; 64 L.J.Ch. 378, *n* ; *subsequent proceedings*, [1895] 2 Ch. 603 .. .. 31, 32
Scrimshire *v.* Scrimshire (1752), 2 Hag. Con. 395 ; 11 Digest 417, *836* 368, 372, 373
Sebag-Montefiore, *Re*, Sebag-Montefiore *v.* Alliance Assurance Co., Ltd., [1944] 1 Ch. 331 ; [1944] 1 All E.R. 672 .. .. 395, 396
Selwood *v.* Towneley Coal & Fireclay Co., Ltd., [1910] 1 K.B. 180 ; [1939] 4 All E.R. 34 ; Digest Supp. ; 109 L.J.K.B. 8 ; 161 L.T. 323 ; 32 B.W.C.C. 238 .. .. 294, 296, 297
Shepherd *v.* Hills (1855), 11 Exch. 55 ; 42 Digest 758, *1846* ; 25 L.J.Ex. 6 .. .. .. 569, 570
Shoesmith, *Re*, [1938] 2 K.B. 637 ; Digest Supp. ; 107 L.J.K.B. 582 ; *sub nom.* Shoesmith *v.* Lancashire Mental Hospital Board, [1938] 3 All E.R. 186 ; 159 L.T. 155 .. .. 294, 299
Shubrook *v.* Tufnell (1882), 9 Q.B.D. 621 ; 30 Digest 129, *71* ; 46 L.T. 749 .. .. .. 584, 585
Simonin *v.* Mallac (1860), 2 Sw. & Tr. 67 ; 11 Digest 428, *924* ; 29 L.J.P.M. & A. 97 ; 2 L.T. 327 .. .. 368, 371, 372, 374
Sinclair *v.* Sinclair (1798), 1 Hag. Con. 294 ; 11 Digest 431, *944* 368, 373
Sinclair, *Re*, Allen *v.* Sinclair, Hodfkins *v.* Sinclair, [1897] 1 Ch. 921 ; 23 Digest 420, *4917* ; 66 L.J.Ch. 514 ; 76 L.T. 452 595
Sirdar Gurdyal Singh *v.* Farikdote Rajah, [1894] A.C. 670 ; 42 Digest 688, *1032* 557, 559
Slack's Settlement, *Re*, *Re* Slack, Butt *v.* Slack, [1923] 2 Ch. 359 ; 37 Digest 449, *519* ; 93 L.J.Ch. 46 ; 129 L.T. 628 .. .. 462, 465, 466
Smalpage *v.* Tonge (1886), 17 Q.B.D. 644 ; Digest, Practice, 845, *3925* ; 55 L.J.Q.B. 518 ; 55 L.T. 44 .. .. 388, 390
Smart Bros. *v.* Ross, [1943] A.C. 84 ; [1942] 2 All E.R. 282 .. .. .. 115, 116, 117, 118
Smith, *Re* (1876), 2 Ex.D. 47 ; 16 Digest 41, *423* ; 46 L.J.Q.B. 73 ; 35 L.T. 858 .. .. 179, 180
Smith *v.* Anderson (1880), 15 Ch.D. 247 ; 9 Digest 72, *255* ; 50 L.J.Ch. 39 ; 43 L.T. 329 .. 208, 212
Smith *v.* Baker & Sons, [1891] A.C. 325 ; 36 Digest 95, *633* ; 60 L.J.Q.B. 683 ; 65 L.T. 467 99, 100
Smith *v.* Barkley, [1943] 2 All E.R. 788 .. .. 11, 12
Smith *v.* Cammell Laird & Co., Ltd., [1940] A.C. 242 ; [1939] 4 All E.R. 381 ; Digest Supp. ; 109 L.J.K.B. 134 ; 163 L.T. 9 .. .. 99, 106
Smith *v.* Davey Paxman (Colchester), Ltd., [1943] 1 All E.R. 286 ; 36 B.W.C.C. 60 439, 441, 442
Smith *v.* Kenrick (1849), 7 C.B. 515 ; 36 Digest 157, *8* ; 18 L.J.C.P. 172 ; 12 L.T.O.S. 556 99, 102
Smith *v.* Muller, [1894] 1 Q.B. 192 ; 24 Digest 905, *50* ; 70 L.T. 170 603
Smith, *Re*, Public Trustee *v.* Smith, [1932] 1 Ch. 153 ; Digest Supp. ; 100 L.J.Ch. 409 ; 146 L.T. 145 .. .. 599, 600
Smith-Bosanquet, *Re*, Smith *v.* Smith-Bosanquet, [1940] Ch. 954 ; [1940] 3 All E.R. 519 ; Digest Supp. ; 109 L.J.Ch. 440 .. .. 549, 551
Soho Square Syndicate *v.* E. Pollard & Co., [1940] Ch. 638 ; [1940] 2 All E.R. 601 .. 115, 117
Solicitor, *Re* A, [1924] 1 K.B. 699 ; 42 Digest 408, *1659* ; 93 L.J.K.B. 478 ; 131 L.T. 136 .. 432, 433
South Suburban Gas Co. *v.* Metropolitan Water Board, [1909] 2 Ch. 666 ; 43 Digest 1080, *149* ; 79 L.J.Ch. 27 ; 101 L.T. 560 .. .. 601, 602
South-Western Suburban Water Co. *v.* St. Marylebone Guardians, [1904] 2 K.B. 174 ; 43 Digest 1078, *139* ; 73 L.J.K.B. 347 .. .. 601, 602, 603
Southall *v.* Cheshire County News Co., Ltd. (1912), 5 B.W.C.C. 251 ; 34 Digest 333, *2703* 453, 456, 457
Speed *v.* Thomas Swift & Co., [1943] K.B. 557 ; [1943] 1 All E.R. 539 ; 112 L.J.K.B. 487 ; 169 L.T. 67 .. .. 411, 413, 414
Spencer *v.* All Souls College (1762), Wilm. 163 ; 8 Digest 367, *1724* 255, 259
Stanley, *In the Estate of*, [1916] P. 192 ; 39 Digest 336, *224* ; 85 L.J.P. 222 ; 114 L.T. 1182 375, 378
Stedham, *In the Goods of*, *In the Goods of* Dyke (1881), 6 P.D. 205 ; 44 Digest 369, *2028* ; 50 L.J.P. 75 ; 45 L.T. 192 .. .. 398, 399
Steele *v.* Robert George & Co. (1937), Ltd., [1942] A.C. 497 ; [1942] 1 All E.R. 447 ; 111 L.J.P.C. 9 ; 167 L.T. 1 ; 35 B.W.C.C. 38 .. .. 351, 355, 367
Stephens *v.* Dudbridge Ironworks Co., [1904] 2 K.B. 225 ; 31 Digest 492, *4070* ; 73 L.J.K.B. 739 ; 90 L.T. 838 ; 6 B.W.C.C. 48 .. .. 317, 319
Stickney *v.* Keeble, [1915] A.C. 386 ; 40 Digest 237, *2061* ; 84 L.J.Ch. 259 ; 112 L.T. 664 590, 593
Stirland *v.* Director of Public Prosecutions, [1944] 2 All E.R. 13 .. .. .. 338, 339, 340
Stratford (Inspector of Taxes) *v.* Mole & Lea (1941), 24 Tax Cas. 20 136
Strickland *v.* Palmer, [1924] 2 K.B. 572 ; 31 Digest 568, *7150* ; 93 L.J.K.B. 1033 ; 131 L.T. 648 .. .. 107, 110
Sutherland *v.* Pratt (1843), 11 M. & W. 296 ; 29 Digest 102, *597* ; 2 Dowl. N.S. 813 ; 12 L.J.Ex. 235 .. .. 198, 199
Sutton, *Re*, Stone *v.* A.-G. (1885), 28 Ch.D. 464 ; 8 Digest 298, *753* ; 54 L.J.Ch. 613 .. 61, 69
Swinburne, *Re*, Swinburne *v.* Pitt (1884), 27 Ch.D. 696 ; 37 Digest 453, *550* ; 54 L.J.Ch. 229 462, 465

Tailby *v.* Official Receiver (1888), 13 App. Cas. 523 ; 20 Digest 334, *770* ; 58 L.J.Q.B. 75 ; 60 L.T. 162 .. .. 182, 183
Tattersall *v.* Drysdale ,[1935] 2 K.B. 174 ; Digest Supp. ; 104 L.J.K.B. 511 ; 153 L.T. 75 244, 248
Taylor *v.* Chester (1869), L.R. 4 Q.B. 309 ; 12 Digest 279, *2285* ; 10 B. & S. 237 ; 38 L.J.Q.B. 225 ; 21 L.T. 359 .. .. 580, 583
Taylor *v.* Sims and Sims, [1942] 2 All E.R. 375 ; 167 L.T. 414 .. .. 439, 441
Tredgold, *Re*, Midland Bank Executor and Trustee Co., Ltd. *v.* Tredgold and the Royal Society of Musicians of Great Britain (Incorporated), [1943] Ch. 69 ; [1943] 1 All E.R. 120 .. .. 395, 396
Trim Joint District School Board of Management *v.* Kelly, [1914] A.C. 667 ; 34 Digest 270, *2300* ; 83 L.J.P.C. 220 ; 111 L.T. 305 ; 7 B.W.C.C. 274 .. .. 351, 352
Tutton *v.* Majestic (Owners), [1909] 2 K.B. 54 ; 34 Digest 349, *2808* ; 78 L.J.K.B. 530 ; 100 L.T. 644 ; 2 B.W.C.C. 346 .. .. 351, 361
Twentyman *v.* John Hulbert, Ltd. (1944), 170 L.T. 340 .. .. 553, 555

United Collieries, Ltd. *v.* Inland Revenue Comrs. (1930), 12 Tax Cas. 1248 ; [1930] S.C. 215 280, 282
United Zinc & Chemical Co. *v.* van Britt (1922), 258 U.S. 268 .. .. 21, 26
Usher's Wiltshire Brewery, Ltd. *v.* Bruce, [1915] A.C. 433 ; 28 Digest 56, *287* ; 84 L.J.K.B. 417 ; 112 L.T. 651 ; 6 Tax Cas. 399 ; *revsg.*, [1914] 2 K.B. 891 .. .. 133, 134, 280, 283

PAGE

Unsworth *v.* Elder Dempster Lines, Ltd., [1940] 1 K.B. 658; [1940] 1 All E.R. 362; Digest Supp.; 109 L.J.K.B. 305; 162 L.T. 163; 33 B.W.C.C. 1 .. 294, 296, 300

Valezquez, Ltd. *v.* Inland Revenue Comrs., [1914] 3 K.B. 458; 30 Digest 194, *624*; 83 L.J.K.B. 1108; 111 L.T. 417 .. 294, 297, 298
Vallambrosa Rubber Co., Ltd. *v.* Farmer (Surveyor of Taxes) (1910), 5 Tax Cas. 529; 28 Digest 44, *k* .. 280, 282
Van den Berghs, Ltd. *v.* Clark, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390 .. 280, 283
Vaughan *v.* Marquis of Headford (1840), 10 Sim. 639; 44 Digest 1021, *8791*; 9 L.J.Ch. 271 .. 255, 259
Von Brockdorff *v.* Malcolm (1885), 30 Ch.D. 172; 37 Digest 480, *771*; 55 L.J.Ch. 121; 53 L.T. 263 .. 462, 465, 466, 467
Von Eckhardstein (Baroness) *v.* Von Eckhardstein (Baron) (1907), 23 T.L.R. 593; 11 Digest 427, *920* .. 344, 347

Walker *v.* Bletchley Flettons, Ltd., [1937] 1 All E.R. 170; Digest Supp. .. 315, 316
Walker, *Re*, Goodwin *v.* Scott, [1921] 2 Ch. 63; 33 Digest 216. *1236*; 90 L.J.Ch. 433; 125 L.T. 764 .. 407, 408
Wallasey U.D.C. *v.* Walker & Co. (1906), 70 J.P. 199; 26 Digest 547, *2445* .. 400, 402
Ware *v.* Garston Haulage Co., Ltd., [1943] 2 All E.R. 558 .. 272, 273
Ware *v.* Whitlock, [1923] 2 K.B. 418; 34 Digest 447, *3659*; 92 L.J.K.B. 763; 129 L.T. 595; 16 B.W.C.C. 100 .. 317, 319
Warner *v.* Jacob (1882), 20 Ch.D. 220; 35 Digest 507, *2381*; 51 L.J.Ch. 642; 46 L.T. 656 .. 75, 77, 78
Watts, *Re*, Cornford *v.* Elliott (1885), 29 Ch.D. 947; 8 Digest 268, *310*; 55 L.J.Ch. 332; 53 L.T. 426 .. 182
Webb *v.* Portland Manufacturing Co. (1838), 3 Sumner's Rep. 189 .. 172, 177
Webster *v.* Inland Revenue Comrs., [1942] 2 All E.R. 517 .. 164, 166
Weddell *v.* Road Transport & General Insurance Co., Ltd., [1932] 2 K.B. 563; Digest Supp.; 101 L.J.K.B. 620; 146 L.T. 162 .. 244, 247, 248
Weld-Blundell *v.* Stephens, [1920] A.C. 956; 36 Digest 126, *837*; 89 L.J.K.B. 705; 123 L.T. 593 .. 439, 441
Weldon *v.* Neal (1887), 19 Q.B.D. 394; Digest, Practice, 106, *913*; 56 L.J.Q.B. 621 .. 388, 390
West *v.* Bristol Tramways Co., [1908] 2 K.B. 14; 36 Digest 194, *356*; 77 L.J.K.B. 684; 99 L.T. 264 .. 99, 101
West *v.* Knight (1669), 1 Cas. in Ch. 134; 8 Digest 255, *163* .. 597, 599
Westminster Bank, Ltd. *v.* Edwards, [1942] A.C. 535; [1942] 1 All E.R. 470 .. 145, 148
Westminster City Council *v.* Southern Ry. Co., and Others, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; *sub nom. Re* Southern Ry.. Co's Appeals, 155 L.T. 33 .. 541, 543
Weston's Settlement, *Re*, Neeves *v.* Weston, [1906] 2 Ch. 620; 37 Digest 451, *540*; 76 L.J.Ch. 54; 95 L.T. 581 .. 462, 465, 467, 468, 469
White's Case (1558), 2 Dyer 158 *b*; 29 Digest 4, *29* .. 172, 173
White, *Re*, White *v.* White, [1893] 2 Ch. 41; 8 Digest 249, *89*; 62 L.J.Ch. 342; 68 L.T. 187 .. 61, 68
White *v.* Tyndall (1888), 13 App. Cas. 263; 12 Digest 26, *45*; 57 L.J.P.C. 114; 58 L.T. 741 .. 6
White *v.* White (1802), 7 Ves. 422; 8 Digest 242, *10* .. 255, 256
White (otherwise Bennett) *v.* White, [1937] P. 111; [1937] 1 All E.R. 708; Digest Supp.; 106 L.J.P. 49; 156 L.T. 422 .. 368, 372
Whitten *v.* Army and Navy Stores, Ltd., [1943] 1 K.B. 580; [1943] 2 All E.R. 244; 169 L.T. 207 .. 486, 488
Wigfull (J.) & Sons' Trade Marks, *Re*, [1919] 1 Ch. 52; 43 Digest 195, *432*; 88 L.J.Ch. 30; 120 L.T. 78 .. 395, 396
Wilkinson *v.* Lindgren (1870), 5 Ch. App. 570; 8 Digest 296, *732*; 39 L.J.Ch. 722; 23 L.T. 375 .. 61, 68
Wilkinson *v.* Rea, Ltd., [1941] 1 K.B. 688; [1941] 2 All E.R. 50; 110 L.J.K.B. 389; 165 L.T. 156 .. 566, 567
Williams *v.* Birmingham Battery & Metal Co., [1899] 2 Q.B. 338; 36 Digest 135, *899*; 68 L.J.Q.B. 918; 81 L.T. 62 .. 99, 100
Williams *v.* Dormer (1852), 2 Rob. Eccl. 505; 11 Digest 334, *225* .. 344, 348
Williams *v.* Graigola Merthyr Co., Ltd. (1924), 17 B.W.C.C. 202; 132 L.T. 227; 34 Digest 348, *2804* .. 351, 359, 367
Williams *v.* Williams, Williams *v.* Kershaw (1835), 5 Cl. & Fin. 111, *n*; 8 Digest 297, *747*; 1 Keen, 274, *n*; 5 L.J.Ch. 84 .. 61, 67, 71
Williamson *v.* Thornycroft (John I.) & Co., Ltd., [1940] 2 K.B. 658; [1940] 4 All E.R. 61; Digest Supp. .. 595
Wilson, *Re*, Parker *v.* Winder (1883), 24 Ch.D. 664; 44 Digest 998, *8559*; 53 L.J.Ch. 130 .. 225, 228
Wilson *v.* Merry & Cunningham (1868), 40 Sc. Jur. 486; 34 Digest 207, *1697 xiv* .. 54, 55
Wilson *v.* Wilson (1872), L.R. 2 P. & D. 435; 11 Digest 422, *884*; 41 L.J.P. & M. 74; 27 L.T. 351 .. 368, 373
Wilsons & Clyde Coal Co., Ltd. *v.* English, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406 .. 54, 55, 57, 486, 488
Winslow Hall Estates Co. & United Glass Bottle Manufacturers, Ltd.'s Contract, [1941] Ch. 503; [1941] 3 All E.R. 124; Digest Supp. .. 31, 35
Wood *v.* Leadbitter (1845), 13 M. & W. 838; 30 Digest 515, *1708*; 14 L.J.Ex. 161; 4 L.T.O.S. 433 .. 477, 479
Wood *v.* London County Council, [1941] 2 K.B. 232; [1941] 2 All E.R. 230; 110 L.J.K.B. 641; 165 L.T.B. .. 54, 60
Woolmington *v.* Director of Public Prosecutions, [1935] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232; *revsg.* S.C. *sub nom.* R. *v.* Woolmington, 179 L.T.Jo. 256 .. 14, 15
Wright *v.* Hobart (1723), 9 Mod. Rep. 64; 8 Digest 318, *993* .. 61, 65
Wyatt *v.* Guildhall Insurance Co., Ltd., [1937] 1 K.B. 653; [1937] 1 All E.R. 792; Digest Supp.; 106 L.J.K.B. 421; 156 L.T. 292 .. 574, 576
Wynne-Finch *v.* Chaytor, [1903] 2 Ch. 475; 2 Digest 632, *2593*; 72 L.J.Ch. 723; 89 L.T. 123 .. 294, 299

Yelverton *v.* Yelverton (1859), 1 Sw. & Tr. 574; 11 Digest 423, *895*; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194 .. 344, 348
Yorkshire Dale Steamship Co., Ltd. *v.* Minister of War Transport, [1942] A.C. 691; [1942] 2 All E.R. 6; 111 L.J.K.B. 512; 167 L.T. 349 .. 301, 307, 439, 440, 441, 442
Young *v.* Bristol Aeroplane Co., Ltd., [1944] 2 All E.R. 293 .. 351, 352, 364, 388, 391
Ystradowen Colliery Co., Ltd. *v.* Griffiths, [1909] 2 K.B. 533; 34 Digest 342, *2760*; 78 L.J.K.B. 1044; 100 L.T. 869; 2 B.W.C.C. 357 .. 351, 357, 358

STATUTES, ETC., REFERRED TO

	PAGE
Witchcraft Act, 1735 (*c.* 5), *s.* 4	220
Charitable Uses Act, 1735 (*c.* 36), *s.* 3	181
Stamp Act, 1815 (*c.* 184), Sched., Pt. III	375
Vagrancy Act, 1824 (*c.* 83), *s.* 4	8
Wills Act, 1837 (*c.* 26), *s.* 9	348
——, *s.* 11	36
——, *s.* 22	397
Wills Act Amendment Act, 1852 (*c.* 24), *s.* 1	348
Poor Rate Assessment and Collection Act, 1869 (*c.* 41), *s.* 16	540
Endowed Schools Act, 1869 (*c.* 56), *s.* 45	119, 565
Debtors Act, 1869 (*c.* 62), *s.* 4	179
Summary Jurisdiction Act, 1879 (*c.* 49), *ss.* 9 (1), (2), 19	530
——, *s.* 33 (1)	562
——, *s.* 44	522
Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38	208
Army Act, 1881 (*c.* 58), *ss.* 176, 190	375
Bills of Exchange Act, 1882 (*c.* 61), *s.* 13 (2)	83
Coroners Act, 1887 (*c.* 71), *s.* 6 (1) (*b*), (2)	453
Customs and Inland Revenue Act, 1889 (*c.* 7), *s.* 11	208
Weights and Measures Act, 1889 (*c.* 21), *s.* 29 (2)	552
Lunacy Act, 1890 (*c.* 5), *s.* 116	406
Private Street Works Act, 1892 (*c.* 57), *ss.* 7, 22	400
Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1	119, 565
——, *ss.* 35, 36	518
Sale of Goods Act, 1893 (*c.* 71), *s.* 13	586
Finance Act, 1894 (*c.* 30), *s.* 2 (1) (*c*)	208
——, *s.* 8 (1)	375
Criminal Evidence Act, 1898 (*c.* 36), *s.* 1 (*f*)	13
Factory and Workshop Act, 1901 (*c.* 22)	485
Dogs Act, 1906 (*c.* 32), *ss.* 1, 7	474
Marine Insurance Act, 1906 (*c.* 41), *ss.* 57 (1), 60	249
Criminal Appeal Act, 1907 (*c.* 23), *s* 4 (1)	13, 337
Patents and Designs Acts, 1907-1942, *s.* 18 (6)	421
Copyright Act, 1911 (*c.* 46), *s.* 1 (1)	92
Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10	342
——, *s.* 37	530
Bankruptcy Act, 1914 (*c.* 59), *s.* 30 (3), (4)	593
Courts (Emergency Powers) Act, 1914 (*c.* 78)	115
Income Tax Act, 1918 (*c.* 40), *s.* 30	157
——, *s.* 149	503
——, Sched. A, No. 111, *rr.* 1, 2, 3, All Schedules Rules, *r.* 19	115
——, Sched. B, *rr.* 1, 8	154
——, Sched. D, Case I	133, 237
——, All Schedules Rules, *r.* 19	547
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 2 (3)	106
——, (*c.* 17), *s.* 15 (1)	510
Lunacy Act, 1922 (*c.* 60), *s.* 2 (8)	406
Agricultural Holdings Act, 1923 (*c.* 9), *ss.* 25 (1), 57	126
Finance Act, 1923 (*c.* 14), *s.* 24 (3)	158
——, *s.* 24 (5)	503
Trustees Act, 1925 (*c.* 19), *s.* 33 (1) (i)	593
Law of Property Act, 1925 (*c.* 20), *s.* 34 (2), 36	6
——, *s.* 49 (2)	31, 589
——, *ss.* 101, 106 (3)	75
Administration of Estates Act, 1925 (*c.* 23), First Sched., Part 1, para. 2	593
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *ss.* 31 (1) (i), (2), 68 (2)	583
——, *s.* 191	446
Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 9 (1), 12 (3), 19 (4)	350
——, *s.* 9 (3) (*i*)	289
——, *ss.* 23, 25 (4), 29 (1)	317
——, *s.* 26 (1)	530
——, *s.* 29 (1)	293
Criminal Justice Act, 1925 (*c.* 86), *s.* 46 (1)	342
Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1), (2), (4), (5), (7), (8)	37
Coroners (Amendment) Act, 1926 (*c.* 59), *s.* 19	453
Sale of Food (Weights and Measures) Act, 1926 (*c.* 63), *s.* 12 (2)	552
Finance Act, 1927 (*c.* 10), *s.* 39 (1)	547
Trade Disputes and Trade Unions Act, 1927 (*c.* 22), *s.* 1	403
——, *s.* 36 (4)	243
Companies Act, 1929 (*c.* 23), *ss.* 337, 338	557
Road Traffic Act, 1930 (*c.* 43), *ss* 35, 36, 38.	573
Land Drainage Act, 1930 (*c.* 44), *ss.* 24, 26, 29	507
Local Government Act, 1933 (*c.* 51), *ss.* 228 (1), 229	261
Finance Act, 1934 (*c.* 32), *s.* 21	135
Finance Act, 1936 (*c.* 34), *s.* 21	160, 491
Public Health Act, 1936 (*c.* 49), *ss.* 91-94	489
Factories Act, 1937 (*c.* 67), *ss.* 14 (1), (2), 133	434
——, *ss.* 14, 60, 159	485
——, *ss.* 60, 106, 159	53
——, *s.* 151	315
Finance Act, 1938 (*c.* 46), *s.* 38	160, 491
Food and Drugs Act, 1938 (*c.* 56), *s.* 3	544, 586
——, *s.* 24	481
——, *ss.* 3, 6	42
——, *ss.* 21 (1), 22	119
Administration of Justice (Miscellaneous Provisions) Act, 1938 (*c.* 63), *ss.* 8, 19	562
Limitation Act, 1939 (*c.* 21), *s* 21.	565
Building Societies Act, 1939 (*c.* 55), *s.* 10	75
Emergency Powers (Defence) Act, 1939 (*c.* 62), *s.* 1	139
Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71), *s.* 3 (3)	167
Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 1	489
——, *s.* 4, 5, 8	214
——, *s.* 15 (3), (4)	145, 535
Compensation (Defence) Act, 1939 (*c.* 75), *s.* 2	518
——, *ss.* 4, 7	332

PAGE
Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 1, 2, 8 (1) (*b*) .. 308
——, *ss.* 3, 8 .. 21, 415
—— (*c.* 82), *ss.* 3 (1), 8 .. 438
——, *s.* 8 .. 301
Finance (No. 2) Act, 1939 (*c.* 109), *s.* 12 (3) .. 163
——, *s.* 13 (3), Sched. 7, Pt. 11, para. 1 .. 285
——, Sched. 7, para. 6 (1), (2) .. 340
Finance Act, 1941 (*c.* 30), *s.* 25 .. 153, 395
——, *s.* 25 (1) .. 528
——, *ss.* 25, 26 .. 593
——, *s.* 35 .. 320
Landlord and Tenant (War Damage) (Amendment) Act, 1941 (*c.* 41), *s.* 13 .. 214
——, Sched. .. 145, 535
Landlord and Tenant (Requisitioned Land) Act, 1942 (*c.* 13), *ss.* 1, 2 .. 513
Pensions (Mercantile Marine) Act, 1942 (*c.* 26), *s.* 5 .. 308
——, (*s.* 15) .. 525
Courts (Emergency Powers) Act, 1943 (*c.* 19), *s.* 1 .. 583
Negotiable Instruments Act (India), 1881 (No. 26 of 1881), *s.* 7 .. 83
Palestine Interpretation Ordinance, 1933 (1933, No. 69), *s.* 7 .. 139
Palestine Criminal Code Ordinance, 1936, *ss.* 214, 216 .. 139
Palestine Defence (Judicial) Regulations, 1942, reg. 3 .. 139
Poor Persons Defence Ordinance, 1939 (Somaliland Ordinances, 1939, No. 26), *s.* 3 (2) .. 50
Code of Civil Procedure (Quebec), art. 94 .. 274
Shipbuilding Regulations, 1931 (S.R. & O., 1931, No. 133) .. 53
Defence (General) Regulations, 1939, reg. 51 .. 589
——, reg. 53 (2) .. 322
——, regs. 55 and 98 .. 579
——, reg. 56AB .. 3
——, reg. 58AA .. 568
——, reg. 82 (2) .. 11
Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 .. 485
Defence (Local Defence Volunteers) Regulations, 1940 (S.R. & O., 1940, No. 748), reg. 2 (3), as amended by S.R. & O., 1940, No. 1383 .. 375
Limitation of Supplies (Miscellaneous) Order, 1940 (S.R. & O., 1940, No. 874) .. 333
Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305), arts. 1, 2, 5, 7, .. 568
Control of Machine Tools (No. 3) Order, 1940 (S.R. & O., 1940, No. 1374) .. 579
Control of Machine Tools (No. 5) Order, 1940 (S.R. & O., 1940, No. 1784) .. 579
Solicitors (Disciplinary Proceedings) Rules, 1942 (S.R. & O., 1942, No. 1831/L.25), *r.* 29 (1) .. 432
Essential Work (Building and Civil Engineering) Order, 1942 (S.R. & O., 1942, No. 2044) .. 448
Personal Injuries (Civilians) Scheme (S.R. & O., 1944, No. 369, Part IV, art. 12 (2)) .. 308
—— ,——, arts 1 (8), 29 .. 415
R.S.C., Ord. 8, *rr.* 1, 2 .. 387
——, Ord. 58, *r.* 15 .. 219, 395, 583
——, Ord. 64, *r.* 7 .. 387, 395
County Court Rules, 1936, Ord. 2, *r.* 1 (1) (*b*) .. 205

WORDS AND PHRASES

Adapting for sale .. 315
Aggrieved person .. 261
All other contents of my home or at the bank .. 457
Allow .. 145
Asset .. 285
At caution .. 438
Business .. 163
Cattle .. 474
Charitable or benevolent .. 60
Circumstances . . . attributable to war .. 525
Clear yearly sum .. 528
Combating the enemy .. 21
Common Good Fund .. 597
Common soldier .. 375
Cordial .. 544, 586
Domestic purposes only .. 600
Economic source .. 470
Gifts or settlements .. 470
Gifts or settlements made in my lifetime .. 470
In furtherance of .. 403
Income payable to settlor in any circumstances whatsoever .. 491
Income received from investments .. 340
Kept up .. 208
Per stirpes .. 225
Person charged .. 522
Point of law arising in connection with the computation of profits or income .. 503
Profession .. 163
Recognised terms and conditions .. 568
Standard rate for the year in which the amount payable becomes due .. 547
Specified person .. 448
Stocks and shares .. 19
Supply .. 333
To be sold .. 457
War injury .. 301, 415, 438
Without any deduction .. 547
Working proprietors .. 320

CORRIGENDA

P. 269. OFFICE CLEANING SERVICES, LTD. *v.* WESTMINSTER OFFICE CLEANING ASSOCIATION. Junior counsel for the appellants was *L. M. Minty*.

P. 293. YOUNG *v.* BRISTOL AEROPLANE CO., LTD. Junior counsel for the appellant was *Henry Burton*.

Printed by R. J. ACFORD, LTD., Little London, Chichester, Sussex.

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

Re ROGERS, LLOYDS BANK, LTD. *v.* LORY AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **April 21, 1944.**]

Wills—Construction—Vesting—Gift of fund to child on attaining the age of 21 *years—Direction to executors to pay income during infancy and after death of life tenant to mother of child to be applied for advancement and education of child.*

The testator bequeathed the sum of £2,000 in trust for his wife for life and after her death to his grandson on attaining the age of 21 years with a proviso that, should the wife die before the grandson attained the age of 21, the executors should pay the income of such fund to the mother of the grandson for his advancement and education. The wife died in 1941 and in 1943 the grandson died at the age of 10 years. It was contended on behalf of the personal representatives of the grandson that the gift to him became vested on the death of the testator's wife :—

HELD : there was no such complete gift of the entirety of the income to the child as to displace the *prima facie* contingency arising from the words "on his attaining the age of 21 years." The gift was, therefore, contingent and failed.

Decision of VAISEY, J. ([1944] 1 All E.R. 408) *affirmed.*

[**EDITORIAL NOTE.** A gift, though in form contingent, may be construed as vested, if the whole of the income of the gift is given to the beneficiary although the contingency is not fulfilled. In this case, if the will properly construed meant that the whole of the income was to be applied for maintenance, it would have been held to be a vested gift. The words are, however, held not to be sufficient to provide that the whole income should be so applied, because a person to whom income is to be paid for maintenance of an infant cannot be forced to account for the income.

AS TO GIFT OF INTERIM INTEREST, see HALSBURY, Hailsham Edn., Vol. 34, pp. 391-396, paras. 436-440 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1085-1100, Nos. 9361-9496.]

Cases referred to :

*(1) *Browne* v. *Paull* (1850), 1 Sim. N.S. 92 ; 28 Digest 244, *1009* ; 20 L.J.Ch. 75 ; 16 L.T.O.S. 550.

(2) *Berkeley* v. *Swinburne* (1834), 6 Sim. 613 ; 28 Digest 242, *1004* ; 3 L.J.Ch. 165.

(3) *Hadow* v. *Hadow* (1838), 9 Sim. 438 ; 28 Digest 243, *1005*.

APPEAL by the personal representatives of the grandson from a decision of VAISEY, J., reported [1944] 1 All E.R. 408, where the facts are fully stated.

J. N. Gray, K.C., and *George Maddocks* for the appellants, the personal representatives of the grandson.

R. F. Roxburgh, K.C., and *Harold Lightman* (for *R. W. Goff* on war service) for the first respondents, the residuary legatees.

H. A. Rose for the second respondents, the trustees of the will.

LORD GREENE, M.R. : The question for decision is whether the gift in favour of Ian Roger Pearson was a vested gift, so that on his death it passed to his next of kin, or whether it was contingent on his attaining the age of 21. It is not disputed that the opening words import contingency, but it is well-settled that such words may have their meaning and effect altered by accompanying provisions. Where a direction as to the intermediate income covers the whole of the intervening period and directs its application for the person contingently entitled, it will be treated as a vested gift. The question which we have to decide is whether Vaisey, J., was right in holding that, on the true construction of this will, the gift was contingent. If the true construction of the direction is that the infant has the beneficial interest in the whole of the income before he attains 21, then it is a vested gift.

It is said that that is not so because it must be construed not as a gift to his mother as trustee for him, but as a gift to his mother beneficially, subject to a charge for his advancement and education. In other words, so long as his advancement and education are provided by his mother, the court has no power to interfere with her use of the income. In that case the rule to which I have referred does not apply.

A number of cases were referred to, but the principle of construction in a gift of this kind is one where there has been a long-standing method of judicial construction, the correctness of which has not been challenged. What may be regarded as the leading case is *Browne* v. *Paull* (1), decided by Lord Cranworth, V.-C. In that case the headnote states the facts as follows:

> Testator gave all his property to trustees, in trust to pay an annuity to his wife, and, subject to that payment, to convey, assign or transfer, all his property, unto and equally between his children, when and as they severally attained 21; and, in the meantime, to pay, to his wife, or otherwise apply the rents and proceeds of their respective shares for or towards their respective maintenance, education, and advancement. But, in case of the decease of any of the children under 21, then upon trust to convey, assign or transfer the shares of such of them as should so die, and the accumulations, if any, unto and equally between such of them as should attain 21. The testator's widow maintained and educated the children for several years, and advanced three of them, out of the income received by her from the testator's property, exclusive of her annuity; and, the income being more than sufficient for those purposes, a considerable surplus remained in her hands.

The question arose whether the wife was accountable. Lord Cranworth treated the matter as a pure question of construction of the gift and after referring to *Berkeley* v. *Swinburne* (2) and *Hadow* v. *Hadow* (3), he said, at p. 102:

> His Honour's judgment . . . evidently proceeded on the ground that where, during the minority of a child, the interest of such child's legacy is directed to be paid to the parent, to be applied for or towards its maintenance, there the direction as to the application is a mere charge, for the benefit of the child, on what is, substantially, a gift to the parent subject to such charge.

Then he gives his own reasons, at p. 104, for accepting that principle:

> . . . it is always extremely improbable that a testator can mean that a parent shall keep an accurate account of all money expended in the maintenance and education of a child, forming, as that child ordinarily does, part of the parent's establishment. The great probability always is that nothing more was intended than that the parent should adequately maintain and bring up the child: and I have no hesitation, therefore, in following the two decisions I have referred to.

The question, therefore, is one of construction, and it would not be right in this court to adopt a different method of approach from that which has been adopted for so many years, and, if the case is one of the category where it is extremely improbable that the testator would have intended the parent to be responsible as a trustee, one ought not to make him so. If the word "maintenance" had appeared, there could have been no doubt, for "maintenance and education" are the very words which appeared in *Browne* v. *Paull* (1). I thought at one time that "advancement and education" might have fallen in a different category as matters which could easily be made the subject of account, but counsel for the residuary legatees has satisfied me that that is a distinction for which there is no justification in the present case. Part of "education" may be easily accountable, but part may not, and might involve apportionment of payments between "education" and "maintenance." A parent who is entitled to a fund for the purpose of education cannot be expected to account. So with regard to "advancement," though counsel for the residuary legatees said the word has "a capital flavour," where it applies to income I do not think one can exclude expenses of an "income flavour."

I think, therefore, that the mother of Ian Roger Pearson was not a trustee of the income for him, and that VAISEY, J., was right in thinking that these words were not sufficient to make the contingent gift into a vested one. The appeal must be dismissed.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J. I agree.

Appeal dismissed. The costs of the parties to be paid half out of each estate.

Solicitors: *Gard, Lyell & Co.*, agents for *Theodore Bell, Cotton & Curtis*, Cheam (for the trustees and the residuary legatees); *Bower, Cotton & Bower*, agents for *George Davies*, Manchester (for the personal representatives of the grandson).

[*Reported by* R. L. ZIAR, ESQ., *Barrister-at-Law.*]

ERNEST WILLIAM COURTMAN *v.* CHARLES TALBOT.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Atkinson and Oliver, JJ.), **April 27, 1944.**]

Emergency legislation—" No person shall carry out any work in the course of a building undertaking carried on by him unless there is in force a certificate . . . under this regulation "—Appellant employed as a servant to build a barn—No certificate issued to appellant under the regulation—" Carry out "—" In the course of a building undertaking carried on by him "—Defence (General) Regulations, reg. 56AB.

The appellant was employed at a wage per hour by a farmer to do the bricklaying of a barn. The farmer bought the materials and carted them to the site, exercised some supervision over the appellant's work and retained the right to dismiss him. The appellant was convicted under the Defence (General) Regulations, reg. 56AB, of having carried out work in the course of an undertaking of a jobbing builder carried on by him without there being in force a certificate that he was registered under the regulations:—

HELD: the appellant was the servant of the farmer and was not, therefore, carrying out the work " in the course of an undertaking of a jobbing builder."

[**EDITORIAL NOTE.** The defence regulations require that a man carrying out work in the course of a building undertaking carried on by him shall be registered. These words are rather obscure, but it seems plain, and is here so held, that a man employed to do certain building operations as a workman and not as a contractor is not within this regulation.

FOR THE DEFENCE (GENERAL) REGULATIONS, REG. 56AB, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 35, p. 478.]

APPEAL from a conviction for an offence under the Defence (General) Regulations, reg. 56AB. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Linton Thorp, K.C., and *G. Cunningham* for the appellant.
Colin Pearson for the respondent.

VISCOUNT CALDECOTE, L.C.J.: A farmer, Coates, wanted to build a barn. The Defence (General) Regulations, reg. 56A, required him to obtain a licence, and he obtained it. He was the building owner in that he was employing the appellant to do the bricklaying and other work. Another person was employed by the building owner as a joiner, and several boys were also employed.

The farmer, whom I have described as the building owner, bought the materials, and carted them to the site. He exercised some supervision over the appellant's work on the building, and he retained the right to dismiss the appellant. The case finds that the appellant himself " did the work on the job."

It seems to me plain, stopping there, that the appellant was not employed to do these things as a contractor, and did not engage to do these things in that capacity, and there is no evidence that he did. I think it is plain from these facts (and it is the only conclusion that is possible upon these facts) that the appellant was employed as a servant at a wage per hour subject to the supervision of the building owner and subject to dismissal at any time, whether the work of constructing the barn was completed or not.

The case finds that:

> Coates took the appellant to be a master man. The appellant is and was at all material times a jobbing builder, not holding any national health card or unemployment insurance card.

Those being the facts in this case, the inspector of police, on behalf of the Director of Public Prosecutions, laid an information against the appellant under the provisions of the Defence (General) Regulations, reg. 56AB, which is in these terms, omitting immaterial words:

> No person shall . . . carry out any work in the course of a building undertaking . . . carried on by him unless there is in force a certificate issued by the Minister that he is registered under this regulation.

The matter started a little unfortunately because the information was drawn in a way which really did not disclose the offence with which it was the intention to charge the appellant, and it seems to me that whoever was responsible for drafting the information had misread or misunderstood the regulation, because the offence charged was that the appellant on the day in question "carried out work in the course of a building undertaking on property belonging to one Claude Coates." That seems to me to suggest that the information was based upon the view that the "building undertaking" was the erection of the barn, whereas it seems clear (and indeed it is not denied by counsel for the respondent) "building undertaking" means a business, and not the actual erection of bricks and mortar.

The form of the information would have to be materially altered if it was to disclose the offence said to have been committed under reg. 56AB, para. (1), and the words which would require to be inserted would make it read in this way: "The appellant carried out work in the course of a building undertaking carried on by him." The location of the "building undertaking" carried on by him is neither here nor there, and was, of course, surplusage except upon the hypothesis that the regulation in question had been misunderstood.

The magistrates found as follows:

> That the appellant carried out work as hereinbefore mentioned in the course of the undertaking of a jobbing builder carried on by him without there being in force a certificate that the appellant was registered . . .

under the regulation. They thereupon convicted this appellant and fined him £5 and ordered him to pay £2 7*s*. 4*d*. costs.

The contentions which he raised were that Coates was the person who was carrying out the work and was duly authorised by licence within the meaning of reg. 56 AB and that the appellant was merely a person in the employment of Coates, paid by the hour, liable to dismissal and in no way a contractor responsible for the work or any of it. The question which I think really arises is whether the magistrates came to a right decision when they found that the appellant carried out work in the course of the undertaking of a jobbing builder.

I accept the view that it is for the magistrates to say whether he was a jobbing builder or not; and although the evidence is a little difficult to find in the case, I will assume that finding cannot be attacked. But the finding that the appellant "carried out work" in the course of his undertaking as a jobbing builder is, I think, open to question. There are two parts of that sentence both of which, I think, are wholly unsupported by the evidence in the case.

The first is the finding that he carried out the work. For the reason I have mentioned, namely, that he was a servant and not a contractor, and construing this regulation not in a broad or vague or general way, but construing it with reasonable strictness, I do not think there is any evidence that within the meaning of the expression "carry out" in reg. 56AB, para. (1), this man was carrying out the work.

I would observe that the case further finds that Coates was carrying out the building operations, and that the appellant was working for him. That seems to me to make it impossible to say, consistently with that finding, that this man was carrying out the operation, or carrying out work. He was doing work, as indeed the case finds, and that finding itself illustrates the difference in meaning between the expression "carrying out" as used in the regulation, and the expression "doing the work." I think, therefore, there is no evidence upon which the magistrates could come to the finding that he was the man carrying out the work within the meaning of the regulation.

The second part of the sentence is that he was carrying out the work "in the course of the undertaking of a jobbing builder." I see no evidence whatever of that; everything seems to me to be against it. The payment of a weekly wage; the exercise of supervision of the work which he was doing—which is, of course, only one factor—the right of dismissing the appellant; the arrangements made by the building owner, Coates, for getting the materials and for getting other labour to do other parts of the work—all these matters, I think, show that the appellant, as I have already said, was acting as a servant. It appears to me, therefore, to follow that he was not doing this work or carrying out this work, if he was carrying it out at all, within the meaning of the words "in the course of the undertaking of a jobbing builder." He had, for some reason or other, no national health or unemployment insurance cards. That is an omission which is not explained in the case, but that solitary fact is not, I think, evidence that the man was carrying out work in the course of his building undertaking within the meaning of the regulation.

I think that this appeal should be allowed and the conviction quashed.

ATKINSON, J.: I agree. There are three things which have to be proved before there can be a conviction under this regulation. It has to be proved that the appellant was carrying on a building undertaking. It must be proved that he carried out certain work and it must be proved that he carried out that work in the course of his business of a building undertaking.

A mere workman, a bricklayer, ready and willing to be employed at a wage, is not carrying on a building undertaking; that must be clear. A building undertaking involves the idea of a business in which the owner is ready and willing to undertake, as a contractor, to carry out operations of the kind mentioned in the definition, and whatever the appellant did in this case, in my view, was done in the capacity of a workman who had hired himself out as a workman to Coates; and, even if in normal times he was carrying on a building undertaking, what he was doing then was not done in the course of that undertaking, but was simply done as the result of hiring himself out as a servant or workman to Coates.

I think there is no evidence upon which the magistrates could come to any other conclusion. One of their findings is that it was Coates who was carrying out the building operations, and that the appellant, who was working for him merely received a wage per hour and could be dismissed at any moment. To my mind it is quite impossible to say that services rendered in that way were rendered in the course of a building undertaking as defined in the regulation; and on those grounds I agree that this appeal succeeds.

OLIVER, J.: I agree.

Appeal allowed with costs. Conviction quashed.

Solicitors: *Metcalfe, Copeman & Pettefar* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

CUNNINGHAM-REID *v.* THE PUBLIC TRUSTEE AND UNDERWOOD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **May 5, 1944.**]

Landlord and Tenant—Rent—Joint tenancy—Tenancy of committee rooms—Death of one of two joint tenants—Liability of executors for contribution towards payment of rent—Law of Property Act, 1925 (*c.* 20), *s.* 34 (2), 36.

Certain premises were leased as committee rooms to two tenants who covenanted jointly and severally to pay the rent. After the death of one of the tenants, the surviving tenant brought an action against his executors for contribution towards the rent. It was contended on behalf of the surviving tenant that the interest under the lease was not a joint tenancy by reason of the fact that the premises were covenanted to be used as committee rooms :—

Held : (i) the tenancy created by the lease was a joint tenancy both at law and in equity.

(ii) since the beneficial as well as the legal interest in the lease passed to the surviving tenant, he was not entitled to contribution towards the rent from the executors of the deceased tenant.

[**EDITORIAL NOTE.** Where a lease is granted to two or more persons without words of severance, the tenancy is a joint tenancy both at law and in equity. The point of interest here is in the suggestion that the letting as committee rooms with special covenants directed to that use was a sufficient severance. The law as to contribution is certainly capable of clarification at the present time, but it would not seem that the decision herein is based upon the rules governing contribution. It is held that upon the death of the one tenant, the whole interest vested in the survivor and he became liable for the whole rent.

As to Liability for Rent, see DIGEST, Vol. 31, p. 241, Nos. 3800-3802.]

Cases referred to :

(1) *White* v. *Tyndall* (1888), 13 App. Cas. 263 ; 12 Digest 26, *45* ; 57 L.J.P.C. 114 ; 58 L.T. 741.

(2) *Burns* v. *Bryan* (*or Martin*) (1887), 12 App. Cas. 184 ; 31 Digest 420, *5663*.

(3) *Boulter* v. *Peplow* (1850), 9 C.B. 493 ; 12 Digest 536, *4457* ; 19 L.J.C.P. 190.

Appeal by the plaintiff from an order of His Honour Judge Lilley made at the Bloomsbury County Court, dated Feb. 3, 1944. The facts are fully stated in the judgment of Luxmoore, L.J.

D. A. Scott Cairns for the appellant.

Archibald Safford for the respondents.

Lord Greene, M.R. : As the true ground for supporting the judgment in this case (which is different from that adopted by the county court judge) is, in my opinion, to be found in the point which was suggested by Luxmoore, L.J., in the course of the argument, it will be convenient if he will deliver the first judgment.

Luxmoore, L.J. : Captain Cunningham-Reid sought to recover against the executors of the late Sir Ernest Sanger a sum of £57 10*s*. The basis of Captain Cunningham-Reid's claim is that he is entitled to that sum by way of contribution in respect of a payment of £115 he has made to the landlord of premises at 52, Baker Street.

These premises were let by a lease dated Sept. 29, 1936, made between the landlord and Captain Cunningham-Reid and the late Sir Ernest Sanger. It provides that the premises should be let to Captain Cunningham-Reid and Sir Ernest Sanger for a term of seven years at a yearly rent of £230. The lease contains a covenant in this form :

> The lessees hereby jointly and severally covenant with the lessor in the manner following that is to say that the lessees will pay the rent hereby reserved.

There can be no question that the covenant is anything other than a joint and several one, and, if there were nothing else in the lease, either Captain Cunningham-Reid or Sir Ernest Sanger, if sued on the covenant, would have been entitled to contribution, because it is plain that under the lease a legal joint tenancy was created, and Captain Cunningham-Reid and Sir Ernest Sanger became joint tenants of the property.

The county court judge has based his judgment refusing contribution on the fact that under the Law of Property Act, 1925, s. 34 (2), a tenancy in common was created. If that had in fact been the case it seems to me that the claim for contribution ought properly to have succeeded, but I think sect. 34 (2) only operates if there is in fact a tenancy in common in equity. In the present case there is no evidence whatever as to what the bargain between Captain Cunningham-Reid and Sir Ernest Sanger was, and, in the absence of any evidence which would establish in equity a tenancy in common between them, it seems plain that the legal joint tenancy remains, so that the joint tenancy which is created at law is also a joint tenancy in equity.

Sir Ernest Sanger has died, and Captain Cunningham-Reid has succeeded not only to the legal interest in this lease but he has also succeeded to the full beneficial interest. As I said a moment ago, had the covenant stood alone and had the legal position only to be considered, and, if neither of the parties had any beneficial interest in the lease, there could be no question on a covenant in this form but that whichever of them was called upon to fulfil it would be entitled to contribution from the other. But the substantial point in this case, on which I think Captain Cunningham-Reid is bound to fail, is that he has acquired, by reason of the death of Sir Ernest Sanger, the full beneficial interest in the lease. In those circumstances it could hardly be suggested that, having the full benefit of the lease, he could be equitably entitled to call on the executors of his co-covenantee, whose estate has no beneficial interest in the lease, to pay half of the rent. It seems to me that in equity the claim to contribution in these circumstances must, of necessity, fail.

It was suggested that evidence of some sort of agreement which would constitute some interest other than a joint tenancy was to be found in the fact that in the lease there is a covenant that the lessees will not at any time during the term use the demised premises or permit the same to be used otherwise than as offices, committee rooms or rooms of the Marylebone Conservative and Constitutional Union. Then follow a number of other restrictions. It was not suggested what exactly was the agreement which was to be inferred from the presence of this covenant. Obviously the covenant is one which was inserted for the benefit and at the dictation of the lessor. The lessor could undoubtedly release the covenant. If he released the covenant, Captain Cunningham-Reid would, in the events that have happened, have the beneficial interest in the property and could deal with it as he pleased. In the circumstances it would be impossible to spell out of such a covenant some agreement between the parties which would affect the question whether Captain Cunningham-Reid is entitled in equity to any contribution in respect of the payments of the rent that he has made.

This is a different ground from that on which the county court judge based his judgment, but it is a sufficient and conclusive ground against the plaintiff's claim, and I have no doubt, therefore, that the county court judge came to the right conclusion in dismissing the claim, although for the different reasons which I have stated. In these circumstances, this appeal must be dismissed, with the usual consequences.

LORD GREENE, M.R.: I agree, and do not find it necessary to add anything.

MACKINNON, L.J.: I concur.

Appeal dismissed with costs.

Solicitors: *Cooper, Bake, Fettes, Roche and Wade* (for the appellant); *Underwood & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JAMES HOLLYHOMES *v.* HORACE PERCIVAL HIND

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Croom-Johnson, JJ.), **May 4, 1944.**]

Criminal Law—Loitering—Found upon premises for an unlawful purpose—In entrance hall of flats—Charged as upon premises in occupation of one of the tenants—Surplusage—Vagrancy Act, 1824 (*c.* 83), *s.* 4.

The appellant was found by the police standing in the inner part of the entrance hall of a building near the front door of a maisonette occupied by L.W. The building was comprised of ground and first floor maisonette, occupied by L.W., a second and third floor flat and a basement flat. The entrance hall was used in common by all the occupiers. The appellant was charged under the Vagrancy Act, 1824, s. 4, that he on a certain date " was found in and upon a certain dwellinghouse then in the occupation of L.W. at . . . for a certain unlawful purpose . . . contrary to the Vagrancy Act, 1824, s. 4." It was contended on behalf of the appellant that the information was bad because the entrance hall was not in the occupation of L.W. and, therefore, the appellant was not found in or upon a dwellinghouse in the occupation of L.W. :—

HELD : the entire building was a dwellinghouse within the meaning of s. 4 of the Act, therefore the words in the charge " then in the occupation of L.W." were mere surplusage which could be disregarded.

[**EDITORIAL NOTE.** Modern statutory enactments have made practitioners familiar with dwellinghouses within dwellinghouses and the phrase " a dwellinghouse in the occupation of L.W." is now easily taken to mean the part of a building in the occupation of that person. The only essentials of the offence here, however, is that the offence should be committed in a dwellinghouse and it is immaterial in whose occupation the dwellinghouse happens to be. The statement in the charge, therefore, as to occupation is mere surplusage.

AS TO PERSONS FOUND LOITERING FOR UNLAWFUL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 25, p. 442, para. 790 ; and FOR CASES, see DIGEST, Vol. 37, pp. 363-365, Nos. 1651-1662.]

APPEAL by the defendant from a decision of the Recorder of Bath dismissing an appeal from a conviction under the Vagrancy Act, 1824, s. 4. The facts are fully set out in the judgment of HUMPHREYS, J.

Comyns Carr, K.C., and *G. L. Hardy* for the appellant.

Wilfrid Clothier, K.C., and *Vernon Gattie* for the respondent.

HUMPHREYS, J. : In this case the Recorder of Bath heard an appeal against a conviction which was recorded by the justices of the City of Bath against the appellant for this offence, that he :

> . . . on Mar. 26, 1943, at and in the city of Bath was found in and upon a certain dwellinghouse then in the occupation of Lilian Williams, at 8, Marlborough Buildings for a certain unlawful purpose, to wit, feloniously to steal the goods and chattels of the said Lilian Williams therein, contrary to the Vagrancy Act, 1824, s. 4.

The Vagrancy Act, 1824, s. 4, is a very long section which deals with a great many different offences, and uses language which was no doubt advisedly made as wide as possible to bring within the section, in order that they might be deemed rogues and vagabonds, persons who were going about with evil intent, and were either a particular class of person or were found in one of various named places with that intent, the intent being always some wrongful intent. In this case, the intent was being there for any unlawful purpose, and the unlawful purpose was to steal.

So far as the facts are concerned, they were found very clearly indeed by the Recorder, in the same way as they had been found by the justices. He found that this appellant was found by the police standing in the inner part of the entrance hall of No. 8, Marlborough Buildings, Bath, near a door on which the name of Miss Williams was painted. He further finds for our information that the ground and first floor flat or maisonette of No. 8, Marlborough Buildings, is occupied by a lady named Lilian Williams, that the second and third floor are occupied by somebody else, and the basement is occupied by a third person, in fact the caretaker of the premises. He was satisfied on the evidence that this man was found there for the unlawful purpose set out in the charge, that is to say, he was there for the purpose of stealing.

The contention before him, apart from those contentions to which he declined to accede, was that the original information was bad, and, therefore, the conviction was bad, because the inner part of the entrance hall where this man was found was not part of a dwellinghouse in the occupation of the said Lilian Williams, and that is the only point raised by this appeal. It is obvious, and does not require any discussion or further statement about the matter that the appeal is without the smallest merits, and is on those completely technical grounds.

The first point of counsel for the appellant is this: He says that, upon the facts found, this place where the appellant was found by the police is not either in or upon a dwellinghouse in the occupation of Lilian Williams. It is true that she has a lease or an agreement for a lease, and that she does occupy the ground and the first floor but, argues counsel for the appellant, inasmuch as she has no occupancy of, and her lease does not include the entrance hall which is common to herself and the users and occupiers of other flats, it is wrong to say that he was ever found in or upon the dwellinghouse which she occupied. Well, technical though that may be, it is an argument to which a court of law has to pay attention, and to give effect to if it is correct. But, in our opinion, the matter may be disposed of without discussing at any length the very interesting question for another court to decide, whether in the circumstances of this case it would be right to describe the lady's tenancy as covering the entrance hall, or whether it would be right to say that No. 8, Marlborough Buildings is a building which includes three separate hereditaments separately rateable within the occupancy, as undoubtedly they are, of three separate persons, because this is not a case in which, from the dwellinghouse point of view, any distinction can be made between that part occupied by Miss Williams and that part occupied by the others. In point of fact, whatever may be said from the point of view of rating law, where such matters have to be meticulously and accurately gone into from the point of view of a dwellinghouse, the whole building, No. 8, Marlborough Buildings, is quite clearly a dwellinghouse. It may be said to be three dwellinghouses, but that does not prevent it being a dwellinghouse. It is used as a dwellinghouse; it is occupied as a dwellinghouse. As to one of the parts of it, we know it is let as a dwellinghouse, and we have no reason to doubt that at least the other maisonette is let as a dwellinghouse, and the caretaker lives in the basement, so it is a dwellinghouse so far as he is concerned.

Looking at the words of this section, why is it that this conviction is not right, since this person was in fact found in and upon premises which are premises which are used as a dwellinghouse, the premises being described as No. 8, Marlborough Buildings? That is all very well, says counsel for the appellant, but they are described in this case as in the occupancy of Miss Lilian Williams.

It was argued before the Recorder and, in our opinion, rightly argued, that those words in this case may be disregarded as being mere surplusage. No one doubts the necessity in a conviction for there being sufficient accuracy and sufficient detail to enable the accused to know exactly what is the place in respect of which it is said that he was found, otherwise, if he were charged with that same offence a little later on, he would not be able to prove that he had been already convicted of that offence, and that is the answer to any such suggestion, as perhaps it is sufficient to say, that he was found in a dwellinghouse in the City of Bath. That, no doubt, would not be sufficient, but can anybody doubt that sufficient description is given of this dwellinghouse when it is described as No. 8, Marlborough Buildings? That is the postal address, and that is the way in which the whole building would be described by anybody who was going there. It is No. 8, Marlborough Buildings and it is a dwellinghouse, and, that being so, the view we take is that it was quite unnecessary to add that it was in the occupancy of Miss Williams.

For my own part, I should be quite prepared to hold in this case that the information would have been good and the conviction would have been good if it had never mentioned from beginning to end the name of the person who occupied the ground floor and first floor maisonette. I will go further, and say that, if the evidence of the police officer when challenged had been: "I do not know who occupies that maisonette; I know it is a dwellinghouse; I know there is a lady living there, but what the terms of her lease are, I do not know," I should still hold to the view I entertain that he was rightly convicted of being found in and upon a dwellinghouse within the meaning of the Vagrancy Act, 1824, s. 4.

It is not without interest to see how wide are the words of the section in that respect. The words are:

> Every person being found in or upon a dwellinghouse, warehouse, coach-house, stable or outhouse, or in any enclosed yard, garden or area for an unlawful purpose . . .

I cannot think that any court of justice would ever take the view that it was necessary to describe in a conviction for that offence, with the same particularity and accuracy as might be necessary for totally different purposes, such as rating, either the name of the occupant or the details of the occupancy of the particular person outside whose front door the man was found, the offence being that the person should be found in or upon what is, in my view, the whole building, which is a dwellinghouse.

That view renders it unnecessary, in my opinion, to deal with questions of amendment, or whether there was power of amendment here. In point of fact, the Recorder tells us that the question of amendment arose. He states this in his opinion:

> I was also of opinion that the words " in the occupation of Lilian Williams " were, for the purposes of the Vagrancy Act, 1824, s. 4, surplus, and could be disregarded as not being material for the purposes of the said section, the essence of which is the purpose for which a person, found in or upon premises, is in or upon them.

Then he says:

> No application, however, was made on behalf of the respondent to me to amend the said information by leaving out the said words.

I think it is quite unnecessary to discuss it in this case, but, in my view, the person, whoever it was, who was appearing for the prosecution was quite right in not applying for leave to amend because no leave is necessary to amend something which is surplus. The proper way to treat that which is surplus is to disregard it, not to amend it. I think the Recorder's judgment admirably expresses the law, and was right in every respect.

Viscount Caldecote, L.C.J.: I agree entirely with the judgment which has just been delivered.

Croom-Johnson, J.: I agree. I only want to deal with three very short points. The first one is to say, with the two other members of the court, what a relief and, indeed, a pleasure it is to be able to deal with a case which has been properly stated.

The second point is that in the proceedings before justices, certainly up to the point of the actual conviction, the prosecution is not obliged to state every conceivable thing which the defence think they would like to have stated. The matter is now dealt with by the Criminal Justice Act, 1925, s. 32, under which it is sufficient if there is:

> . . . a statement of the specific offence . . . together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

A later part of the same section goes on to say that, after stating the nature of the offence shortly in ordinary language:

> . . . necessary particulars of the offence shall be set out in ordinary language in which the use of technical terms shall not be required.

It is no part of this offence to show that the premises were occupied or unoccupied. It was not, therefore, in my judgment, one of the necessary particulars that should be in at all. In those circumstances, it is an unnecessary and, therefore, surplus averment altogether.

The third point is the point which counsel for the appellant emphasised somewhat, namely, that this was charging a separate offence, a distinct and different offence. I cannot follow that. The offence charged under the statute is an offence, as Humphreys, J., has pointed out, with reference to a dwellinghouse. I cannot see that there is any departure when the facts are stated and it turns out that the part of the premises upon which the offence is alleged to have been committed is a part of the premises which, I suppose, for the purpose of rating, might be said to be in the occupation of the caretaker. It is nothing to do with the charge, and I think that that wholly artificial distinction which was sought to be raised in order to meet this point about surplusage, fails. I agree, for the reasons given, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Marris & Shepherd* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. Basil Ogden*, Town Clerk, Bath (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

LONDON COMPUTATOR, LTD., *v.* SEYMOUR

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Croom-Johnson, JJ.) **May 9, 1944.**]

Emergency Legislation—Application by employee for allocation of petrol—Untrue statements—Letter by employers certifying accuracy of information furnished—Untrue statements not within knowledge of employers—Whether " knows " to be interpreted as " ought to have known "—Defence (General) Regulations, reg. 82 (2).

An employee of the appellant company made an application under the Emergency Powers (Control of Motor Fuel) Order, 1942, and in so doing made two untrue statements. In accordance with the form supplied for the purposes of the application the employee sent in a letter from the appellant company certifying the accuracy of the information submitted. The appellant company was charged under the Defence (General) Regulations, reg. 82 (2), with making a statement known to be false in a material particular. In the court of first instance it was held that the word " knows " in reg. 82 (2) should be interpreted as " ought to have known " and the appellants were accordingly convicted :—

HELD : upon the true construction of the Defence (General) Regulations, reg. 82 (2), the word " knows " bears its ordinary meaning and is not to be construed as " ought to have known."

[**EDITORIAL NOTE.** The question here is purely the meaning of the word " knows " in the regulation. There are cases where a person can be said to know a thing where he can only be certain of it by reasonable inquiry, but here the word is to be literally read, and unless it is proved that the person charged in fact knew of the untruth of the statement, he cannot be convicted of an offence.

FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 82 (2), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 775.]

Case referred to :

(1) *Smith* v. *Barkley*, [1943] 2 All E.R. 788.

APPEAL by way of case stated from a decision of a court of summary jurisdiction on a question of construction of the Defence (General) Regulations, reg. 82 (2). The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Sandlands, K.C., and *Geoffrey Howard* for the appellants.

Arthian Davies for the respondent.

VISCOUNT CALDECOTE, L.C.J. : Upon the case stated two questions of law have been argued, in the following circumstances. A man named Bulmer applied for petrol, under the Emergency Powers (Control of Motor Fuel) Order, 1942, which provides that :

> . . . every person desiring to obtain . . . (*b*) coupons for the purpose of this Order shall furnish such information as may be requested by or on behalf of the Ministry . . . (2) as may be prescribed by direction of the Minister and any such direction may specify the form in or on which such information is to be furnished.

Bulmer filled up the form required to enable him to get the petrol which was said to be wanted for the purpose of the business of his employers. In filling up the form Bulmer is said to have made two untrue statements : one mis-statement was as to the address at which his car, for which the petrol was wanted, was ordinarily kept and the other was in putting the word " None " in answer to the question " Do you receive from any other source motor fuel for use in a private motor car ? If not enter the word ' none '." He also made a number of statements in answer to the requirements that full particulars should be given of each purpose for which the motor fuel for use in the vehicle was required. On the form is a reference to notes. Note 1 is headed " Business purposes," and it requires that certain information must be included which is put under five heads : " Trading name " ; " Address of business " ; " Nature of business " ; " Business purposes for which car is used " ; " State whether agent, proprietor, owner, etc. : if you are not the proprietor a supporting certificate from the proprietor must be attached." In consequence of that requirement Bulmer obtained from his employers, the London Computator, Ltd., the present appellants, a letter in which a paragraph certified the accuracy of the information submitted. The rest of the letter is a statement as to the nature of the appellants' business and their responsibility to His Majesty's government to perform contracts which they had made.

The Defence (General) Regulations, reg. 82 (2), provides that:

> If, in furnishing any information for the purposes of any of these regulations or of any order . . . made under these regulations, any person makes any statement which he knows to be false in a material particular or recklessly makes any statement which is false in a material particular, he shall be guilty of an offence against such regulations.

The appellants in this case, the London Computator, Ltd., Bulmer's employers, were charged under the first limb of the Defence (General) Regulations, reg. 82 (2), with unlawfully making a statement which they and each of them knew to be false in a material particular.

Before the magistrate three points were taken but there are only two which I need consider. The first was that the only mis-statement attributable to the appellants was in respect of matters of which the said forms did not require the appellants to certify the accuracy and that, consequently, such mis-statements, if any, could not be held to be false in a material particular within the Regulation. That contention was rejected by the magistrate. The contention has been made again to us as a point of law that arises on the case stated. In view of the decision which I think is the right one on another point, I do not think it is necessary to say anything more than what I am about to say on this contention. It has not been fully argued; we have not heard counsel for the respondent upon it. I should have required more argument to persuade me that the contention was a good one. The contention has been said to be supported by the decision of this court in *Smith* v. *Barkley* (1). But I think the facts in *Smith* v. *Barkley* (1) were quite different from the facts in this case. As I have said, I am not going to express an opinion about this point; I am merely saying that it is not necessary for us to decide it.

But there is another point which arises on the third contention made before the magistrate; that was that the charge of unlawfully making a statement knowing it to be false connotes knowledge of the falsity. The magistrate countered that contention by expressing his opinion that as to their third contention the word "knows" should be interpreted as "ought to have known." Now I think the magistrate was wrong in expanding the word "knows" in that way. He may possibly have had in his mind (as suggested by Humphreys, J., in the course of the argument) the Perjury Act which decribes perjury as a statement which he, the person charged, knows to be false or does not believe to be true; or he may have had in his mind some such phrase as "making a statement not caring whether it is true or false." But, in my judgment, the word "knows" means what it says in this regulation, for the simple reason that the regulation goes on to provide for a state of facts in which actual knowledge cannot be proved because it allows a charge to be laid against a person (which was not laid against this appellant) who recklessly makes any statement which is false in a material particular. That charge not having been made against this appellant, the matter rests with the charge based upon the first limb of that regulation, that they had made a statement which they knew to be false in a material particular. There is no finding in this case that they did know it to be false in a material particular; but in any case I think the magistrate was clearly wrong in giving the extended meaning to the word "knows" by saying that it means "ought to have known."

In those circumstances I think this appeal upon the case stated should be allowed.

Humphreys, J.: I am of the same opinion. The magistrate having expressed as a decision of law that the word "knows" in this section (which says that it is an offence for any person to make a statement which he knows to be false in a material particular) is to be construed and should be interpreted as "ought to have known," I express my opinion that his decision in law was completely wrong. For that reason I think this appeal should be allowed. On the other point I only desire to say that I agree with every word that my Lord has said.

Croom-Johnson, J.: On the point upon which we are allowing this appeal, the meaning of the word "knows," I think it is quite a plain case and I agree, for the reasons given by the two other members of the court, that the appeal should be allowed. It, therefore, becomes unnecessary for me to express any opinion about the other point which has been only partly argued. I will merely content myself with saying that I express no concluded opinion on that point.

Appeal allowed. Conviction quashed.

Solicitors: *Pollock & Co.* (for the appellants); *Solicitor to the Ministry of Fuel and Power* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Porter), **December 20, 1943, June 21, 1944.**]

Criminal Law—Evidence—Admissibility—Good character—Accusation of dishonesty not made subject of charge—Criminal Evidence Act, 1898 (*c.* 36), *s.* 1 (*f*).

Criminal Law—Practice—Duty of judge to disallow inadmissible question without objection by counsel.

Criminal Law—Appeal—No substantial miscarriage of justice—Assumption that jury not perverse—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1).

The accused, on a charge of forgery, in his evidence in chief clearly put his good character in issue. Counsel for the prosecution then asked in cross-examination whether on the occasion of his leaving certain employment he had been questioned about a suggested forgery. The accused denied this:—

HELD: (i) the accused can only be asked whether he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged when one or other of the three conditions set out in the Criminal Evidence Act, 1898, s. 1 (*f*) is fulfilled.

(ii) the accused may be examined as to any evidence he has given in chief including statements as to good character with a view to testing its veracity and his credit.

(iii) an accused who puts his character in issue puts his whole past record in issue.

(iv) an accused is not deprived of the protection of the Criminal Evidence Act, 1898, s. 1 (*f*) where the proper conduct of the defence necessitates the making of injurious reflections on the prosecutor or his witnesses.

(v) mere suspicion or accusation of crime is no disproof of good character and evidence thereof is inadmissible.

(vi) the fact that a question put to the accused is irrelevant is in itself no reason for quashing a conviction, though it ought to have been disallowed by the judge. If the question is not only irrelevant but unfair as distracting the jury from the real issues and so likely to lead to a miscarriage of justice it should be disallowed, and, if not disallowed, is a ground on which an appeal may be based. An improper question should be disallowed by the court whether or not objection is taken by counsel.

(vii) conviction may be quashed on appeal on the ground of improper admission of evidence although no application has been made by counsel for the prisoner for the trial to be begun before another jury.

(viii) the word "charged" in the Criminal Evidence Act, 1898, s. 1 (*f*) means charged before a court and not merely accused without prosecution.

(ix) in deciding whether the jury, if properly directed, would have come to the same conclusion despite the reception of inadmissible evidence, it must be assumed that the jury is a reasonable one and would not give a perverse verdict.

(x) the questions put to the accused in the present case were inadmissible but there had been no substantial miscarriage of justice and the conviction should stand.

[**EDITORIAL NOTE.** The opinion of Viscount Simon, L.C., herein contains a complete review of the question of the admission or rejection of questions attacking the character of the accused. It should be noted that *R. v. Haddy* (2) and *R.* v. *Turner* (9) are approved and that *R.* v. *Wattam* (10) is adversely criticised and, in effect, overruled. The actual decision is that suggestions which are accusations against an accused not persisted in and brought to trial are not admissible unless the prisoner has sworn expressly to the contrary. The Criminal Evidence Act, 1898, s. 1 (*f*) does not bar cross-examination to credit and any statement, including one as to good character, made by the accused can be cross-examined to in order to show that it is not worthy of belief. However, if a prisoner is asked if he has been " charged " or says that he has not been " charged," this must be taken to refer to a prosecution in court and not to a private accusation by employers or any similar suspicion or accusation not brought before a court.

As to Evidence of Character, see HALSBURY, Hailsham Edn., Vol. 9, pp. 188-191, paras. 271-274; and for Cases, see DIGEST, Vol. 14, pp. 361-365, Nos. 3818-3874.]

Cases referred to:

*(1) *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462; Digest Supp.; 104 L.J.K.B. 433; 153 L.T. 232; *revsg.* S.C. *sub nom. R.* v. *Woolmington*, 179 L.T.Jo. 256.
*(2) *R.* v. *Haddy*, [1944] 1 All E.R. 319.
*(3) *Maxwell* v. *Director of Public Prosecutions*, [1935] A.C. 309; Digest Supp.; 103 L.J.K.B. 501; 151 L.T. 477.
*(4) *R.* v. *Rowton* (1865), 34 L.J.M.C. 57; 14 Digest 363, *3835*; Le. & Ca. 520; 5 New Rep. 428; 11 L.T. 745.
(5) *R.* v. *Dunkley*, [1927] 1 K.B. 323; Digest Supp.; 96 L.J.K.B. 15; 134 L.T. 632.
(6) *R.* v. *Turner* (1664), 6 State Tr. 565; 14 Digest 362, *3828*.
(7) *A.-G.* v. *Bowman* (1791), 2 Bos. & P. 532, *n.*; 14 Digest 361, *3818*.
(8) *O'Connor's Case* (1798), 27 State Tr. 31.
*(9) *R.* v. *Turner*, [1944] 1 All E.R. 599.
*(10) *R.* v. *Wattam*, [1942] 1 All E.R. 178; 28 Cr. App. Rep. 80.
*(11) *R.* v. *Firth*, [1938] 3 All E.R. 783; Digest Supp.; 26 Cr. App. Rep. 148.
*(12) *R.* v. *Ellis*, [1910] 2 K.B. 746; 14 Digest 361, *3819*; 79 L.J.K.B. 841; 102 L.T. 922.

Appeal from a decision of the Court of Criminal Appeal (Viscount Caldecote, L.C.J., Atkinson and Croom-Johnson, JJ.) dismissing an appeal from a conviction before the Common Serjeant (His Honour Judge Beazley). The facts are fully stated in the opinion of Viscount Simon, L.C.

Geoffrey Crispin and *Hubert B. Figg* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*,) and *J. Scott Henderson* for the respondent.

Viscount Simon, L.C.: My Lords, the appellant was convicted on Oct. 7, 1943, before the Common Serjeant (His Honour Judge Beazley) on six charges of forgery, and was sentenced to be kept in penal servitude for three years. He appealed to the Court of Criminal Appeal (Viscount Caldecote, L.C.J., Atkinson and Croom-Johnson, JJ.) against the conviction and sentence, but the appeal was dismissed, the judgment of the court being delivered by Atkinson, J. The appellant obtained from the Attorney-General a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that it was in his opinion desirable in the public interest that a further appeal should be brought. Accordingly this appeal has been brought before the House. The point of law immediately involved is as to the admissibility of certain questions put in cross-examination of the accused at the trial after he had put his character in issue, but at the end of the argument the House intimated that, whether the point of law raised on the accused's behalf was well-founded or not, no substantial miscarriage of justice could be regarded as having actually occurred and consequently the conviction should stand.

Apart altogether from the impeached questions (which the Common Serjeant in his summing up advised the jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the jury took only a few minutes to consider its verdict and the judge stated that he considered the verdict " perfectly right." When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to the Criminal Appeal Act, 1907, s. 4 (1) should be applied. The passage in *Woolmington* v. *Director of Public Prosecutions* (1), at p. 483, where VISCOUNT SANKEY, L.C., observed that in that case, if a jury had been properly directed, it could not be affirmed that they would have "inevitably" come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R.* v. *Haddy* (2) correctly interpreted sect. 4 (1) of the Criminal Appeal Act and the observation above quoted from *Woolmington's* case (1) in exactly this sense.

It remains to decide the point of law on account of which the appeal has been brought to this House. The appellant clearly put his character in issue in the course of the trial, and that more than once, as appears from the quotations which follow:—

(*a*) Mr. French, a witness for the prosecution, was asked in cross-examination and answered:

Q.—During the time Stirland was employed by the corporation, you had no complaint to make about him? *A.*—No.

Q.—You found him a loyal and faithful servant? *A.*—Yes.

Q.—You had no reason at all to suspect him. That is right, is it not? *A.*—Yes.

(*b*) Again, a police inspector who was also called for the prosecution gave the following evidence in answer to questions from the appellant's counsel:

Q.—He is a man of good character? *A.*—Yes; he has not been charged before.

(*c*) Further, the appellant went into the witness-box and was asked in chief:

Q.—Have you ever in your life been charged with any offence whatever? *A.*—No.

As the result of those questions and answers, counsel for the prosecution felt justified in cross-examining the appellant as follows:

Q.—Why did you leave the Westminster Bank? *A.*—For two reasons. The first reason was that I have other interests outside the bank, which the bank did not like, and they were entirely literary interests, when I came to London. The second reason was that I had the offer of an opportunity in London for going in for advertising, and therefore I resigned from the Westminster Bank and came to London.

Q.—May I suggest another reason to you? Were you questioned about a suggested forgery? *A.*—No.

Q.—Did you leave after an interrogation about a particular signature? *A.*—I did not.

Finally, in re-examination after explaining that he left the bank because his family expenses necessitated his earning more money than he was receiving as salary, the appellant said "the suggestion that was made by counsel for the prosecution is untrue in every particular."

Q.—You say your leaving the bank had nothing whatever to do with any question of your dishonesty? *A.*—No. I even had a reference from the Westminster Bank, which I told you about this morning.

Q.—The Bank gave you a reference? *A.*—Yes, from the Leeds office.

Q.—After you left the bank? *A.*—Yes.

It will be observed that these questions were not put in order to suggest a previous conviction or even a previous charge (if by "charge" is meant a criminal proceeding), but insinuated that the appellant had left his previous employment under suspicion, whether well or ill-founded, of dishonesty. Counsel for the prosecution, of course, put such questions relying on material in his brief—indeed, after conviction, a chief inspector of police, when asked about the convict's history, gave information as to the circumstances in which the appellant left the Westminster Bank which corresponded to the questions put. But this provides no answer to the problem whether such questions were legitimate at the stage when the issue of the appellant's guilt or innocence of the crime charged was still before the jury.

Before your Lordships it was contended that this cross-examination was wholly inadmissible, as tending to suggest that the appellant had been guilty of a crime other than that with which he was charged and as being irrelevant to the question of his guilt in respect of the crime for which he was being tried.

The right of a prisoner to give evidence on his own behalf was not conferred until 1898 and is governed by the Criminal Evidence Act of that year. The relevant portion of the first section runs thus :

> (1) Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . Provided as follows :— . . .
>
> (*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :
>
> (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or
>
> (iii) he has given evidence against any other person charged with the same offence.

This House has laid down in *Maxwell* v. *Director of Public Prosecutions* (3) that while paragraph (*f*) of this section absolutely prohibits any question of the kind there indicated being put to the accused in the witness box unless one or other of the conditions (i), (ii) or (iii) is satisfied, it does not follow that such questions are in all circumstances justified whenever one or other of the conditions is fulfilled. VISCOUNT SANKEY, L.C., in delivering the judgment of the House defined the matter to be decided in *Maxwell's* case (3) thus : whether it was permissible in the particular facts of that case for the prosecution to ask the prisoner (who had put his character in issue) whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal. The House decided that in the circumstances the question was not admissible, for the previous acquittal proved nothing against the accused—" the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune " (p. 319)—and moreover the accused had not said that he had never previously been charged, so that the question could not be justified as a challange to the accused's veracity and as seeking to show that he was a person not to be believed on his oath. The question, in the opinion of the House, was, therefore, irrelevant and at the same time was " likely to lead the minds of the jury astray into false issues," inasmuch as it might suggest to the jury that the accused had committed a similar offence before and, therefore, was likely to have been guilty of the crime now charged against him.

In delivering the judgment of the Court of Criminal Appeal in the present case, ATKINSON, J., thought that there was nothing in the trial which conflicted with the decision in *Maxwell's* case (3) largely because the appellant swore that he had never in his life " been charged with any offence whatever." Therefore, argued ATKINSON, J., cross-examination about the allegedly suspicious circumstances in which the appellant left the bank was relevant and admissible to disprove his denial that he had ever been " charged." I should agree with ATKINSON, J., that, if the accused in the witness box makes a statement of fact which the prosecution does not accept, he is liable to be cross-examined on the statement with a view to showing that it is not true. And this applies to a statement as to the accused's past record where he puts his character in issue just as much as to a statement on any other matter. But this is all subject, as explained below, to the judge's discretion to disallow any question which in the circumstances he thinks to be unfair.

It is necessary, however, to guard against a possible confusion in the use of the word " charged." In sect. 1 (*f*) of the Act of 1898 the word appears five times and it is plain that its meaning in the section is " accused before a court " and not merely " suspected or accused without prosecution." When the appellant denied that he had ever been "charged," he may fairly be understood to use the word in the sense it bears in the statute and to mean that he had never previously been brought before a criminal court. Questions as to whether his former employer had suspected him of forgery were not, therefore, any challenge to the veracity of what he had said. Neither were they relevant as going to disprove good character: the most virtuous may be suspected, and an unproved accusation proves nothing against the accused. But the questions, while irrelevant both to the charge which was being tried and to the issue of good character, were calculated to injure the appellant in the eyes of the jury by suggesting that he had been in trouble before, and were, therefore, not fair to him. They should not have been put, and, if put, should have been disallowed.

It must not be forgotten that the judge presiding at a criminal trial has a discretion (as VISCOUNT SANKEY, L.C., said in *Maxwell's* case (3), at p. 321) to disallow questions addressed to the accused in cross-examination if he considers that such questions, having regard to the issues before the jury and to the risk of the jury being misled as to what those issues really are, would be "unfair," and the judge's disallowance cannot be challenged on appeal. A question as to whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in court, or if charged was acquitted, is an example of a case where the judge should intervene. It is true that a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. But when *Maxwell's* case (3) decided that, where the prosecution had enough evidence to indict a man for a crime but not enough to convict, no questions can be asked as to that incident in a later trial at which he puts his character in issue, how can mere suspicion alleged to have been entertained by his previous employer on an earlier occasion be a legitimate topic for cross-examination to credit?

There is perhaps some vagueness in the use of the term "good character" in this connection. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him? In *R.* v. *Rowton* (4), on a re-hearing before a full court, it was held by the majority that evidence for or against a prisoner's good character must be confined to the prisoner's general reputation, but ERLE, C.J., and WILLES, J., thought that the meaning of the phrase extended to include actual moral disposition as known to an individual witness, though no evidence could be given of concrete examples of conduct. In the later case of *R.* v. *Dunkley* (5), the question was further discussed in the light of the language of the section, but not explicitly decided. I am disposed to think that in para. (*f*) (where the word "character" occurs four times) both conceptions are combined.

The historical development of the English rule that the prosecution in seeking to prove the crime charged, may not, generally speaking, introduce evidence as to the previous bad character of the accused, but that the accused may call evidence in support of his previous good reputation, is difficult to trace. SIR JAMES STEPHEN in his HISTORY OF THE CRIMINAL LAW OF ENGLAND (Vol. I, p. 449) has some interesting observations on the subject, and see also KENNY, OUTLINES OF CRIMINAL LAW, 15th Edn., pp. 464-467. Stephen points out that before the Norman Conquest "the character of the accused decided the question whether he was to be allowed to make his purgation by compurgators or was to be sent to the ordeal. In later times the character of the accused must have weighed with the jury who acted as witnesses." Under the Stuarts, evidence was freely given of particular crimes or misconduct unconnected with the matter in issue committed by the prisoner. The earliest instance which Stephen records of evidence being admitted of the prisoner's good character is at the trial of Colonel Turner for burglary in 1664: *R. v. Turner* (6) at p. 613. In an early edition (2nd) of RUSSELL ON CRIMES, published in 1828 (Vol. II, p. 703), there is a note stating that "formerly evidence of the prisoner's good character was admitted in capital cases only, *in favorem vitae*." The rule, however, was later extended to cover any prosecution for positive crime. "The true line of distinction," said EYRE, C.B., in *A.-G.* v. *Bowman* (7), is "that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information," (it was an information for keeping false weights) "it is not." By the end of the 18th century evidence of good character was constantly admitted. A remarkable instance is provided by the trial of *Arthur O'Connor* (8) for high treason in 1798 where Mr. Erskine was one of a large number of distinguished persons who testified to the prisoner's character for loyalty. Erskine, indeed, in the course of his evidence (p. 40) stated that with the choice before him of defending Mr. O'Connor or of giving evidence as to his good character, he chose the latter, and the Attorney-General, Sir John Scott (p. 113) told the jury that “in all doubtful cases, character ought to have very considerable weight indeed.” A COCKBURN, C.J., in *R.* v. *Rowton* (4) observes at p. 61 :

> Although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt, as previous good character lays the foundation for the presumption of innocence, yet the prosecution cannot go into evidence as to the prisoner's bad character. The allowing evidence of a prisoner's good character to be given has grown up from a desire to administer the law with mercy, as far as possible. It sprung up in a B time when the law was, according to the common estimation of mankind, severer than it should have been.

It is most undesirable that the rules which should govern cross-examination to credit of an accused person in the witness box should be complicated by refined distinctions involving a close study and comparison of decided cases, when in fact these rules are few and can be simply stated. The following propositions C seem to cover the ground. (I am omitting the rule which admits evidence tending to prove other offences where this evidence is relevant to the issue being tried, as helping to negative accident or to establish system, intent or the like.)

(1) The accused in the witness box may not be asked any question “tending to show that he had committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is a bad character D unless” one or other of the three conditions set out in sect. 1 (*f*) of the Act of 1898 is fulfilled.

(2) He may however be cross-examined as to any of the evidence he has given in chief, including statements as to his good record, with a view to testing his veracity or accuracy, or to showing that he is not to be believed on his oath.

(3) An accused who “puts his character in issue” must be regarded as putting the whole of his past record in issue. He cannot assert his good character E in certain respects without exposing himself to inquiry as to the rest of his record so far as this tends to disprove a claim for good character.

(4) An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses : *R.* v. *Turner* (9).

(5) It is no disproof of good character that a man has been suspected, or accused, of a previous crime. Such questions as “Were you suspected ?” F or “Were you accused ?” are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary. (See r. 2 above.)

(6) The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the judge. If the question is not only irrelevant but is unfair to the accused as being likely G to distract the jury from considering the real issues, and so lead to “a miscarriage of justice” (Criminal Appeal Act, 1907, s. 4 (1)), it should be disallowed, and, if not disallowed, is a ground on which an appeal against conviction may be based.

A further question was raised in the present appeal which can be briefly disposed of. ATKINSON, J., in delivering the judgment of the Court of Criminal Appeal, called attention to the decision of that Court in *R.* v. *Wattam* (10) H where VISCOUNT CALDECOTE, L.C.J., quoted the observation of LORD HEWART, L.C.J., in *R.* v. *Firth* (11), and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether LORD HEWART'S words require so strict a construction, but, in any case, it seems to me that there cannot be a universal rule to this effect. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself: see *R.* v. *Ellis* (12), at p. 764. If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as BRAY, J., said, at p. 763, in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and, if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.

My Lords: My noble and learned friend LORD RUSSELL OF KILLOWEN, who is not able to be here, has authorised me to say that he concurs in this opinion.

LORD THANKERTON: My Lords, I have had an opportunity of considering the opinion which has just been delivered by my noble and learned friend on the woolsack and I find myself in complete agreement with it.

LORD WRIGHT: My Lords, I also agree.

LORD PORTER: My Lords, I agree.

Appeal dismissed.

Solicitors: *J. H. Milner & Son* (for the appellant); *Director of Public Prosecutions* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished. *Re* PURNCHARD'S WILL TRUSTS. [1948] 1 All E.R. 790.

Re EVERETT, PRINCE *v.* HUNT AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), **January 20, 1944.**]

Wills—Legacies—Construction—" All my stocks and shares "—Whether bequest included investments other than stocks and shares of limited companies.

By her will the testatrix provided, *inter alia*, that her trustees should sell " all my stocks and shares " and divide the proceeds of sale between certain named persons. The question for the decision of the court was whether this bequest included, in addition to stocks and shares of limited companies, certain investments possessed by the testatrix which were not stocks or shares of limited companies :—

HELD : the natural meaning of " stocks and shares " is stocks and shares of limited companies and there was nothing in the will or the surrounding circumstances to extend that natural meaning.

[**EDITORIAL NOTE.** This short decision is concerned solely with the phrase " all my stocks and shares." The words *prima facie* mean stocks or shares of limited companies and that view is here strengthened by the fact that any other view would defeat all the other bequests in the will.

AS TO BEQUESTS OF STOCKS AND SHARES, see HALSBURY, Hailsham Edn., Vol. 34, p. 260, para. 311; and FOR CASES, see DIGEST, Vol. 44, pp. 702-705, Nos. 5441-5476.]

Cases referred to:

*(1) *Morrice* v. *Aylmer* (1875), L.R. 7 H.L. 717; 44 Digest 704, *5465*; 45 L.J.Ch. 614; 34 L.T. 218.

(2) *Higgins* v. *Dawson*, [1902] A.C. 1; 44 Digest 646, *4862*; 71 L.J.Ch. 132; 85 L.T. 763.

Summons by the executor of the will of Elizabeth Wilson Everett to determine the meaning to be given to the words "stocks and shares" in cl. 3 of the will. The facts and the relevant part of the will are set out in the judgment.

A. H. Droop for the executor.

M. G. Hewins for the legatees of the stocks and shares.

C. V. Rawlence for the residuary legatee.

Cohen, J.: The testatrix, Elizabeth Wilson Everett, made her will on Mar. 14, 1942. She died on Apr. 25, 1943, and on June 19, 1943, probate was granted to the executors appointed by the will. By cl. 1 of the will the testatrix appointed Thomas Hector Prince and Herbert William Hunt to be her executors and trustees, and then, after bequeathing a number of pecuniary legacies and certain specific bequests, she provided by cl. 3 of her will as follows:

> I desire my trustees to sell my freehold premises, No. 2, Queen Elizabeth's Drive, aforesaid and all my stocks and shares and to divide the net proceeds of sale between the said Herbert William Hunt, Louise Hunt, George Craik and Kate Elizabeth Craik, share and share alike.

The testatrix was at the time of her death possessed of the following securities: £400 London Power Co., Ltd., 5% Redeemable Debenture Stock, Oct. 1, 1952-72; £600 Northmet Power Co., 4% Debenture Stock, 1943-76; £600 London Transport 3% Guaranteed Stock, 1967-72; £300 Central Electricity 3½% Stock, 1963-93; £1,426 1*s.* War Loan 3½% Stock, 1952 or after; £500 New Zealand 4% Inscribed Stock, 1943-63; £1,000 London County Consolidated 3% "B" Stock, 1934-2003; £1,000 3% Defence Bonds (Post Office Issue); £300 3% Conversion Loan, 1948-53 (Post Office Issue); £300 3½% Conversion Loan (Post Office Issue); £4 0*s.* 4*d.* 2½% Consolidated Stock (Post Office Issue), 1961 or after. She also possessed certain other securities, but, as they were either ordinary or preference shares, or ordinary or preference stock of limited companies, it is not disputed that these come within the description of "all my stocks and shares." Counsel for the legatees contends that the words "all my stocks and shares" in cl. 3 is equivalent to "all my investments." If I adopt this construction, there will be no money left for the payment of the pecuniary legacies and, indeed, barely enough to discharge the testamentary expenses and debts. Apart from authority, I should construe the word "stocks" with the word "shares" and hold that the meaning of "all my stocks and shares" was stocks and shares of limited companies. Counsel for the legatees relied on *Morrice* v. *Aylmer* (1). That authority does not conclude the present case because, in my view, consideration of the circumstances leads to the opposite conclusion. The matter is not free from ambiguity and I think that I am entitled to look at the circumstances. I find that the estate is of such a character that, to adopt the meaning for which counsel for the legatees contends, would be to hold that the testatrix, by using those words, had disposed of the whole of her personal estate save cash in hand and in the bank and goods in the house. It does not seem to me right to construe a will giving substantial specific and pecuniary legacies as disposing of all her available estate to the legatees of the stocks and shares. It is argued that I cannot have regard to the circumstances, for I am not entitled to inquire whether the effect of any proposed construction is that there would be insufficient funds to pay the debts, funeral and testamentary expenses and pecuniary legacies and *Higgins* v. *Dawson* (2) is relied on. I do not, however, base my decision wholly on that ground but mainly on the ground that the natural meaning of "stocks and shares" is stocks and shares of limited companies. The circumstances of the present case confirm me in that conclusion for I find nothing in them to extend that natural meaning, and every reason for so restricting it.

Order accordingly.

Solicitors: *S. Bregan* (for the trustee and for residuary legatees); *Mark Lemon* (for legatees of stocks and shares).

[*Reported by* R. L. Ziar, Esq., *Barrister-at-Law.*]

ADAMS *v.* NAYLOR.

[LIVERPOOL AUTUMN ASSIZES (Cassels, J.) **November 11, 1943**].

[COURT OF APPEAL (Scott, MacKinnon, L.JJ. and Morton, J.), **May 22, 23, June 21, 1944**].

Negligence—Trespassers—Minefield laid by military authorities in war-time—Children playing—Fence obliterated by natural causes.

Emergency Legislation—Compensation—Personal injuries—Child injured in following ball into minefield—" In combating the enemy "—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3, 8.

The military authorities laid a minefield as part of the coast defences on a golf course which extended for some miles close to the shore. They surrounded the minefield with a substantial wire fence and placed danger notices at frequent intervals to exclude the public, but part of the fence and a notice on it had in the course of time been buried by drifting sand. Before the military had occupied the golf course there had been no restriction on children going on the foreshore, and even on the golf course on which the minefield was laid. The military officer in charge of the district circularised the local schools and education authorities as to the danger to children. Three young boys who were playing on the foreshore, where they were entitled to be, went on to the golf course in pursuit of a ball. These boys had all been warned by their teachers of the dangerous nature of this minefield. A mine exploded killing one of the children and seriously injuring one other. When the minefield was first laid in 1940 the military authorities had inspected the fencing every week but at the time of the accident it had not been inspected for some weeks. It was contended that there was a duty to these boys, even if they were trespassers ; and for the defendant it was contended that the action was barred since the injury was a personal injury within the Personal Injuries (Emergency Provisions) Act, 1939 :—

HELD : (i) [SCOTT, L.J., *dissenting*] the boys were trespassers and there was no duty owed to them.

(ii) *Semble :* this was not a personal injury within the Personal Injuries (Emergency Provisions) Act, 1939, since the minefield was not laid " in combating the enemy."

[**EDITORIAL NOTE.** Without finally deciding the point, it is here suggested that an accident of this type is not within the Personal Injuries (Emergency Provisions) Act, 1939. The common law remedy is refused because the children were trespassers. SCOTT, L.J., has sought to bring the position within the sphere of strict liability and holds that the military authorities brought these dangerous explosives on the land at their own risk. The other members of the court, however, hold that, while there is a liability to trespassers where dangerous explosives are put upon land for the purpose of injuring trespassers, that, apart from the doctrine of *Cooke* v. *Midland and Great Western Ry. of Ireland* (6), is the limit of the liability and no such liability is shown in this case.

AS TO DUTY TO TRESPASSERS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 613, 614, para. 864 ; and FOR CASES, see DIGEST, Vol. 36, pp. 49, 50, Nos. 307-310.]

Cases referred to :

*(1) *Robert Addie & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358 ; Digest Supp. ; 98 L.J.P.C. 119 ; 140 L.T. 650.

(2) *Liddle* v. *North Riding of Yorkshire County Council*, [1934] 2 K.B. 101 ; Digest Supp. ; 103 L.J.K.B. 527 ; 151 L.T. 202.

(3) *Graham* v. *Peat* (1801), 1 East 244 ; 31 Digest 47, *1953*.

*(4) *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404 ; Digest Supp. ; 99 L.J.K.B. 380 ; 142 L.T. 531.

(5) *United Zinc & Chemical Co.* v. *van Britt* (1922), 258 U.S. 268.

(6) *Cooke* v. *Midland and Great Western Ry. of Ireland*, [1909] A.C. 229 ; 36 Digest 70, *450* ; 78 L.J.P.C. 76 ; 100 L.T. 626.

(7) *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 304 ; 36 Digest 94, *627*.

(8) *Bird* v. *Holbrook* (1828), 4 Bing 628 ; 36 Digest 94, *629* ; 6 L.J.O.S.C.P. 146.

(9) *Deane* v. *Clayton* (1817), 7 Taunt. 489 ; 43 Digest 411, *345*.

(10) *Lynch* v. *Nurdin* (1841), 1 Q.B. 37 ; 36 Digest 24, *118* ; 10 L.J.Q.B. 73.

*(11) *Hardy* v. *Central London Ry.*, [1920] 3 K.B. 459 ; 36 Digest 71, *457* ; 89 L.J.K.B. 1187 ; 124 L.T. 136.

(12) *Mourton* v. *Poulter*, [1930] 2 K.B. 183 ; Digest Supp. ; 99 L.J.K.B. 289 ; 143 L.T. 20.

Consolidated Actions to recover damages for negligence. The actions were tried at the Liverpool Autumn Assizes. The material facts are stated in the headnote and are fully stated in the judgments.

B. R. Rice-Jones for the plaintiffs.

G. J. Lynskey, K.C., and *H. I. Nelson* for the defendant.

Cassels, J.: It must be established that the injuries which have been sustained, and the loss of expectation of life which has occurred, were due to A some legal wrong on the part of the defendant from whom the damages are sought. The position is that, for the protection of this country, and for the protection of the coast, this minefield was laid by the engineers under and by proper direction. The first step which was taken was that Captain Lowson, who is the Assistant War Department Land Agent for the West Lancashire District, requisitioned on behalf of the War Office exclusive possession of 25 acres of land belonging to the West Lancashire Ladies' Golf Club. That land was taken for war purposes. B No question can be raised about that. These mines were laid by the Royal Engineers. This barbed wire fence was put between the sandhills to which the public had access and this minefield, and there were erected notices, of which one has been produced—large red boards which announced to those who read them: "Death, Explosive Minefield. Keep out." A further and very proper step was taken. The education authorities were communicated with and warning was given to the children that they were to be careful of the minefields, and not C to go into the barbed wire enclosures. The warning was given on occasions when each of the boys was present.

So that every step was taken, and, notwithstanding that, this accident happened. It is said by the plaintiffs, or on their behalf, that the accident happened because just previous to the accident sand had silted up on to a portion of the wire fence, and for about 20 yards about 12 to 15 or 18 ins. of the wire D protruded above the sand, and it was not observable to a height of 5 or 6 ft. until you got further along. It was just about there that this ball went through, and so these youngsters very naturally went after it. The plaintiffs contend that the defendant should have guarded it better; that he should have removed the sand round the barbed wire fence; that he failed to inspect the fence sufficiently so as to make sure that it was always effective.

How do these particular allegations stand with regard to these plaintiffs? E I think it would be holding far too much in a case of this kind to say that because the landlord has put a minefield and a fence on private land he has to observe, and inspect, and guard every 20 or 30 yds. of it. Something may have happened in the night to a particular length of fence intended to keep out boys who might run on to that land for the purpose of looking for a ball. In law, in my view, there is a great deal to support the contention which has been made by counsel for the defendant, that these boys were both trespassers when they went on to F this land. On the other hand, counsel for the plaintiffs argued that, assuming they were trespassers, there was a duty still owed, for this minefield was just the same as if spring guns had been placed there.

There is legislation with regard to spring guns. They are illegal, and you must not put what is the equivalent of dynamite beneath your land which will go off at any moment and may injure anyone. Here, indeed, there was a G warning; in fact, there were warning boards all round. I think the law is to be found in what Lord Hailsham said in *R.* v. *Addie & Sons* (*Collieries*) v. *Dumbreck* (1), at p. 365:

> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where injury is due to some wilful act involving something more than the absence of reasonable care. There H must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with careless disregard of the presence of the trespasser.

I think that explains the actual position. You are not, of course, to put dynamite on to your land for the express purpose of blowing up a trespasser. These mines were not put on to this land for the purpose of blowing up trespassers. They were put on to the land for the purpose of blowing up the enemy, and, if the enemy had come over and had got to this minefield, everyone would have rejoiced when they met with their deserts.

But that is a very different state of affairs from putting something on to land for the purpose of destroying—and deliberately destroying—the trespasser. Therefore, if these lads were trespassers—and I am very much inclined to think they were—they were not licensees in any way—of course they would not be entitled to recover, because there is an abundance of authority to say that, if a trespasser goes on land where the land is being put to a proper use, he is not entitled to recover.

Apart from that it might be said that there is one point which would seem conclusively to answer the case of both plaintiffs, and that is the Personal Injuries (Emergency Provisions) Act, 1939. Sect. 3 of that Act, leaving out the non-essential words, provides as follows :

> In respect of a war injury sustained during the period of the present emergency by any person . . . no such . . . damages shall be payable . . . to the person injured . . . as, apart from the provisions of this subsection . . . (*b*) would . . . by virtue of any enactment . . . contract, or at common law, be payable (i) in the case of a war injury, by any person . . . on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person . . . is responsible.

That takes you to the definition clause, s. 8, to find out what war injuries mean :

> . . . physical injuries caused by . . . (ii) the use of any weapon, explosive or other noxious thing ; or (iii) the doing of any other injurious act, either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy . . .

It is said, on behalf of the plaintiffs, that this minefield was not being used in combating the enemy, or in repelling an imaginary attack by the enemy. I cannot accept that contention at all. The moment that minefield was laid, it was laid in order to combat the enemy, and it was put down there for that purpose ; and the very words which were used by Brigadier Waddington himself were : " The minefields were for preventing the enemy landing, and for defensive purposes," which seems to me to be one method of combating the enemy, and this Act provides that where a war injury has been caused during that operation, then no damages shall be payable.

I have, therefore, come to the conclusion that the plaintiffs are not entitled to recover, however much one may sympathise with both the actual plaintiffs here, and there must be judgment for the defendant with costs. There must be judgment for the defendant in both actions.

From this judgment the plaintiffs appealed to the Court of Appeal.

Rose Heilbron for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *G. J. Lynskey, K.C.*, and *H. I. Nelson* for the respondent.

SCOTT, L.J. : This is an appeal in a case where a boy was killed and another seriously injured by the explosion of a land mine on the coast. It is a borderline case, and for that reason is, in a legal sense, both difficult and perhaps important. On Aug. 8, 1942, in the afternoon three children, boys aged 11 to 13, who lived in Waterloo, Lancashire, went six miles by train along the coast (which there runs roughly N. and S.) to Hall Road Station in order to play in the sand hills which lie between there and Southport in a fringe along the coast, just above high-water line. In 1940 and 1941, in case of enemy attempts at invasion, the military authorities had constructed minefields comparatively narrow in width in the sand hills, but running many miles along that coast. There was one which extended northwards for some distance from Hall Road West, a short road which runs west from the station direct to the sandy beach. The general method adopted for enclosing them, so as to prevent risk of the public entering, was to erect wire fences round them, with warning notice boards. The minefield in question had been surrounded with a fence nearly 6ft. high, consisting of uprights and thick wire, a double coil in the lower part and a single coil above it. Against this fence they had affixed at intervals, said to be of 100 yds., red notice boards on which were painted in white letters a warning of danger and the words " Keep out." The sandhills are composed of loose sand, originally blown up from the seashore and then gradually held together to some extent by sea-grasses ; but they are continually liable to change through the drifting of sand blown on to or off them by wind action.

For some time the military authorities had caused the fencing of the Hall Road minefield to be inspected every week, but after that period it had been inspected only when those on the spot thought it necessary. There was no evidence of any inspection during a period of some weeks just before Aug. 8, 1942. But there was evidence of sand having blown up in March and more in July, 1942. On that day the three boys walked down Hall Road West from the station to the shore and after playing about on or near some boats turned northwards from the road for some 350 yds. and started to play with a tennis ball in the sandhills. They evidently were quite ignorant of the fact that there was a minefield there, and, indeed, at the very spot where they were playing with their ball the gradual drifting of wind-blown sand had raised the level of the ground to within 12 or 15 ins. of the top of the fence, completely covering all but the top wire. This stretch of higher ground level extended some 15 yds. north and south and it was another 25 to 30 yds. on the north and south of that 15 yds. before the sandhills descended enough to uncover the full height of the fence. By an unfortunate coincidence the warning board happened to have been fixed on the fence just in the 15 yds. stretch, where nearly the whole fence was buried underground and invisible ; with the result that nothing could be seen of the warning board except a little triangle at one corner, which contained no words at all. These facts were proved by witnesses who saw the place that evening and the next. What happened was told by the surviving boy who was injured and by the boy who escaped injury. Their ball rolled down the hill and they ran after it, stepping over the one visible wire, then came the explosion ; the uninjured boy falling on the top of the injured boy. The boy who was killed simply disappeared and no trace of him was found except a small piece of cloth.

It was not disputed that the spot where the boys were playing was accessible to the public, and that it was well-known that children played in the sandhills in that particular locality, that is to say, in the immediate vicinity of the minefield.

In consequence of this knowledge the military authorities in July, 1941, caused the local education authorities to " discourage all their pupils from spending time on the foreshore," and on Oct. 30, 1941, again at the instance of the military, the director to the Crosby Education Committee (within whose district was the minefield in question) sent a circular letter to all headmasters and headmistresses in the following terms :

> Coastal Defences—Danger to Children.
>
> I am directed to send you the following extract from a letter recently received from the Divisional Inspector of the Board of Education. " As there have, unfortunately, been one or two fatal accidents owing to children penetrating into defensive minefields which have been laid at certain points in coastal areas in the region, it has been suggested by the Regional Commissioner that education authorities in the area concerned should ensure that the children are clearly told where thick wire fences are encountered these should be left severely alone, as there is the greatest danger in going anywhere near them. In this way the number of accidents might be reduced. It is felt to be particularly important that the danger should be carefully explained to the youngest children who may be too young to read or understand the danger notices and who may climb through the wire."

It will be noticed that, even if the three boys had had an opportunity of learning the contents of that letter by heart, they might well have thought there was no thick wire fence, and no minefield at the spot where they entered it.

The defendant in the action, respondent before us, is an officer under whose charge the fence was at the time of the accident ; but he is a party merely in a representative character according to the usual arrangement with the Crown in cases of tort. The knowledge of the military authorities that children were likely to frequent sandhills in the vicinity of the minefields, including the Hall Road one, was clearly sufficient on their own view to impose upon them a moral duty towards such children, but the question is whether they had also a legal duty. I do not think that that issue should be expressed in the terms used in the United States of America and referred to by SCRUTTON, L.J., in *Liddle* v. *Yorkshire County Council* (2), as an antithesis between " the humanitarian view and the Draconian view." Such a metaphor is apt to beg the question of law.

There was discussion before us as to whether the military were in possession of the minefield pursuant to Defence (General) Regulations, reg. 51, or had merely executed works under reg. 50, leaving possession in the person or body entitled in law to occupy the land, which in this case was either the district council or the ladies' golf club whose links included the sand hills where the minefield was constructed, and to whom the military had in fact at some time been paying compensation as if under reg. 51. In my opinion, that question is irrelevant. The fact that the military had, without protest from anybody, surrounded the minefield with a fence, the purpose of which was the exclusion of the public, is sufficient to establish their actual possession, and actual possession is sufficient to entitle the possessor to the old writ of *quare clausum fregit* against any person entering who cannot prove a title to do so : see HOLMES ON THE COMMON LAW (1881), p. 244 : "Possession is, of course, sufficient for trespass" ; where *Graham* v. *Peat* (3) is cited. I, therefore, approach the problem on the footing that, if the children had been adults, they would have been trespassers as from the moment when they crossed the line of the fence. Had they in fact been adults, it may be that the defendant would, apart altogether from contributory negligence, have had a good defence at common law. The only question, however, which we have to decide is whether he has one as against the children in the particular circumstances of this case.

The prominent feature in the facts is the sudden death-dealing character of the minefield, coupled with its situation in absolute juxtaposition to a place of public resort, where children were known to be likely to come for play. The division of plaintiffs in actions against occupiers of premises for damages for negligence into the three classes of invitees, licensees and trespassers with the fundamental distinctions in the legal position of each class is now part of our substantive law. It seems to predicate the possibility of drawing two absolutely rigid divisions between them. LORD DUNEDIN in *Addie* v. *Dumbreck* (1), at p. 371, treated the three classes as divided one from the other "by an absolutely rigid line" ; and on p. 372 he deprecated the use of the epithets in the phrases "bare licensees" and "pure trespassers." But in *Excelsior Wire Co.* v. *Callan* (4), he added at p. 411 :

> . . . I think that the word "licensee" . . . is certainly intended to include another class, if you so call it, which I may coin a word to represent, namely, a permittee.

In the latter case the occupier was held liable on the footing that it had permitted the children to trespass, if I may express my meaning paradoxically. That inference was drawn from the circumstances that children had often been sent by the occupier's servants near to the wheel, which when set in motion from a distance was dangerous, and that no steps had been taken to keep them away. The circumstances of the present case are different from those of any decided case, and raise, I think, a new question of law. The material facts are, I think, these : (i) that before the minefield was constructed the public had free access to the sandhills, and that children were accustomed to play there ; (ii) that after it was constructed the public, including children, continued to have access to the sandhills outside and immediately adjoining the area enclosed by the minefield fence ; (iii) that the danger of death for anyone, adult or child, who found his way into the minefield was extreme ; (iv) that because of this extreme danger it was necessary to erect high fences of strong wire to keep people out and to inspect them regularly to ensure their maintenance in effective condition, with easily visible and legible warning boards at sufficiently short intervals ; (v) that previous accidents had already happened to children ; in consequence of which the military authorities had taken elaborate measures to have all children in the elementary schools of the district warned of the danger of the minefields and directed that the high fences of thick wire should be described to the children so that they should easily identify a minefield when they saw it ; (vi) that regular and frequent inspection was necessary to make sure that the fences did not get covered by drifting sand ; (vii) that at the place, where eventually the accident did happen, the fence was allowed by the military to get nearly covered up, and the warning board was allowed to get completely covered up, so far as its warning function was concerned ; and lastly (viii) that although the silting up of the sand at the fatal spot had been observed in March, 1942, and was increasing in July, 1942, the military took no steps whatever to dig out the buried notice board, or to raise the fence so as to make it apparent to anybody passing and particularly to children at play, that the minefield was still there and that the fence was still intended to exclude the public. In those circumstances when it is borne in mind that at the particular spot in question the children were lawfully where they were before the ball rolled down the hill under and past the one low wire into the minefield, so that the children were naturally tempted to run after it, and further that the military had failed to maintain the preventive character of the fence, and were at least morally to blame for so failing and thus to their knowledge endangering the children, I cannot help thinking that the common law ought to treat such circumstances taken together as giving a cause of action for negligence in the case of children of such an age. It is to be noted that in *United Zinc Co.* v. *Britt* (5), O. W. HOLMES, J., delivering the judgment of the Supreme Court of the United States, pointed out at p. 276 that there was no evidence there of children being in the habit of going to the place where they were injured. I recognise that there was in the present A case not the same kind of positive allurement as in *Cooke* v. *Midland and Great Western Ry. Co. of Ireland* (6), where LORD COLLINS, at p. 241, said, "A jury might infer not merely a licence but an invitation"; but the whole of these sandhills had been before the military took possession, and until they laid the minefield so continued to be, a children's playground to which they were free to resort, and the fact that the boundary fence had at the critical position been allowed to pass almost into oblivion with only a remnant of old wire remaining B visible, does seem to me, when considered in relation to the appalling danger from the neglected but still explosive minefield, to put upon the military a positive duty owed to the children to keep them out and prevent their trespassing; or, alternatively, to justify the inference that the military were so indifferent as to whether the old fence would or would not keep children out that they must be treated in law as if they had allowed the fence to become completely buried, C thus leaving ingress so completely open as to amount to permission to enter.

In the spring gun cases, it was held that the only defence to an action by an injured trespasser was proof of notice to him of the danger. It is true that there was in those cases an element of intent, which on first impression may be said to differentiate them from a case of mere negligence; but ought the law to treat extreme and reckless negligence as so different from intent as to deny all right of action, even to a child who trespasses in ignorance? In the common law the D fundamental distinction is not between intent and negligence, but between trespass and case. In the former the act of the defendants is of itself actionable, but in the latter as a general rule the wrong is only actionable if the defendant as a reasonable man ought to have foreseen the probability or at least the grave risk of his action harming some other person or one of a class of persons, and it is noteworthy that in all three of the well-known cases of *Ilott* v. *Wilkes* (7), *Bird* v. *Holbrook* (8), and *Deane* v. *Clayton* (9), the action was in case not trespass. The E only other observation I would make is that, if in *Lynch* v. *Nurdin* (10) the act of the child playing with the unattended horse was not a *nova causa interveniens* which interrupted the operation of the defendant's negligence, so here the spontaneous and natural act of the young boys in running after their ball was no break in the chain of causation between the neglect of the military to maintain their preventive barrier and the damage from the mine.

F I am very sensible of the difficulty of the case; but, if an occupier has to keep artificial water in at his peril, I do not see why on principle he should not be called on to take all reasonable precautions to keep children out of a place where he knows they will be blown up. Our common law rules were evolved before the age of high explosives, and I cannot think that the flat denial to the child trespasser in the present case of all right of recovery is consonant with the principles which underlie those rules. I give this judgment with diffidence and G hope that there may be an appeal.

The other issue in the appeal depends upon the true interpretation of the Personal Injuries (Emergency Provisions) Act, 1939, s. 3. It was urged for the appellants that sect. 3 had no application unless a scheme has been made under sect. 1. I do not think so. Sect. 3 is quite independent of sect. 1. In my view, these two actions would be barred by subsect. (1) of that section if the death and injuries caused to the two boys were "war injuries" as defined by H sect. 8, which, leaving out immaterial words, defined them as injuries "caused by . . . the use of [*inter alia*] any . . . explosive . . . either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy." The Solicitor-General submitted that it is impossible to put any limit on the phrase "in combating the enemy" as long as the war is continuing, and the minefield is kept in existence. Had that been the intention of Parliament, it would have sufficed to enact the first seven lines of para. (*a*) in the definition of war injuries with the addition of "either by the enemy or by His Majesty's

Forces for the purpose of the war." The exegetic words "in combating the enemy, etc." are also words of limitation. They seem to me to import active fighting, but, if they be ambiguous, the alternative about repelling unreal but supposed attacks seems to me to make it clear that they relate to the risks of an actual or imagined engagement. I cannot think it was the intention of Parliament to take away a civilian's right of action in such a case as the present, and on ordinary principles of statute interpretation the fundamental right of the subject of coming to the King's courts for redress of wrongs should not be treated as taken away by Parliament except by quite clear language. Unless the definition is limited in the way I suggest, I cannot see where else to draw the line, and the very fact that Parliament has not made the deprivation of the civilian's rights dependent on the making of a scheme for an equivalent right of compensation under sect. 1 affords a strong confirmation of the limited interpretation of sect. 3 with its careful definition in sect. 8.

For the above reasons I reject the statutory defence and think the appeal should be allowed with costs here and below and judgment entered for the respective sums provisionally found by the judge, but my brethren disagree with my view of the common law position, and the order of the court will be as they direct.

MACKINNON, L.J. [read by MORTON, J.]: These actions arise out of a lamentable accident that occurred on Aug. 8, 1942. On the afternoon of that day three boys, Smith aged 13, Charles Adams aged 12 or 13, and Robert Adams aged 11, went to the sand dunes which flank the estuary of the Mersey at Great Crosby. A minefield had been laid on those dunes by the military authorities. The boy Smith trod on something which exploded a mine and he was killed. Robert Adams was injured. Charles Adams escaped practically unhurt. These actions are brought by the mother of Smith, and by Robert Adams by his father as next friend, claiming damages from the defendant. The defendant is a captain in the Royal Engineers, who in August, 1942, was in control of the minefield in question. I understand he was indicated by the War Office as the proper person to be made defendant in such a claim. CASSELS, J., dismissed both actions. The plaintiffs appeal. I think the judge arrived at the right conclusion, though I prefer to rest my decision on a different ground to that on which he relied.

The War Office, or the Royal Engineers, in fact took possession of this region of sandhills, and by February, 1942, had laid a minefield in it. Much time was spent in discussing before us which was the precise regulation in the Defence (General) Regulations under which such possession was taken. This discussion appeared, and appears, to me to be unnecessary and irrelevant. There is no doubt whatever that possession had been taken in fact. Whether the clerk who served some notice on the owners of the land used one form or another—possibly even a wrong and inappropriate form—might be material on some question as to the rights of the owners, or the liability of the Army authorities to those owners. As between the parties to this litigation it is sufficient that the Army authorities had in fact taken possession, and were in possession on Aug. 8, 1942.

In happier times of peace these sand-dunes were obviously a place where people walked about, and young people played. When it had been, or was being, made dangerous by the mines, in order to prevent people straying on to it, the military erected a barbed wire barrier all along its landward side, and at intervals of 100 yds. erected notice boards of warning. The barbed wire fence, when first erected, was composed of three rolls of wire, 6ft. high and 6ft. wide at the bottom. In these circumstances anyone, whatever his or her age, who got inside the fence, would be a trespasser, and, if damaged by a mine, would be a trespasser adequately protected and warned, who could have no claim against anyone for damages for his or her injury. But on Aug. 8, 1942, the fence and notice boards were not all along in the condition described above. Owing to the blowing of the sand a hillock had been created at one point along the line of the fence, which for 15 yds. had buried the lower part of the fence, so that only 15ins. of the wire were visible above the top of the hillock. Obviously to left and right of these 15 yds. as the sides of the hillock sloped down the top of the wire fence could be seen joining on to the top of the 6ft. fence where the sand had not covered its base. The notice boards were all in position, but the one of them opposite the

15yds. of hillock had been almost entirely buried, and of legible notice boards one was 100yds. to the left, and the other 100yds. to the right of this 15yds. hillock. The boys got inside the fence at this point by stepping over the wire 15ins. high.

When the boys got inside the enclosure I think they were clearly trespassers. *Prima facie* a trespasser can have no claim against the owner or occupier of land for damage sustained by him from any dangerous thing on the land. There is, no doubt, an exception to this rule. The owner or occupier of land may be liable to a trespasser, especially a youthful trespasser, in respect of damage to him. *Cooke* v. *Midland and Great Western Ry. Co. of Ireland* (6) is the best known example. This exceptional liability arises when the owner or occupier has by his conduct tacitly elevated the intruder from the status of trespasser to the status of licensee. The principle is, I think, accurately stated in Salmond on the Law of Torts, 9th Edn., at p. 534 :

> Where, however, an occupier habitually and knowingly acquiesces in the trespasses of children, these children cease to be trespassers and become licensees, and the occupier owes to them a certain duty of care and protection accordingly.

It is discussed with his usual lucidity by Scrutton, L.J., in *Hardy* v. *Central London Ry.* (11), at p. 469, and pp. 472, 473.

To invoke that principle the plaintiffs here would have to give evidence that the defendant, or those whom he represents, had been made aware of the practice of youths like this to enter upon this land, and had by their conduct tacitly indicated that they did not object to the practice, in short that they had tacitly given their licence to the intruders so to enter. I can find no evidence in the record of this sort. Brigadier Waddington in his evidence said that on one occasion before this it had been reported to him that children had tried to get into the minefield (he could not remember when, but counsel for the defendant suggested it was in September, 1941). Thereon he caused the local education authority to be asked to warn children. The headmistress of the school where the plaintiff, Robert Adams, was a pupil, gave evidence that she received these instructions on Oct. 10, 1941, and thereafter repeatedly warned her pupils, including Robert Adams, of the danger, and the headmaster of the school attended by the boy who was killed gave similar evidence as to him. I can find no other evidence in the cross-examination of the other military officers of their being made aware that people, adults, youths, or children, were intruding upon this minefield. I can find no evidence at all that the defendant, or his fellow officers, ever assented to, or condoned, or permitted such intrusion so as to confer on the intruders the status or privilege of licensees.

In the result I think the plaintiffs failed to establish any reason why these unfortunate young trespassers should enjoy any higher right than mere trespassers, and this appeal must fail. The judge based his decision upon the effect of the Act of 1939. The reasons I have given for supporting his judgment make it unnecessary for me to embark upon the question whether he was right in deciding the case upon that ground. I have not formed, and I do not desire to express, any opinion upon it.

Morton, J. : It is unnecessary for me to restate the events leading up to these consolidated actions, as they have already been fully stated by the other members of the court. The evidence establishes that, prior to Aug. 8, 1942, the military authorities had taken possession of the land whereon the explosion took place. It is true that the only notice given to the owners of the land was a notice of an intention to do work on the land, under Defence (General) Regulations, reg. 50 ; but the military authorities effectively took possession of the land, by laying mines on it and surrounding it with a barbed wire fence, and I do not doubt that when the explosion took place they were in a position to maintain an action of trespass against intruders.

Prima facie, Frank Smith and Robert Adams were trespassers. Are there any facts justifying the court in treating them as being either invitees or licensees ? I can find no implied invitation to the boys to come upon this land. No attractive object was placed on the minefield which could entice them to come upon it : compare *Cooke* v. *Midland and Great Western Ry. Co. of Ireland* (6). They went upon it in pursuit of their tennis ball, which they had kicked beyond the fence. Nor do I think that there was any tacit permission to the boys, such as would alter their status from that of trespassers to that of licensees.

The military authorities started by erecting a thick and forbidding barbed wire fence all round the minefield and erecting warning notice boards every 100 yds. Later they caused warnings to be given to children attending schools in the neighbourhood. It is true that for about 15 yds., including the spot where the boys entered the minefield, only one strand of wire was visible about 12 to 15 ins. above the ground on Aug. 8, 1942. It is also true that the notice board at that point was almost submerged in the sand, and there was no writing on the portion which was visible. Having regard to the other facts in the case, I cannot regard these facts as amounting to a tacit permission. Further, I cannot doubt that the boys knew perfectly well, when they pursued the ball, that they were going on forbidden ground. On each side of the 15 yds. stretch which I have mentioned, the level of the sand became gradually lower, so that more and more of the fence was revealed, and some 25 yds. away on each side the fence was visible to its full height of nearly 6ft. There were red notice boards at intervals along the fence, with an impressive warning on them, although the notice board at the point where the boys entered had been submerged in the sand. The boys had been playing on the sandhills for some time before the accident occurred. They had been there on previous occasions. They must have seen this high thick wire fence stretching along on both sides of their point of entry, though it was neither high nor thick at that point, and warnings had been given at their schools. I strongly suspect that they knew the fence was there to shut off a minefield; and I gather from the judgment of CASSELS, J., that he took this view, notwithstanding the denials of Robert and Charles Adams in the witness box. However that may be, I am sure they knew that the fence was put there with the intention of keeping them out, but they took the risk of crossing it because their ball was precious to them; tennis balls are hard to obtain in these days. In my view, no permission can be implied in this case, and the boys cannot be regarded as licensees. According to my understanding of the law they must have been invitees or licensees or trespassers. There is no fourth class into which they might be placed. Thinking, as I do, that they were not invitees or licensees, I see no escape from the conclusion that they were trespassers. In these circumstances can the plaintiffs recover damages in these actions? In *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1) (p. 358 and pp. 364 and 365), LORD HAILSHAM said:

> There are three categories in which persons visiting premises belonging to another person may fall; they may go (1) By the invitation, express or implied, of the occupier; (2) With the leave and licence of the occupier; and (3) As trespassers. It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or Scotch law, and I do not think that the category exists.

LORD HAILSHAM then went on to deal with the duty which was owed to the occupier of premises to invitees and licensees, and he proceeded:

> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.

In the same case LORD DUNEDIN said, at p. 373:

> On the duty to trespassers there is a considerable body of authority. There is no duty, save only that of not inflicting malicious injury.

In my view, these boys had no higher right against the occupier than they would have had if they had been trespassing adults. The courts have been very ready to find in the case of children that there have been such acts or omissions on the part of the occupier as amount to a tacit invitation or licence; but, if the facts do not warrant such a finding, and the child must be regarded as a trespasser, his position is defined in the passages which I have just quoted. As LORD DUNEDIN said in the same case, at p. 376:

> The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser.

The case before us is a hard case, and there is much to be said for applying a rule that, if an occupier of land places deadly mines in it, however good his motive may be, and, if he knows that children play on the adjoining land, he owes a duty to those children not merely to warn them but to render their entry on the land impossible. Children at play are always likely to trespass, however much they may be warned to keep out; they will, I think, disregard any warning of hidden dangers if they are strongly moved by curiosity or by the desire to recover a plaything. The creation of minefields in England is something new and children need protection against their tendency to stray wherever their impulse leads them. The military authorities knew that children frequented the sandhills adjoining the minefield, and it might be said that it was their duty to make it impossible for children to enter. If they were under such a duty, they certainly did not fulfil it. It would have been possible, by daily inspection, and by digging or adding to the wire where necessary, to keep this fence in such a condition that a child could not pass through it. No doubt this would have entailed some interruption of other military duties, but it could have been done in August, 1942. Indeed, it appears from the evidence of Major Ospolak that such work had been done in July, 1942, at another part of the fence. On the other hand, it is obvious that a situation might arise in which a fence round the minefield would defeat the whole object with which the minefield was laid.

In my view, however, the rule which I have outlined does not form part of the law of England. Even if one disregards the difficulty of applying such a rule to a time of national emergency, and disregards also the fact that this minefield was laid with the praiseworthy motive of protecting this country, such a rule would involve the creation of a fourth class, coming between licensees and trespassers, of persons who, though not licensees, must be effectively prevented from becoming trespassers. I do not believe that such a class is recognised by the law, apart from cases such as *Bird* v. *Holbrook* (8), where a trap was set with the intention of injuring trespassers. I think that the cases in which a remedy has been granted to children injured when straying on another's land have been either cases in which, on the facts, the court was able to hold that the children must be treated as invitees or licensees, or cases in which a dangerous act was done with reckless disregard of the presence of trespassing children at the time. See for instance *Excelsior Wire Rope Co.* v. *Callan* (4), and *Mourton* v. *Poulter* (12). The present case does not fall under either of these descriptions.

It is much to be regretted that these boys were not prevented from following their ball on to the minefield. In my view, however, having regard to the unenviable position of a trespasser at common law, the plaintiffs in these actions cannot succeed. Despite the admirable argument of counsel for the appellants, I agree with MacKinnon, L.J., that the appeal must be dismissed.

Though he was very much inclined to think that the boys were trespassers, Cassels, J., based his judgment on the Personal Injuries (Emergency Provisions) Act, 1939, s. 3. On this branch of the case I cannot agree with Cassels, J., and I accept the view of Scott, L.J., as to the interpretation of that Act. In one sense, the engineers who laid these mines along the coast were combating the enemy as the mines were placed there with the intention of preventing the enemy from invading this country, and of killing him if he did land on our shores. If the words were interpreted in this sense, it might well be held that a person who performs the vital work of filling a shell at a factory is "combating" the enemy. Such a person is certainly doing work directed to killing the enemy and protecting this country. This is not, however, in my view, the sense in which these words are used in the Act. Having regard to the context, I think that, in this Act these words, so far as land operations are concerned, can only apply to a situation arising from the actual presence of an enemy on the soil of this country. Different considerations may well arise in the case of operations at sea or in the air. Putting the matter at its highest in favour of the defendants, the words are ambiguous; and I agree with Scott, L.J., that a fundamental right of the subject should not be treated as having been taken away by statute unless the language used clearly has that effect. I should have been in favour of allowing the appeal, if this had been the only ground of defence.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Silverman & Livermore* (for the appellants); *Treasury Solicitor* (for the respondents).

[*Reported by* M. D. Chorlton *and* C. St.J. Nicholson, Esq., *Barristers-at-Law.*]

JAMES MACARA, LTD. *v.* JOHN DONALD BARCLAY.

[KING'S BENCH DIVISION (Vaisey, J., sitting as an additional judge), **May 19, 1944.**]

Sale of land—Recovery of deposit—Statement by vendor to requisitioning authority that he was prepared to accept requisition notice as owner and that he intended to reside on the property—Repudiation of contract by purchaser—Whether purchaser entitled to recover deposit—Law of Property Act, 1925 (c. 20), *s.* 49 (2).

By a contract dated Apr. 16. 1943, the defendant agreed to sell certain property to the plaintiffs. £1,550 was handed to the defendant as a deposit and part payment of the purchase price. The time for completion was on or before June 24, 1943, vacant possession to be given on completion. The agreement further provided that, if the plaintiffs should neglect or fail to complete the purchase, the deposit was thereupon to be forfeited, unless the court should otherwise direct, to the defendant. On Apr. 17, both parties became aware that the property was likely to be requisitioned by a government department. On June 10, the defendant without informing the plaintiffs of his actions telephoned the requisitioning authority and stated that he would accept the requisitioning notice as the owner of the property and asked the authority that no copy of the notice be sent to the plaintiffs. On June 18, the defendant wrote to the requisitioning authority urging them not to requisition the property and stating that he wished to live on the property himself. On June 18 the defendant's solicitors sent a copy of the requisition notice to the plaintiffs; and, on June 21, the plaintiffs gave notice to the defendant that they rescinded the contract on the ground of the defendant's inability to grant vacant possession. The defendant resisted this decision and the plaintiffs brought an action under the Law of Property Act, 1925, s. 49 (2), to recover the £1,550 deposit. On behalf of the defendant it was contended that the plaintiffs had no right to rescind or repudiate the contract and that such attempted rescission or repudiation was fatal to the claim:—

HELD: the defendant's behaviour with regard to the requisitioning of the property would disentitle him to specific performance of the contract. The court, therefore, had jurisdiction under the Law of Property Act, 1925, s. 49 (2), to order the return of the deposit, and in the circumstances the discretion should be exercised in favour of the plaintiffs.

[**EDITORIAL NOTE.** This case considers for the first time the effect of the Law of Property Act, 1925, s. 49 (2), which gave the court a discretionary power to order a return of the deposit where under the common law no such order could be made. The section also requires that the court should refuse specific performance of the contract, but clearly if specific performance were ordered, no order for the return of the deposit would be necessary. The judgment also contains some observations on the two decisions where the effect of a requisitioning notice upon the contract for sale with vacant possession has been considered, but a final conclusion on this point was not essential.

AS TO RECOVERY OF DEPOSIT BY PURCHASER, see HALSBURY, Hailsham Edn., Vol. 29, pp. 379-381, paras. 520, 521; and FOR CASES, see DIGEST, Vol. 40, pp. 230-241, Nos. 2003-2099.]

Cases referred to:

*(1) *Hunt (Chas.), Ltd.* v. *Palmer*, [1931] 2 Ch. 287; Digest Supp.; 100 L.J.Ch. 356; 145 L.T. 630.

(2) *Re National Provincial Bank of England & Marsh*, [1895] Ch. 190; 40 Digest 78, *602*; 64 L.J.Ch. 255; 71 L.T. 629.

(3) *Re Scott & Alvarez's Contract, Scott* v. *Alvarez*, [1895] 1 Ch. 596; 40 Digest 72, *563*; 64 L.J.Ch. 378, n.; *subsequent proceedings*, [1895] 2 Ch. 603.

*(4) *Beyfus* v. *Lodge*, [1925] Ch. 350; 40 Digest 45, *284*; 95 L.J.Ch. 27; 133 L.T. 265.

*(5) *Winslow Hall Estates Co. & United Glass Bottle Manufacturers, Ltd's Contract*, [1941] Ch. 503; [1941] 3 All E.R. 124; Digest Supp.

*(6) *Cook* v. *Taylor*, [1942] Ch. 349; [1942] 2 All E.R. 85.

(7) *Cramp* v. *Henry Hughes & Son, Ltd., unreported.*

ACTION to recover deposit made under a contract for the sale of land. The facts are fully set out in the judgment.

Patrick Devlin for the plaintiffs.

John W. Morris, K.C., and *S. Pascoe Hayward* for the defendant.

Vaisey, J.: In this case the plaintiff company, purchasers under a contract in writing dated Apr. 16, 1943, seek to recover £1,550, the amount of their deposit, from the defendant, the vendor, on the sale of the property, situate at Shillingford in the county of Oxford, consisting of a house known as Ferry House, with some 50 acres of land. The amount of the purchase money was £15,500. The deposit had in fact been handed over a few days before the signing of the contract in which it is expressed to have been paid "as a deposit and in part payment of the purchase money." The time for completion of the purchase was "on or before" June 24, 1943. Vacant possession was to be given on completion.

One of the general conditions incorporated in the contract provided that, if the purchaser should neglect or fail to complete his purchase, his deposit was thereupon to be forfeited (unless the court should otherwise direct) to the vendor. Here, as it seems to me, is a reference to the Law of Property Act, 1925, s. 49 (2), which, applying only in the case of sales or exchanges of land, (see subsect. (3)) reads as follows:

> Where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

I take the view that my jurisdiction in the present case arises from, and is limited by the terms of, this statutory provision which has not as yet, so far as I am aware, received any judicial interpretation. In *Hunt (Chas.), Ltd.* v. *Palmer* (1), it was made use of, but in circumstances which did not call for any explanatory observations. In my judgment the primary purpose of the provision was to remove the difficulty which had stood in the way of a purchaser who, though in a position successfully to resist specific performance in equity, was at law precluded from recovering his deposit; see *Re National Provincial Bank & Marsh* (2), *Re Scott & Alvarez* (3), and *Beyfus* v. *Lodge* (4). Possibly this was not only the primary object of the provision, but its sole object, for it should be noticed that while the court may order the return of the whole of the deposit, it is not, at any rate in terms, authorised to order the return of less than the whole. In some circumstances it might be just and fair that the amount of the deposit should be shared between the parties; in other circumstances that the purchaser should recover the amount less expenses reasonably incurred by the vendor; but such cases as these do not appear to be covered by the subsection, which seems to contemplate that it must be all or nothing. The effect of the subsection is dealt with in Williams on Vendor and Purchaser, 4th Edn., at p. 30, and in Halsbury's Laws of England, Hailsham Edn., Vol. 29, at p. 380. These statements of the law seem to me to be accurate, and may be treated as incorporated in this judgment.

Turning to the facts of the present case, the first point to be noticed is that neither of the parties now wishes to carry out the contract. The day after the date of the contract the fact that a government department was likely under its emergency powers to requisition the property, or some part of it, became known both to the defendant and also to Hetherington, who for the present purposes may be regarded as identical with the plaintiffs. I understand that Hetherington had been in some way in touch with the authorities and had been trying, though without success, to get from them some sort of assurance or promise that the threatened requisition would not be made. However, that may be, on June 10, just a fortnight before the latest day appointed for completion of the contract, the defendant had a conversation on the telephone with an official of the Ministry of Works (Reading Branch), named Kilner, who on the same day wrote a letter to the defendant as follows:

> Confirming my telephone conversation this afternoon, I enclose herewith requisition notice *re* Ferry House, which you promised to accept as owner of the property. In deference to your wishes, a copy of this notice is not being sent to the solicitors of Mr. Hetherington in view of the fact that you accept the responsibility. Kindly sign one of the notices and return to me. Enclosed you will also find claim forms No. 1 to enable you to make a claim in the usual way.
>
> Since my last meeting with you I have made a thorough search of all the neighbourhood, but unfortunately nothing suitable is available, and it is regretted that it has been found necessary to take this action. The premises are being taken for use by the Women's Land Army as a hostel for Land Girls, and there is, perhaps, some consolation in your knowing that the premises will be put to a very good and important use.

As to this letter the defendant gave me no really satisfactory explanation of why he had promised to accept the notice " as owner of the property " which was then in equity owned by the plaintiffs, or of why he had expressed a wish that no copy of the notice should be sent to the plaintiffs' solicitors, or of why and in what sense he " accepted the responsibility." It is evident that the defendant was, at any rate for the time being, deliberately ignoring the plaintiffs and also causing them to be ignored by the requisitioning authority. I have now to mention two other letters. The first is dated June 17, 1943, and is written by William Gibson, a partner in the firm of Knight, Frank & Rutley, who had acted and were acting as the defendant's agents in connection with the sale to the plaintiffs. It is addressed to the Director of Lands and Accommodation at the Ministry of Works. After calling attention to various other properties in the neighbourhood which, in the writer's view, might more conveniently be requisitioned instead of Ferry House, Gibson proceeds :

> Quite apart from " The Court " on the opposite side of the road, my client will suffer unduly in regard to the requisition within a few days of completion and two months after he had entered into a contract for sale. He has incurred legal expenses and also the cost of an inventory and valuation of some £4,000 worth of furniture which the purchaser wished to acquire, but he will receive no compensation for those outlays. I know how difficult is your task, and I would be sorry to add to it, but I trust you will reconsider this case.

Gibson was not called as a witness, and I have therefore no clue to what he considered to be the position at this time of the plaintiffs. He seems to have given them no thought at all. Did he or did he not think that the contract was going to be carried out ? Whatever the answer to this question may be, it is plain enough that Gibson supposed that the burden was going to fall not upon the plaintiffs, but upon the defendant. Upon what that supposition was based, I have no idea.

The second of the two letters is written on the following day, June 18, by the defendant himself to a Major Broad, one of the assistants in the Directorate of Land and Accommodation in the Ministry of Works. I regard this as an absolutely amazing letter. It runs thus :

> You will appreciate from our conversation this morning that I was very disturbed over the position which has arisen *re* the requisitioning order on my home at Shillingford. Quite frankly the position is as follows . My wife and sons are living there, but when your Reading representative, Mr. Kilner, called on the first occasion, he had every right to assume the inference he did, namely, that the property was not occupied, due to the fact that my son at that time was having an operation at the London Clinic and, therefore, my wife and youngest child were in London in close proximity to the boy, added to which we have no servants in the country, so I had sent down a member of my office staff who was doing odd jobs to keep himself occupied and who would, of course, have no information as to the position. In fact, the only reason I thought of disposing of this home was because I had received an exceptionally good offer for it, and coupled with this had had the offer of a house at Aston Tirrold, which is now withdrawn.

I pause here to observe that the defendant admitted in the witness box that he had not in fact had any offer of a house at Aston Tirrold until some time after the date of the contract. The letter proceeds :

> Not only is there a large area of corn land and many stock are kept, but also a great scheme of reclamation is being carried forward where 200 acres of derelict land is being drained and reclaimed and turned into first-class arable and market garden land. This is an undertaking of great national importance in which I am keenly interested. It is essential that I should be in close touch with these operations, and I feel that to be driven out of Ferry House just when our projects at Aston Tirrold are being so successful will greatly diminish my ability to be helpful in that direction. Confirmation of the success of the Aston Tirrold undertaking can readily be obtained from officials and all concerned in the Berkshire War Agricultural Executive Committee.

The defendant proceeds to indicate other properties belonging to other persons which he invited the Ministry to requisition instead of what he calls " my house ", and gives particulars of companies of which he is director and of the valuable work in connection with the war which those companies were doing. He goes on :

> Owing to my factory having been severely damaged in 1941, as and when I took Ferry House I deemed it necessary that [a particular company which he names]

> should have an evacuation office, and with that object in view the lease was signed between [that company] and myself whereby they, in the event of emergency, would evacuate to this address, and all our duplicate records have always been kept there since that time. So without bothering you any more about my personal activities, you may gather that I am already deeply involved in the war effort, and feel that the requisitioning order is a little harsh. I am now anticipating living in Ferry House myself, subject to your Ministry de-requisitioning the property, and I shall deeply appreciate the utmost consideration that your Department can grant me in this instance.

This is a most extraordinary letter for a vendor of property to have written less than a week before the time at which he had contracted to complete the sale of it to a purchaser, unless, of course, he was quite clear in his own mind that the contract was no longer to be taken seriously. The plaintiffs were not consulted by the defendant as to what they wished to be done: indeed, he disregards not only their interests, but even their existence, though they were, of course, at the time the true owners in equity of the property. He strongly urges in opposition to the national need for which, as he had been told, the requisition had been made, the plea of how much more important in the public interest it was that he himself should be allowed to continue to reside there.

For anything he knew or took the trouble to find out, the plaintiffs might well by that time have preferred that the requisition should be made, or at least have had their own ideas as to how best to conduct the negotiations with the Ministry with respect to it, and to the time and manner of the subsequent taking of physical possession of the property which was in contemplation. The letter is the plainest possible intimation to the Ministry that the defendant, so far as he could, was repudiating the contract, and neither expected nor wished nor intended (if he could help it) to carry it out. On that basis, and only upon that basis, could his plea to the Ministry be justified.

If the Ministry had listened to the defendant and requisitioned a neighbour's property in order that the public interest might be served by leaving the defendant in possession of his property, and if, thereafter, the plaintiffs had held the defendant to his bargain and turned him out, the defendant would have found himself in very serious trouble with the neighbour, if not with the Ministry. This letter, in my view, is not at all the same thing as a communication made to some third party unconnected with the property; it was a piece of extremely officious interference in a matter in which the plaintiffs as purchasers were concerned to a greater extent than was the defendant, who had no right to handle it at all without their concurrence. It is truly amazing to find a vendor of property calmly making arrangements as to its future behind the back of the purchaser, as the defendant was presuming to do in the present case.

I was not at all satisfied with the evidence which the defendant gave in the witness box. If at any time after writing the above letter he had sought specific performance of the contract, I think that relief would have been refused him in the Chancery Division where his action would of necessity have been brought: see the Supreme Court of Judicature Consolidation Act, 1925, s. 56 (1) (*b*).

From this I think it follows that I have the jurisdiction invoked in this action by the plaintiffs, and I think also that my discretion ought to be exercised in their favour.

There is, however, another aspect of the matter on which I must state my views. On June 18 the plaintiffs' solicitors wrote to the defendant's solicitors enclosing a copy of the requisition notice, and the reply of the plaintiffs' solicitors, dated June 21, is in the following terms:

> We are in receipt of your letter of the 18th instant, enclosing a requisition notice, dated June 10, 1943, served by the Ministry of Works upon your client giving him formal notice that the Commissioners of Works are taking possession of the premises.
>
> In these circumstances your client will be unable to fulfil his obligation under the agreement for sale to give vacant possession of the property on completion. As your client is fully aware, our clients were purchasing the property for their personal occupation. We accordingly, on behalf of our clients, have to give you and your client formal notice that in view of the inability of your client to give such vacant possession, our clients rescind the contract. We shall be glad if you will kindly obtain and let us have at your early convenience a cheque for the deposit paid. In view of the position which has now arisen, no good purpose is served by our client inspecting and selecting the furniture and fittings, and we accordingly return herewith the two valuations made by your client's agents, Messrs. Knight, Frank & Rutley.

To this response was a letter dated June 22, as follows :

> We are in receipt of your letter of yesterday's date returning the valuation of furniture and fittings. We have given very careful consideration to the sentiments expressed in your letter, and with respect have to intimate that we cannot agree therewith in law, and accordingly it is not admitted that your clients have a right to rescind the contract. We would suggest therefore that in the circumstances the whole position be reconsidered by you.

It must be assumed that the writers of the last mentioned letter were not aware of the terms of their clients' letter to Major Broad, or they would surely have accepted the rescission of the contract with alacrity. That they wrote as they did is one of the many surprising features of this case, but I do not suppose that there was any conscious or intentional " double dealing " with the plaintiffs on the part of the defendant or his solicitors, or any deliberate attempt to induce the plaintiffs to take a false step to their own prejudice.

It was nevertheless argued before me on the part of the defendant, firstly, that the plaintiffs had no right either to rescind or to repudiate the contract as they did, or purported to do by their solicitors' letter of June 21 ; and, secondly, that such attempted rescission or repudiation was fatal to their present claim.

The former of these propositions seems to depend upon the correctness or otherwise of the decision of Bennett, J., in *Winslow Hall Estates Co. and United Glass Bottle Manufacturers, Ltd.'s Contract* (5). It was there held that a vendor is in a position to give vacant possession to a purchaser notwithstanding the pendency of a requisition notice framed in terms not distinguishable from those used in the present case. The relevant expression is that the government department " are taking possession of the premises "—an expression, to my mind, of extremely ambiguous import. Bennett, J., considered that the notice so phrased was only a " polite intimation " of a possible future taking of possession. If that be right, the defendant would seem to be justified in saying that the plaintiffs had no ground for complaint on June 21.

In *Cook* v. *Taylor* (6) the headnote of the report indicates a decision to the exact contrary of this by Simonds, J., but the actual report of the judgment shows that in that case the point did not really arise, because the keys of the premises had been handed over to the agents of the requisitioning authority, and it was that, rather than the serving of the requisition notice, which in his lordship's view had deprived the vendor of his ability to give vacant possession. He distinguished without dissenting from the decision of Bennett, J., but I myself feel some doubt as to whether that decision was correct.

The de-requisitioning notice relating to the property which was served on the defendant on July 26 is in these terms :

> Take notice that the Commissioners of His Majesty's Works and Public Buildings will on July 27, 1943, quit and deliver up possession of the above mentioned premises which they have requisitioned from you.

From which it would certainly appear that the department itself regarded the requisitioning as something much more definite than a " polite intimation."

Moreover in a recent unreported case of *Cramp* v. *Henry Hughes, & Son. Ltd.* (7), Asquith, J., in a considered judgment, of which a copy has been supplied to me, appears to have regarded the service of a requisition notice, similar to if not identical with the one served in the present case, as operative to vest possession in the requisitioning authority, a conclusion which is inconsistent with that of Bennett, J.

I should have mentioned that the defendant's continuous occupation of the property has been interrupted only by the purely " notional " possession of it by the Ministry of Works between June 10 and July 27, being the dates of the requisitioning and de-requisitioning respectively.

It was said further that the rescission or repudiation was, on any view of the matter, premature as having been given before the date fixed for completion. One answer to that appears to me to be that completion was to take place not on, but on or before, June 24. I should, I think, if it had been necessary, have decided this point in favour of the plaintiffs ; but even if that be wrong, and the plaintiffs did rescind or repudiate the contract on no sufficient ground so that their rescission was ineffective and their repudiation unjustified, I think that the defendant had then already put himself so much in the wrong by the attitude he was adopting, and particularly by his letter to Major Broad, that what the plaintiffs did thereafter had no real bearing on the matter which I have to decide.

The defendant retains his home as he told me he was most anxious to do. Not satisfied with that, he desires also to retain the deposit. In my judgment he ought not to be allowed to do this. He says that he has incurred expenses; so, no doubt, have the plaintiffs. In my view, the defendant's case is unmeritorious, and I give judgment for the plaintiffs for £1,550, the amount of their claim, with costs but without interest.

Judgment for the plaintiffs for £1,550 *with costs.*

Solicitors: *Clifford-Turner & Co.* (for the plaintiffs); *Simmonds & James, Church Rackham & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

In the Estate of ROWSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), **April 25, 1944.**]

Wills—Soldier's will—Actual military service—Women's Auxiliary Air Force—Wills Act, 1837 (*c.* 26), *s.* 11.

The deceased was a member of the Women's Auxiliary Air Force. She was in the balloon command and at the time of her death was in charge of a depot in Gloucestershire :—

HELD: the deceased was in actual military service within the meaning of the Wills Act, 1837, s. 11.

EDITORIAL NOTE. The extension of the meaning of the words " in actual military service " due to the changed conditions of war has here been carried a step further.

AS TO SOLDIERS' WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328; and FOR CASES, see DIGEST, Vol. 39, pp. 332-336, Nos. 180-224.]

Case referred to:

(1) *In the Estate of Grey*, [1922] P. 140; 39 Digest 334, *196*; 91 L.J.P. 111; 126 L.T. 799.

MOTION for admission to probate under the Wills Act, 1837, s. 11, of a testamentary document executed by a member of the Women's Auxiliary Air Force whilst in actual military service. The facts required for the purposes of the report are set out in the judgment.

C. A. Marshall-Reynolds for the applicant.

WALLINGTON, J.: I want to make it quite clear in directing that the document should be admitted to probate, that I am basing myself entirely upon the particular facts of the case and the few observations I desire to make, are not to be understood by anybody as indicating a view, even remotely, that everybody in the Women's Auxiliary Air Force is in actual military service, and, therefore, capable of making a soldier's will.

In this particular case I am relying in part, at all events, on what HILL, J., said in *Grey's* case (1), namely, that the person whose documents are submitted for probate and in respect of which an order may be made by the judge of the High Court, must have been in some place for the purpose of the war, and that predicates that the person must be in the military forces.

In view of the fact that this lady was mentioned in despatches and she was in the balloon command, at another time in Bomber Command, at several stations had been in charge of the Women's Auxiliary Air Force, and even at the date of her death was still on the strength of that Force at the depot at Innsworth in Gloucestershire, it seems to me, having regard to the circumstances in which this war was and is being carried on and to the activities she was quite plainly engaged in from time to time, it would be wrong to say she was not in actual military service, finding as a fact, as I do on the evidence before me, that she was in actual military service within the meaning of the Wills Act, 1837, s. 11, I admit the document to probate.

Order accordingly.

Solicitors: *Bartlett & Gluckstein* (for the applicant).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

GARTSIDES (BROOKSIDE BREWERY), LTD., AND BENTS BREWERY CO., LTD. *v.* THE UPPER AGBRIGG ASSESSMENT COMMITTEE, THE RATING AUTHORITY FOR THE URBAN DISTRICT OF SADDLEWORTH AND THE COUNTY VALUATION COMMITTEE OF THE WEST RIDING OF YORKSHIRE.

[KING'S BENCH DIVISION (Humphreys, Croom-Johnson and Stable, JJ.), **April 27, 1944.**]

Rates and Rating—Valuation list—Proposed amendment to valuation list—Appeal—Appellants not entitled but invited to attend hearing—Whether appellants had a locus standi in the matter—Grounds of proposed amendment—"Annual revision"—Sufficiency—Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1), (2), (4), (5), (7), (8).

The respondent rating authority made a proposal under the Rating and Valuation Act, 1925, s. 37, for the amendment of the valuation list for a certain rating area in respect of a hereditament owned but not occupied by the appellants. The respondent rating authority served a notice of the proposal upon the occupier in accordance with subsect. (2) of the section, and also a notice upon the appellants in which the reason given for the proposal was stated to be "annual revision." The section did not authorise the service of a notice on the appellants. The appellants acting upon the notice duly appeared, without there being any objection to their *locus standi*, at a hearing before the respondent assessment committee who allowed the proposed amendment. On appeal from that decision the respondents objected that the appellants had no right of appeal under the section, inasmuch as they ought never to have been served with the notice of the proposal and that, therefore, there was no jurisdiction in anybody to determine the proposal and that quarter sessions could have no jurisdiction to entertain the appeal. The appellants contended (i) that they were entitled under the section to appeal; and (ii) that the proceedings for the amendment of the valuation list were defective in that the respondent rating authority, in serving the appellants with notice of the proposal, did not specify within the meaning of sect. 37 (2) (*b*) the grounds on which the proposal was supported:—

HELD: (i) in the circumstances the appellants were entitled to appeal under the section.

(ii) in order to satisfy sect. 37 (2) (*b*), the notice must give the party affected an indication in broad outline of the reasons why the amendment is being proposed. The words "annual revision" are not sufficient.

[**EDITORIAL NOTE.** On the first point it might be that the owners were not the right parties to object where there is an occupier in existence, but where the rating authority have dealt with the owners as the party concerned, they cannot at the last moment object to their presenting an appeal. The second point is that it is insufficient for the rating authority merely to give as their grounds for an amendment the words "annual revision." They must go further and state the reasons why an assessment should be increased or diminished.

FOR THE RATING AND VALUATION ACT, 1925, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, p. 617.]

Cases referred to:

*(1) *R.* v. *Thanet & District Assessment Area Assessment Committee & Kent County Valuation Committee, Ex p. Isle of Thanet Gas Light & Coke Co.*, [1939] 2 K.B. 640; [1939] 2 All E.R. 489; Digest Supp.; 108 L.J.K.B. 515; 160 L.T. 509.

(2) *Ex. p. St. Albans Rubber Co.* (1942), unreported.

APPEAL by the ratepayers by way of case stated from a decision of the Court of Quarter Sessions for the county of the West Riding of Yorkshire. The facts are fully set out in the judgment of CROOM-JOHNSON, J.

A. S. Comyns Carr, K.C., and *Harold B. Williams*, for the appellants.

G. H. B. Streatfeild, K.C., and *Myles Archibald*, for the respondents.

CROOM-JOHNSON, J. [delivering the judgment of the court on the preliminary point]: The rating authority, who are one of the respondents to this appeal, made a proposal for the amendment of the valuation list for the rating area of the Urban District of Saddleworth in respect of a hereditament described as licensed premises, Clarence Hotel, Greenfield. When that appeal came on at quarter sessions, counsel appearing for the present respondents, who are the assessment committee and the rating authority and the County Valuation Committee, took a preliminary objection, and the preliminary objection was this : that the present appellants had no *locus standi* because they ought never to have been served originally with, or have had transmitted to them originally by the responsible one of these respondents, a proposal which set the whole of this controversy in motion. That objection was upheld by the Court of Quarter Sessions, and the question which is now raised for our determination is whether the Court of Quarter Sessions was right in so upholding the objection.

During the war, quinquennial valuations are suspended, but instead it is open either to persons who are liable to be assessed and to the assessing authority, to make proposals for the amendment of the current list. The statute which deals with these matters, the Rating and Valuation Act, 1925, contains in sect. 37 a number of provisions which deal with the amendment or, as it is sometimes called, the revision of the current valuation list. I need not read a great deal of that section, but I think it is convenient that I should refer to some of it before I state the facts which have been found by the Court of Quarter Sessions. Subsect. (1) gives power, amongst other persons, to the county valuation committee and any local authority who may be aggrieved by the incorrectness of any matter in the valuation list for the time being in force, to make, in manner provided in the rest of the section, a proposal for the amendment of the list. Subsect. (2) provides that, when a proposal is made by the rating authority, they are, within 3 days after the date on which it is made, to transmit a copy, in the case of a proposal made otherwise than by the occupier, to the occupier, or, where there is no occupier, to the owner, and not less than 21 days before the date of the meeting at which the proposal will be considered by the assessment committee, transmit to him a notice of the date on which the meeting will be held and a short statement of the effect of the next following subsection. Subsect. (4) gives power to " any person " to whom a copy of the proposal is transmitted to give, if he thinks fit, to the rating authority notice in writing of objection to the proposal, and unless he gives such notice he is not to be entitled to be heard at the meeting in opposition to the proposal. Subsect. (5) puts upon the rating authority the duty forthwith to transmit to the person to whom the proposal is made a copy of any notice of objection, and the rating authority, if they themselves intend to object to the proposal, are to give to that person notice of it. I do not think I need bother with subsect. (6). Subsect. (7) says this :

> The assessment committee shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this Part of this Act relating to the hearing and determining of such an objection shall apply accordingly.

That, we are told, is a reference to sect. 26, which provides for objection to the draft valuation list, and sect. 27 which contains provisions relating to the revision of the draft valuation list by the assessment committee and prescribes the meetings to be held by the assessment committee and provides that the assessment committee may at such meetings consider any objection, although notice thereof has not been given in accordance with this Act, if the persons to whom copies of the notice of objection are required by this Act to be given consent to the consideration of the objection.

I may stop my consideration of the sections at that stage for the purpose of stating what actually happened in this case and seeing what are the facts which have been found by the Court of Quarter Sessions. The appellants, Bents Brewery Co., Ltd., are really the owners, and the details of the valuation do not matter for the purposes of this present point. The respondent rating authority made a proposal under sect. 37 on Sept. 30, 1942, under which they proposed an amendment by increasing the gross and rateable values of the premises in the current list. Thereupon a copy of the proposal was transmitted by the rating authority to one Alfred Jenkinson, who was said in the case to be the person who occupied the said hereditament, and a further copy was transmitted within the same period, according to the rating authority, as a matter of courtesy, although this was not stated at the time, to Bents Brewery. Gartsides are a subsidiary company of Bents, and the document which was sent to them is in this form :

> Proposal by rating authority for amendment of the valuation list. To Messrs. Bents Brewery Co., Ltd., c/o Messrs. Gartside's Brewery Co., Ltd.

Then we are told that put into the form, or in the form already in print are the words " or occupier," and that later on in the print the name is given of Alfred Jenkinson as the occupier. At the end of the form, in purported compliance with the provision to that effect in the end of subsect. (3), was this statement :

> You [that must mean Bents] may if you think fit object to the proposal. Unless you object you will not be entitled to be heard at the meeting in opposition thereto. Notice of objection must be in writing and must state the grounds of objection. It must be served on the rating authority not less than 7 days before the date of the meeting. Forms for this purpose may be obtained from the undersigned.

Under subsect. (3), that notice ought to have been served upon the occupier, and the only case in which it is to be served upon the owner is where there is no occupier. That must mean no occupier for the purpose of the Act.

Thereupon, in answer to that, Bents on Feb. 9, 1943, accepting the invitation to object, or, at all events, heeding the statement that they could object, but, if they did not they would not be entitled to be heard, served a notice of objection setting out grounds of the type which are familiar in matters of this sort. Thereupon, on Feb. 11, the county valuation officer communicated to Griffiths, at Bents, and apparently on behalf of Bents, a statement that they intended to appear in opposition to the objection to the proposal which Bents had made. What happened upon that is stated in the case. Jenkinson did not give notice of objection to the said proposal. The documents which I have read are referred to and are annexed to the case. Para. 3 of the case states as follows :

> The respondent assessment committee considered the said proposal and objection at a meeting held on Feb. 23, 1943, and determined to allow the said proposal and to amend the said valuation list. Accordingly the appellants appeared before the respondent assessment committee on their consideration of the said proposal and objections, as also did the respondents the County Valuation Committee of the West Riding of Yorkshire and the respondent rating authority.

We have been told at the Bar, and it is conceded, that no objection was taken by the present respondents before appearing.

The matter was heard and determined by the assessment committee without objection on the one side or the other as to the competence of the parties to attend and to take part in the discussion, and, being aggrieved, the present appellants gave notice of intention to appeal to quarter sessions. Their right of appeal to quarter sessions comes out of sect. 37 (8), which says this :

> If the person by whom any proposal is made under this section, or a person who objects to any such proposal, or the rating authority is aggrieved by the decision of the assessment committee thereon that person, or authority, as the case may be, may within 21 days after the date of the decision appeal against the decision in the same manner as if the decision were a decision of the committee on an objection to a draft list [then follow some words to which counsel for the respondents here today attaches importance, as follows] : and subject to the express provisions of this section all the provisions of this Part of this Act with respect to appeals against such a decision shall apply accordingly.

It is put in this way. On behalf of the appellants it is said : We actually were served with a notice telling us that we must object or otherwise the matter would be determined against us. We did object. Nobody took any objection to our turning up ; nobody raised any point of any sort or kind as to the competence of the assessment committee to hear us, and it does not now lie in the mouth of anybody who served us with the proposal and gave us that notice to say that we had no right to be there; or, that being so, that we were not lawfully there and, therefore, could not be persons aggrieved by the determination of the assessment committee.

On the other hand, it is said: Under subsect. (8) the right of appeal is a right of appeal only subject to the express provisions of the section and that one of the express provisions of the section is that the only case in which a copy of the proposal is to be transmitted to the owner is where there is no occupier, and that unless that condition is satisfied there is no jurisdiction in anybody to determine, and, accordingly, nothing which can be appealed against to quarter sessions, and that no amount of waiver before the assessment committee can clothe quarter sessions with jurisdiction to entertain this appeal. That, I gather, is the point of counsel for the respondents, and clearly put. I only hope that I have done full justice to what the point is.

In my judgment, without expressing any view about sect. 27—I think, in the circumstances of this case, it is unnecessary that I should do so—that the respondents to this appeal could not be heard to say at quarter sessions that the very state of things which they had brought about by their own invitation was a state of things which made the assessment committee have no jurisdiction at all and made the appellants persons who had no right to be there. The document which was served transmitting the proposal was a document which I think this court should regard as being in accordance with the law, at all events so far as the persons who sent that document forward were concerned. The law presumes legality. What was it that the people who were sending forward that proposal were saying ? They were saying : Here is a notice of something which we are going to contend against you, the owners. The only way in which they could give such a notice properly would be on the basis that there was no occupier ; no occupier for the purposes of the Rating and Valuation Act, 1925. It is true they mentioned by name that Jenkinson was the occupier ; but that statement is inconsistent with the whole thing which they are doing here, sending a notice to the owners and obviously warning the owners that they are in a sense going to have this proposal pursued against them before the relevant tribunal. In respect of that, they purport to set out in that notice, as their duty is under subsect. (3), the effect of subsect. (4). Unless that is all quite meaningless and quite nonsense, that could only be upon the basis that that notice was a proper notice, properly drawn up and properly served upon the right persons. Furthermore, when the matter came before the assessment committee, nobody took any objection to the appearance there of Bents. Counsel for the respondents said that Bents are presumed to know the law ; so, I suppose, are the assessment committee, the rating authority and the County Valuation Committee of the West Riding of Yorkshire, and they said nothing. Why ? It can only be, as I see it, upon the basis that they were indicating to Bents that they were brought there as owners and that can only be upon the basis that they were rightfully brought there as owners.

The view which I have formed about the case, accordingly, is that Bents are persons who come within the meaning of sect. 37 (8) ; they were persons who had objected to the proposal and who were aggrieved in the sense that they were aggrieved by the decision. But, says counsel for the respondents, their right to appeal is only subject to the express provisions of this section. The express provisions of the section are something more than merely subsect. (3) ; they include the provisions of subsect. (7), and those incorporate sect. 27 at the very least. However, I do not find it necessary, having come to the conclusion that it did not lie in the mouth of these respondents to object to the consequences of their own act before quarter sessions, to deal with the point which has been raised by counsel for the appellants ; on the face of it, a formidable point under sect. 27. I have come to this conclusion not as something which lays down any general rule or general principle applicable to other cases, but on the rather strange facts of this quite exceptional case, and for the reasons that I have given, I have come to the conclusion that quarter sessions came to a wrong determination as a matter of law and that they ought to have heard and determined the appeal of Bents, who were persons who had been, in the result, lawfully brought before the assessment committee and who alleged that they were aggrieved by their decision.

The court having decided the preliminary point in favour of the appellants, after further argument gave judgment on the main issue.

Stable, J. : In this case I have been asked to give my judgment first.

This is an appeal by way of special case in which Bents Brewery Co., Ltd., are the appellants, and what I may, for the sake of brevity, call " the rating authority " are the respondents. It so happens that the case before the Court of Quarter Sessions was decided against the appellants on a preliminary point in which they have now succeeded, after which the court proceeded to determine what would have been the real matter in issue. The appellants in this court had not failed on the preliminary point. In substance it is the rating authority that are the appellants here.

The matter can be very shortly stated. The Court of Quarter sessions having decided, as we think wrongly and as we have already decided, that the brewery company had no *locus standi* to appeal at all, went on to hold that, had they had a *locus standi*, they would have been successful on the ground that the proposal to alter this particular rate, which was the initiation of the whole proceeding, was bad in law. The proposal in question was a proposal made in accordance with the Rating and Valuation Act, 1925, s. 37. Subsect. (2) of that section provides that every proposal must be made in writing and—and this is the important matter—must specify the grounds on which the proposed amendment is supported. The proposal in this case was in writing. The proposed amendment was an increase in the gross value from £85 to £95 and an increase in the rateable value from £68 to £76. So far so good; the proposed amendment was perfectly clearly set out in writing.

As regards the specification of the grounds on which the proposed amendment is supported, all that the proposal said was the two words "annual revision." That is all we know. In my judgment "annual revision" is not a specification of the grounds on which the proposed amendment is being supported. If it is anything, it is a statement of the occasion on which the amendment was made. In my judgment the section means exactly what it says. It does not mean that the authority putting forward the proposal has got to set out its evidence, or that it has to set out in minute detail the grounds on which the proposed amendment is supported; but it must, in my judgment, in order to satisfy the section, give the party affected thereby some indication of the reason why the particular change is being made. That party must know in broad outline why the particular rate has been altered.

In my judgment, that view of the law is merely to reiterate what has already been stated by this court in *R. v. Thanet and District Assessment Committee* (1). It is true that in that case the major flaw that was complained of was that the proposal did not indicate what the amendment was. It did not indicate whether it was an increase or a decrease in the valuation, and that fact perhaps relegated the second point to a comparatively subordinate position. None the less it is clear that each member of the court that decided that case indicated quite plainly that the requirements of subsect. (2) (*b*) must be complied with.

We were referred to the transcript of the shorthand note of an ex parte motion that was made to this court in 1942 where it appears the court came to the conclusion that the word "re-assessment" which was set out as being the ground on which the proposed amendment in that case was supported, was sufficient. We have been told that the court on that occasion had not had the advantage that we have had in having its attention called to the *Isle of Thanet* case (1), and there may be, as, indeed, I think there is, a distinction between the words "annual revision" which, as far as I know, mean nothing and the word "re-assessment."

However that may be, both on principle and in accordance with the decision, as I understand it, in the *Isle of Thanet* case (1), the words "annual revision" do not specify a ground on which the proposed amendment can be supported. That being the case, the proceeding was defective from the very start and the Court of Quarter Sessions came to a right decision in hypothetically allowing the appeal. I say "hypothetically" because as I have already pointed out, the decision was on the hypothesis that their earlier decision against the brewery company was held to be erroneous.

In my view, the appeal on the special case should be allowed.

CROOM-JOHNSON, J.: I am of the same opinion and for the same reasons, but I would like to add one other point. Under sect. 28 when the draft valuation list has been approved and is sent to the rating authority, then it becomes the valuation list for the rateable area and becomes the valuation list in force and is deemed to have been duly made in accordance with the provisions of that part of the Act. If anybody wants to alter that valuation list while it is in force, the statute prescribes certain conditions under which the law may be set in motion with a view to getting the valuation list amended. Amongst other persons the authority in this case is empowered to make a proposal with a view to getting the list altered. If that is so, it seems to me they must carry out those statutory directions which are laid down as the method by which they must proceed. One of them is that they shall make the proposal in writing and the other is that they shall specify the requirements upon which the alteration or the proposed amendment is to be put.

I agree with Stable, J., that you do not specify a ground by giving what may be called the woman's reason and saying "because I say so" or by saying "because this is my annual revision," or, "I am going to do it *holus-bolus* with regard to everybody." That does not seem to me to be a specification within the words used by Lord Hewart in the case to which our attention has been A directed. Speaking for myself, I find it a little difficult to believe that the decision of this court in the *St. Albans Rubber Co.* case (2) would necessarily have been the same if the *Isle of Thanet* case (1) had been cited to them.

Humphreys, J.: I had the good or bad fortune to be a member of the court in each of the two cases which have been cited on different sides in this case. B

All I desire to say about the matter is this: I think the decision in the *Isle of Thanet* case (1) not only is binding upon this court but is a correct decision.

With regard to the application in the *St. Albans Rubber Co.* case (2), which was an *ex parte* application made to the court of which I was a member, I only desire to say that I am not satisfied that the decision of the court would have been the same if we had had the decision in the *Isle of Thanet* case (1) before us. However that may be, if it becomes a question of which should prevail, I prefer C the decision in the *Isle of Thanet* case (1) to the decision in the *St. Albans Rubber Co.* case (2). If I look at the matter quite apart from authority I am of opinion in this case that the words which were used, and the only words, "annual revision" do not constitute grounds upon which the proposed amendment is supported within the meaning of the Rating and Valuation Act, 1925, s. 37 (2) (*b*).

The result of the judgment of the court will be that the appeal will be allowed.

Appeal allowed with costs. Leave to appeal granted. D

Solicitors: *Godden, Holme & Ward*, agents for *Edwin Berry & Co.*, Liverpool (for the appellants); *Warwick Williams & Marchant*, agents for *Bernard Kenyon*, Wakefield (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

E

SOPERS OF HARROW, LTD. *v.* JOHNSTON & SON (LONDON), LTD., AND HENDERSON & LIDDELL, LTD., AND COLLINS ARDEN PRODUCTS, LTD.

[King's Bench Division (Tucker, J.), **May 25, 1944.**]

Food and Drugs—Implied statutory warranty—Nature substance or quality demanded—Cordial—Whether cordial must contain substantial percentage of sugar—Food and Drugs Act, 1938 (*c.* 56), *ss.* 3, 6. F

Damages—Duty to minimise loss—Breach of warranty—Beverage misdescribed as "cordial"—Whether purchaser required to replace label or add sufficient sugar to sell as cordial.

The defendants entered into a verbal agreement with the plaintiffs to G supply the plaintiffs with 100 gross of various "cordials." 76 gross and 7 doz. bottles of the beverage labelled "cordial" were delivered and 20 gross of a liquid called Summadrink which the plaintiffs accepted in place of cordial. The defendants warranted that the goods complied with the requirements of the Food and Drugs Act, 1938, ss. 3 and 6. The plaintiffs contended that the beverage was not in fact a cordial as it contained no sugar and that, therefore, there had been a breach of contract and that the H sale of such goods would be a breach of the Food and Drugs Act, 1938, ss. 3 and 6. The defendants contended that the beverage was a cordial notwithstanding that it contained no sugar; that the label indicated that it contained no sugar; and that the plaintiffs could have minimised their damage by (i) adding the requisite amount of sugar, (ii) by pasting labels supplied by the defendants bearing the word "Summadrink" over the word "cordial," and (iii) by re-selling the goods to an offeror inspired by the defendants:—

Held : (i) the word "cordial" implies that the beverage contains a substantial percentage of sugar.

(ii) there was a breach of contract and of the Food and Drugs Act, 1938, s. 3, in respect of the goods labelled "cordial." In considering this matter the most important customer to consider is the food inspector.

(iii) the plaintiffs were not required to take such steps as those suggested by the defendants in order to mitigate damages.

[**EDITORIAL NOTE.** The question of what is a cordial has been before the courts before, and, after a wider discussion of the position based on more evidence than is usual in such cases, the previous decisions are in effect followed. However, it must be noted that it is said that the most important customer to be considered is the food inspector. The consideration of mitigation of damage is always directed to the particular facts of each case, but in this case the general duty of a retailer is considered.

As to Duty of Plaintiff to Mitigate Loss, see HALSBURY, Hailsham Edn., Vol. 10, pp. 113-115, paras. 143, 144 ; and for Cases, see DIGEST, Vol. 17, pp. 124-128, Nos. 324-361.]

Action by purchaser against vendor for breach of contract by misdescription and for breach of implied warranty under the Food and Drugs Act, 1938, ss. 3 and 6. The vendor instituted third-party proceedings as regards part of the goods supplied against Henderson & Liddell, Ltd., and as regards the remainder against Collins Arden Products, Ltd., and Henderson & Liddell, Ltd., brought fourth-party proceedings against Collins Arden Products, Ltd., in respect of goods which they had supplied to the defendants. The facts are fully set out in the judgment.

John W. Morris, K.C., and *P. B. Morle* for the plaintiffs.

R. F. Levy, K.C., and *Colin P. Duncan* for the defendants.

A. J. Hodgson for the third party.

C. Gallop for the fourth party.

Tucker, J. : Sopers of Harrow, Ltd., are a departmental store at Harrow of some 100 departments. In 1937 they started, amongst other things, selling foods and at the time in question they also had a restaurant. In 1942 for the purpose of their food department and to a lesser degree for purposes of use in their restaurant, they entered into a contract with Johnston & Son (London), Ltd., the defendants, to purchase a quantity of cordials. The contract was made orally in May between Mears on behalf of the plaintiffs and a lady representative on behalf of the defendants. There is no dispute with regard to the terms of sale, except with regard to quantities. It is conceded that a quantity of goods were sold as cordials : a quantity of Lemon-Citric Flavoured Cordial, a quantity of Lime-Citric Flavoured Cordial and a quantity of Orange-Citric Flavoured Cordial. Apart from the dispute as to quantity, there is no dispute that the contract was for the sale of cordials and there is no dispute that on the sale the defendants warranted that the goods would comply with the provisions of the Food and Drugs Act, 1938.

In fact deliveries were made totalling 76 gross, 7 dozen, but out of that quantity 20 gross delivered were called Orange-Citric Flavoured Summadrink and not cordial. In May, 1942, the fourth parties sent out a circular letter to their various trade customers, including the plaintiffs in this action, informing them that, owing to the great popularity and success of this liquid, they had registered the name of "Summadrink" and in future these goods would go by that name. The letter has been a good deal criticised, because, it is said, and the fact is that a witness for the fourth parties admitted, that the real cause of that letter being sent out was that they had by that time ascertained that there might be a question whether it was proper to sell these goods under the description of "cordial" and whether or not a sale under that description might be a breach of warranty, and to that extent the letter is not as frank as it might be when sent to purchasers who had bought the goods as cordials, with an express warranty that they did in fact comply with the Food and Drugs Act, 1938.

On receipt of that letter, the plaintiffs were perfectly content to accept and take 20 gross of this liquid labelled "Summadrink" and not described as cordial, but later on they were delivered a further quantity of 16 gross 7 dozen which were labelled "Orange-Citric Flavoured Cordial" and for that quantity they have not paid. The plaintiffs claim that there was a breach of warranty by the defendants. They say that this was a sale of goods by description, the description being that they were cordials, and that these drinks were not cordials. I will deal first of all with the alleged breach of warranty that these goods did not comply with the Food and Drugs Act.

The Food and Drugs Act, 1938, ss. 3 and 6 are in point, and provide as follows:

> 3. If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall, subject to the provisions of the next succeeding section, be guilty of an offence.
>
> 6. A person who gives with any food or drug sold by him a label, whether attached to or printed on the wrapper or container or not, which falsely describes that food or drug, or is otherwise calculated to mislead as to its nature, substance or quality, shall be guilty of an offence, unless he proves that he did not know, and could not with reasonable diligence have ascertained, that the label was of such a character as aforesaid.

It is said that there has been a breach of warranty, because the warranty that the goods complied with the provisions of this Act must mean that, if a purchaser asks for cordials or Lime-Citric Flavoured Cordial or Lemon-Citric Flavoured Cordial or Orange-Citric Flavoured Cordial, he will get something which is a cordial.

On the other hand, it is argued (and this argument is relied upon both by counsel for the fourth parties, the manufacturers, and by counsel for the defendants), that that is not the proper test with regard to this warranty, but the test is, whether it is proved that at the date of delivery a sale by the plaintiffs in the manner customary at their establishment would necessarily have involved an offence under the Act and, therefore, they say that the warranty can only mean that, if sold in the ordinary way in which the plaintiffs sell their goods, it will not follow as a necessity that there will be any breach of the law. In fact the difference between the parties with regard to this is, I think, that counsel for the fourth parties says that you must envisage the type of person who in fact visited this shop, namely, a customer who did not ask for "Cordial," but used such words as "Orange drink" or "Lemon drink," as being the kind of purchaser whose prejudice is in question and whose demand is in question, whereas counsel for the plaintiffs says that you must envisage a hypothetical purchaser who comes into the shop and asks for the goods under the description by which they were in fact sold, namely, under the description "Cordial," and that that is the object and meaning of the warranty; and he points out, and I think, if I may say so, very cogently, that one of the hypothetical purchasers and far and away the most important hypothetical purchaser who has to be borne in mind in this connection is the food and drugs inspector.

With regard to the interpretation of the warranty, I think that the interpretation of counsel for the plaintiffs is the right one and that it means: I warrant that these goods may be sold as cordials, because they are cordials; because they in fact answer to that description; and, if they are not cordials, then there has been a breach.

That takes me to the question which has occupied the greater part of this trial: whether or not it has been proved by counsel for the plaintiffs that the goods sold were not cordials and, therefore, that the sale by them in their shop of them as cordials to a customer who asked for cordials would necessarily involve a breach of the law. The question whether or not this liquid is a cordial is a pure question of fact. Various cases have been referred to, most of them cases which went to the Divisional Court on cases stated by magistrates, where the Divisional Court can never be called upon to give a decision of its own on a question of fact, but can only decide in any particular case whether there was evidence before the justices that justified them in law in coming to the conclusion which they reached or whether they have in law applied the proper tests.

For the plaintiffs it is contended that a liquid of this kind is certainly not a cordial if it contains no sugar, because sugar is one of the necessary and essential ingredients of a cordial, and something which entirely lacks sugar cannot be a cordial. With regard to that, I think that the evidence as a whole shows that in olden days the word "cordial" signified what is now called a liqueur, but gradually, in the course of time, it came to be applied to certain non-alcoholic beverages; and the plaintiffs say that, in so far as non-alcoholic beverages are concerned, they can only be cordials if they contain a very high proportion of sugar, which gives the beverage a food value. Whether or not the sugar was originally put in for that purpose, it in fact has, or had before the war, a considerable food value.

The evidence in this case satisfies me that up to the outbreak of war it was the almost invariable practice of manufacturers of drinks called cordials to put into them percentages of sugar varying from 30 to as much as 50 per cent. forming what is called the base of the drink ; and it is said for the plaintiffs that at any rate by the year 1939 " cordials " had come to mean of necessity in the trade, to the public at large, to analytical chemists who have to deal with these matters, to the appropriate government departments and in fact to everyone required to apply his mind to the question, a drink which necessarily contained sugar. Dictionary definitions of " cordial " have been referred to, and I think that I am right in saying that all of them contain words which indicate that it is one of the qualities of a cordial that it should be either exhilarating, stimulating or comforting. Murray's Dictionary describes a cordial as a " medicine, food or beverage which invigorates the heart and stimulates the circulation ; a comforting or exhilarating drink " ; and there are similar definitions in the other well-known dictionaries. The plaintiffs say that the exhilaration, comfort or sustenance therein indicated has always been provided by this high proportion of sugar.

In support of their case the plaintiffs have called, in particular, two witnesses with whose evidence I was, if I may say so, more particularly impressed : Mr. Voelker, a public analyst, and also (and I think that this is very important in this matter), Mr. Stockwell, a director of a firm of manufacturers of what are called soft drinks, the firm of Rayner & Co., Ltd., who has been in the trade for thirty years and is in fact at the present moment a member of the Ministry of Food committee which has been brought into existence for the purpose of regulating this trade. Those witnesses and others, to whom I need not refer by name, say that commercially a cordial must contain a high percentage of sugar.

On the other hand, the witnesses on the other side say : It is quite true that a very large proportion of drinks sold as cordials before the war did contain sugar, but that is merely an accident ; that is merely due to the fact that sugar was the sweetening agent almost universally used before the war and, if we now use saccharin instead, it still remains a cordial. Furthermore, some of the witnesses for the defendants or for the fourth party seemed to indicate that, in their view, there had at some undefined moment since the war been a change in the meaning of the word " cordial " brought about by the scarcity of sugar since the war.

I have to choose between those two conflicting views or schools of thought with regard to this matter. It is by no means an easy matter to deal with ; and that is shown by the fact, which must be very embarrassing to traders and others who have to deal with matters of this kind, that numerous prosecutions have taken place up and down the country, some of them against the fourth party in this case or against retailers who have been selling their goods, and with regard to other similar liquids. Some of those prosecutions have succeeded ; others have failed. There have been appeals to quarter sessions. Some have succeeded ; some have failed. There has been more than one case stated brought to the Divisional Court. Some have been upheld and some have not. That, of course, must always be the position with regard to any matter which is a pure question of fact, but none the less, of course, as I have said, very difficult and embarrassing for honest people, as I am satisfied that all the people in this case are, who are endeavouring to trade in any particular article.

I have to decide this matter as a question of fact, quite uninfluenced and unassisted by the decisions of fact which have been reached in other cases on other evidence ; but I do venture to think that I have probably had a great deal more evidence put before me in this case and heard probably a good deal more argument than has been afforded to courts of petty sessions and quarter sessions and necessarily to the Divisional Court on a pure question of fact as distinct from law. The conclusion that I have come to is that on this point the plaintiffs are right ; that by the outbreak of war the word " cordial " had acquired a commercial significance and that it necessarily meant a drink, to be used in dilution, which contained a substantial percentage of sugar. I am not attempting to give a comprehensive definition of " cordial " ; I am only dealing with it in so far as it affects the issues in this case and on that question of fact

I prefer the evidence for the plaintiffs.

In arriving at that conclusion of fact I agree that I am not, of course, bound to accept the evidence of a chemist or a manufacturer in preference to that of the man who is called the man in the street. I am entitled to look at the evidence of all those people for the purpose of ascertaining whether or not by a certain date a descriptive word had acquired a certain meaning and I do not think that there is anything in any of the cases which have been cited to me which says that I am taking a wrong view with regard to that. There have been cases in which criticism has been made where justices have apparently accepted the view of a chemist as conclusive, but there has been no case and I do not think that there could be any case which said that on a pure question of fact I am not entitled to have regard to the views of chemists on matters of this kind, or of manufacturers or to take cognisance of the view apparently taken by the appropriate government departments, always assuming that those expert people are dealing with this same commodity.

In this case it is established to my satisfaction that a liquid such as that sold in this case is not a cordial. The analysis of the liquid shows that it contained—the percentages vary very slightly with regard to the tests taken—in substance 3 per cent. citric acid, 0.044 saccharin, 0.055 of benzoic acid, 0.1 of mineral matter and the balance water and flavouring—a very high percentage of water, described in fact as acid flavoured water by counsel for the plaintiffs. It must be borne in mind, however, when dealing with the large percentage of water that all these drinks necessarily contain a very high percentage of water. Fruit itself and fruit juice contain a large percentage of water; so too much emphasis should not be laid upon that; but the important thing is that in every instance the percentage of sugar is *nil*, and I think that it is quite impossible to say that a liquid of this kind, containing no sugar at all, is a cordial. It is the presence of sugar which gives it not only a sweetened taste, but a food value, the quality which exhilarates or sustains. I think that that was an essential quality of a cordial in the year 1939 and I do not think that anything that has happened since during the war, owing to a shortage of sugar, can possibly change something which in 1939 was not a cordial into a cordial in 1942.

What happened in fact was that the manufacturers of these cordials, who had put them on the market containing very large percentages of sugar, found that when sugar supplies were reduced and their allocations were cut down they had either to reduce the quantities supplied or reduce the sugar content, and at that time there sprang into existence a number of firms, including the fourth parties in this case, who, not having got a sugar allocation pre-war, necessarily could not manufacture goods of this kind containing sugar. They therefore put on the market this substitute liquid and claim that it is a cordial. They are perfectly *bona fide* in the matter. They took advice. It is true that the advice given them warned them that a liquid wholly lacking in sugar would not be an altogether satisfactory cordial, but they were advised that they were entitled to put it on the market with these ingredients and they did so in good faith.

I think, therefore, that there has been a breach of warranty that these goods complied with the Food and Drugs Act, 1938, on the ground that a sale thereof in response to a demand for a cordial would have involved a breach of sect. 3. That being so, I do not think that it is necessary for me to go on to consider whether or not there would necessarily have been a breach of sect. 6 with regard to the label.

If that is right, it follows that the plaintiffs in fact had delivered to them a quantity of goods which I must regard in the absence of any evidence to the contrary as being worthless goods, because to deal in them would have involved a breach of law, unless that defect could have been properly remedied in any way; unless the plaintiffs could have reasonably taken any steps which would have diminished the damages otherwise recoverable in respect of the goods which had been delivered.

I have now to consider whether the plaintiffs could or ought to have taken any steps to mitigate the damages. In November, Green, who is, I think, the managing director of the plaintiffs, saw in his neighbourhood other bottles of similar liquid for sale in retail shops at prices substantially lower than the price of 2*s*. 6*d*., which was the price at which the defendants had told him that he must retail these bottles. That made him apprehensive and suspicious. He thereupon consulted his dictionary and he then became dubious as to whether he had got cordials or not. Having consulted his dictionary, he consulted his lawyers and he eventually came to the conclusion that he had not got cordials, but had got something which was worthless. He thereupon stopped the sale at his shop; his advisers notified the defendants, and so forth; and the matter eventually comes to trial. He is perfectly entitled to take up that attitude if he is right. If his discovery shows that these goods were in fact goods which he could not lawfully sell, he is perfectly entitled to say that they are worthless and that he is not going to sell them, even though that may not have been the original reason why he disapproved of these goods in the first instance or possibly disapproved of the vendors. I think that it turned out that he was right as a result of his investigations and that the sale would have been unlawful.

The next step is this. He is bound to minimise his damage as far as reasonably possible. The defendants say (and I am putting on one side now the question of the 20 gross which were delivered labelled "Summadrink" and dealing with the goods which were called "Cordial" on the label) that it would have been a very simple matter to have turned these considerable quantities of goods into cordials by adding the requisite amount of sugar which is now necessary to be put into a cordial by virtue of an order made by the Ministry of Food in June, 1943, a year after these matters had arisen, as a result of which it is now or from that date onwards became permissible to sell under the description of "cordial," Lemon Flavoured Cordial, Lime Flavoured Cordial, Orange Flavoured Cordial, a liquid which contains the ingredients indicated in a schedule to that order and that includes 7½lbs. of sugar to every 10 gallons. It is said: Therefore all that you have to do is to get the requisite amount of sugar for all these bottles, some thousands of them, and put it in. I think that the answer to that is that there is nothing to show that the plaintiffs would have been able to get that quantity of sugar and I think that it is quite unreasonable to suppose that they ought to have taken steps of that kind to minimise their damage.

Another point was taken which I think has much greater force and it is a matter which has troubled me a good deal in this case. It is said, and the evidence was quite frank about this, that really, so far as the plaintiffs were concerned, they wanted some kind of a soft drink, as it is called, to sell in the shop and, provided that the customers would come in and buy it, and that they could lawfully sell it, that is all that they worried about, and that, as a quantity of drink had been supplied to the plaintiffs called "Summadrink," which was exactly the same as the cordial, and, as it was quite lawful to sell this stuff under the description of "Summadrink," all that the plaintiffs had to do was to paste over the word "Cordial" on these bottles the word "Summadrink." It was said that the defendants had actually offered to do this or, at any rate, to supply the plaintiffs in the autumn of 1942 with the necessary quantity of labels to carry out this operation.

The plaintiffs were not willing to do that. They thought that it sounded a rather curious procedure. Counsel for the plaintiffs says that that was a very reasonable attitude for the plaintiffs to take up. They had been sold a drink with a warranty that it was a cordial and complied with the Food and Drugs Act; they had had a circular telling them that the name had been changed to "Summadrink," because of its terrific popularity, not because the sale as a cordial might get them into trouble with the food inspectors; and it is said that, in those circumstances, when the suggestion is made that the retailer should go on selling the identical article, merely pasting over the word "Cordial" the word "Summadrink," it is, at any rate, not unreasonable that the retailer should say: No; I do not like the sound of this transaction and I am not going to do it.

I think, on consideration, that that argument of counsel for the plaintiffs is a sound one. Whether or not it might have resulted in the sale being quite legal is another matter, but I am not prepared to say that in all the circumstances of this case the plaintiffs were unreasonable when they said: No; we are not going to embark on a transaction of that kind.

What they did was this. In the first instance, on notifying the defendants of what had happened, when their solicitors wrote on Nov. 18, 1942, having made their complaint, they said:

> . . . including the last mentioned 16 gross and 7 dozen orange, our clients have an unsold stock of approximately 60 gross and we shall be glad to hear that you will accept a return of these goods, refunding to our clients the price they have paid therefor and will collect the goods from our clients premises at Station Road, Harrow, at your own cost and with your own labour and lorries.

The defendants were not willing to do that. If they had and, if these goods were saleable with this alteration in the labels, they could in that way have very much minimised their own damage. They did not do that ; but at a later A
stage, I am quite satisfied, they inspired someone else to write and make a tentative offer for the purchase of these goods.

That, again, the plaintiffs were not willing to do. They felt great doubt about selling these goods to anybody. What they did was to write the following letter to the solicitors acting for Collins Arden Products, Ltd. :

> If, with the consent of Messrs. Johnston & Sons (London), Ltd., your clients wish B
> to collect the unsold drinks, leaving six bottles of each description with our clients for the purpose of the action, and will collect the same from our clients premises at 279, Station Road, Harrow, at your clients' own expense, including labour, our clients will raise no objection, on your clients agreeing that such collection is without prejudice to the dispute between the parties in the present proceedings, but it must be clearly understood that our clients are not in any way re-selling the goods to Collins Arden Products, Ltd., and that they are not interested in any re-sale by that company and that their claim in the action is for damages for breach of contract against Johnston & C
> Son (London), Ltd. If Messrs. Johnson & Son (London), Ltd., agree to the course suggested and Collins Arden Products, Ltd., re-sell the unsold drinks, the purchase price should be deposited at a bank in the joint names of [the defendants' solicitors and themselves] . . . on the understanding that the same is paid to our clients in part satisfaction of any judgment for damages they may obtain against Messrs. Johnston & Son (London), Ltd., and in the event of our clients' action not succeeding be paid to Messrs. Johnston & Son (London), Ltd.

D

I think that that was quite a reasonable course to take, and I do not think that, in all the circumstances of this case, I can say that the plaintiffs were unreasonable in failing to take any step to mitigate their damage. They gave the defendants, at any rate in the first instance, full opportunity to do so, if they wished to assist in that matter, but they did not get any assistance. I, therefore, think that, apart from the question of "Summadrink," to which I have referred, the plaintiffs have made out their contention that these goods E
were in fact worthless to them or must be regarded as worthless, because to deal in them would have involved a breach of law.

With regard to "Summadrink," I think that the question is different. Of these goods 20 gross were "Summadrink" and were not labelled "Cordial" at all. It is true that the defendants contracted to supply cordials and it is true, on my finding, that "Summadrink" was not a cordial. None the less, F
I do not think that the plaintiffs have made out that to sell it as it was labelled in the shop under the description of "Summadrink" would have involved a breach of the Food and Drugs Act, 1938.

With regard to the breach of contract founded on the fact that the goods "called Summadrink" were not in fact cordials, I think that the answer is that the plaintiffs, although they might have rejected the goods, in fact accepted them, and have not established that they have suffered any damage, because, G
provided that they could sell "Summadrink" without infringing the Food and Drugs Act, the evidence proves that they could have sold it quite successfully in the shop without any trouble or difficulty. It is true that the customers who came into the shop seem to have preferred some other liquid which was for sale at some later date, because it was in a nicer looking bottle, but that was the only reason and not because it was not in fact a cordial or not called "Cordial.'

I think, therefore, in regard to "Summadrink," that the plaintiffs have not H
established that they have suffered any damage by reason alone of the failure to deliver something which was a cordial.

The result is that the plaintiffs are not bound to pay for the 16 gross 7 dozen of goods which were called Orange Flavoured Cordials and they cannot, in my view, complain that the 20 gross of "Summadrink" which they retained are worthless. They can complain that the 40 gross Lime and Lemon-Flavoured Cordial were worthless. The plaintiffs are entitled to recover against the defendants the sum of £341 1*s*. 6*d*., and they are also entitled to a declaration that they are not liable to pay anything for the 16 gross 7 dozen Orange Flavoured Cordial.

There is one matter that I have not mentioned, but which I think that I ought to refer to before I part with the case, to show that I have not overlooked it. On the making of the contract there was brought to the notice of Mears what was written on the labels of these bottles. These labels—they vary slightly—are substantially as follows: "Pure (Collard's) Cordial. Formula approved City & Borough Analysts. Cit. Sac. Essence, Benzoac." It was said that that gave the plaintiffs notice of what was in fact the contents of these bottles and it was said that they could not complain that they were getting something without sugar, because Mears had been told the contents which did not include sugar. I do not think that that affects the real issues in this case, at any rate so far as the warranty that these goods complied with the provisions of the Food and Drugs Act, 1938, is concerned, because the essence of that warranty was that this liquid was a cordial and that warranty is in no way impaired by reciting certain ingredients which are to be found in this bottle. It is common ground that Mears was not bothering his head about whether there was or was not sugar in this; what he did want to get was something which he could safely sell according to law as a cordial and it was warranted to him that this was a cordial. I think that that warranty has been broken, notwithstanding the fact that he was given notice in those terms of what the contents of the bottles were. The words appear in very small letters at the bottom of this slip label and, if I had thought it necessary to consider the question under sect. 6 of the Act, it might have been relevant to the question whether or not these labels were misleading.

There is no dispute that the sales of these goods by Collins Arden Products, Ltd., to Henderson & Liddell, Ltd., and by Collins Arden Products, Ltd., to Johnston & Son (London), Ltd., the defendants, and the sale by Henderson & Liddle, Ltd., to the defendants were all sales made in similar terms; they were all sales of cordials and they all contained express warranties that the goods complied with the Food and Drugs Act and, therefore, all my findings as between the plaintiffs and the defendants are equally applicable to these other contracts. The result is that there must be judgment for the plaintiffs against the defendants for £341 1*s.* 6*d.* There must be a declaration that the plaintiffs are not under any liability to the defendants for the price of the 16 gross 7 dozen bottles referred to in the statement of claim. The counterclaim fails and is dismissed with costs.

Then the defendants are entitled to recover against Henderson & Liddle, Ltd., the sum that they have been adjudged to pay to the plaintiffs, including the taxed costs that the defendants have to pay the plaintiffs and including the defendants' costs as between solicitor and client. The defendants are also entitled to a declaration against Collins Arden Products, Ltd., in the same terms as that to which I have referred.

Then Henderson & Liddell, Ltd., are in turn entitled to judgment against Collins Arden Products, Ltd., for all those sums in respect of which I have held them liable, with the addition of their costs as between solicitor and client as against Collins Arden Products, Ltd.

There was a claim by the plaintiffs by which, in addition to claiming that the goods are worthless, they claim that they are entitled to the loss of profit on the sale of these goods. With regard to that, I do not think that they have made out circumstances which justify them in including loss of profit in their claim. No evidence has been produced before me that they were unable to purchase other goods in the market at the time of breach of a similar quality at a similar price. For those reasons, I hold that they are not entitled to include in their damages the item of loss of profit.

Order accordingly.

Solicitors: *Boyce, Evans & Sheppard* (for the plaintiffs); *Stafford Clark & Co.* (for the defendants); *Mount, Sterry & Co.* (for the third party); *Lieberman, Leigh & Co.* (for the fourth party).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

GALOS HIRAD AND ANOTHER *v.* R.

[Privy Council (Viscount Maugham, Lord Thankerton and Sir Madhavan Nair), **May 18, 1944**].

Privy Council—Somaliland—Criminal law—Counsel retained by government to appear for defendants—Unavoidable absence of counsel on appeal—Hearing without counsel—Appeal not effectively heard — Poor Persons Defence Ordinance, 1939 (*Somaliland Ordinances*, 1939, *No.* 26), *s.* 3 (2).

The appellants were convicted of murder and sentenced to death in Somaliland. Appeals from conviction and sentence were duly made to the Protectorate Court of Appeal of the Somaliland Protectorate, which had very wide powers in effect amounting to a rehearing. Under the Poor Persons Defence Ordinance, 1939, counsel was retained by the government to conduct the defence at the trial and on appeal. Owing to war-time difficulties of transport counsel was unavoidably prevented from appearing at the appeal on the date fixed. The appeal judge made no inquiry as to the absence of counsel or as to the date on which he might be expected to arrive and, after hearing the appellants in person, dismissed the appeals. It was contended on behalf of the appellants that the appeal had not been effectively heard by virtue of the Poor Persons Defence Ordinance, 1939, s. 3 (2):—

Held: the provisions of the Poor Persons Defence Ordinance, 1939, are not merely directory, but give a right to accused persons to be represented by counsel. In the circumstances of this case, the appeal should have been adjourned to enable counsel to attend.

[**EDITORIAL NOTE.** The right to be represented by counsel has so long been secured in England that its importance is apt to be overlooked. Where the accused is illiterate and, in any case, normally speaks a different language to that in which the court conducts its proceedings, a provision for representation is more than directory and gives a substantive right. In such cases, if the accused desires to be represented by counsel, the court must make provision for it.

As to Representation by Counsel, see HALSBURY, Hailsham Edn., Vol. 9, p. 148, paras. 201, 202; and for Cases, see DIGEST, Vol. 14, pp. 247, 248, Nos. 2398-2413.]

Appeal by the accused from a decision of the Protectorate Court of Appeal of the Somaliland Protectorate. The facts are fully set out in the judgment of the Board delivered by Viscount Maugham.

J. D. Casswell, K.C., and *S. P. Khambatta* for the appellants.

Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Kenelm Preedy* for the Crown.

Viscount Maugham: In this case the appellants were charged in the Protectorate Court of the Somaliland Protectorate that on or about the first week in June, 1941, at Harawati Balleh, near Bohadle, in the district of Burao, Somaliland, each of them did participate in a criminal act, namely intentionally causing the death of Corporal Nur Musa, done by several persons in furtherance of the common intention of all and thereby committed the offence of murder punishable under the Indian Penal Code, ss. 34 and 302, which applies in the Protectorate.

The trouble in this case seems to have originated shortly after the Italian forces had been driven out of British Somaliland by His Majesty's forces in the year 1941 and was caused partly at least by the circumstances that rifles had been distributed by the government to a number of the inhabitants to enable them to resist or to protect themselves against the Italians. Rifles were in these circumstances distributed to certain *illaloes* or native watchmen. In June, 1941, one of the rifles so issued was missing, and it was thought to have come into the possession of a sub-tribe of the Dolbahanta, known as the Adan Hagar, to whom also some rifles had been distributed. It was in the course of steps taken by a party of 22 *illaloes* to recover the missing rifle, which, however, had already been sent by the Adan Hagar to an *illalo* post at a village called Garrero, that an affray took place between the *illaloes* and the Adan Hagar, resulting in the death of 11 of the *illaloes*. The two appellants were alleged to be in a party of the Adan Hagar consisting of about forty men armed with about 20 rifles and a light automatic.

The trial took place in the month of February, 1942, before Captain George Paterson, legal secretary, acting as Judge of the Protectorate Court, and three assessors who were Akils (members of a native court). Nine persons had been charged, but one was too ill to be tried. The appellants belonged to the Adan Hagar sub-tribe. All the defendants pleaded not guilty, the appellant Mohamed Ibrahim relying on an alibi and calling two witnesses in support of it. Counsel was retained by the government to defend the appellants (amongst others) at the trial and he conducted their defence. A number of witnesses were called.

It seems desirable to state very shortly the somewhat unusual circumstances which were dealt with in the judgment of the learned judge :

> In June, 1941, a party of 22 *illaloes* from Garrero, Bohotleh and Tallabur were investigating the loss of an *illalo* rifle, and the death of one Iman Mohamed (Abdi Hersi) and for these purposes went to Harawati, where there were some Dolbahanta rer (sub-tribe) Adan Hagar karias. It appears that the missing rifle had come into the possession of the Adan Hagar who decided to send it to the *illalo* post at Garrero. This was done and when the Adan Hagar heard that the *illaloes* were coming they sent a Dolbahanta Akil called Mohamed Abdi and an Elder called Farah Suleman to persuade them to go away. It seems that the *illaloes* did not believe that the rifle had been returned and they demanded another one as security, possibly because they suspected that this story might simply be a device to get them to return home empty-handed. Anyway, the two emissaries procured a rifle from the Adan Hagar which was handed over to the *illaloes*. The *illaloes* did not then leave the neighbourhood and a variety of reasons is suggested as to why they did not do so, the most likely being that as they had also come to investigate a murder they could not leave without finding out something about it.
>
> On the day in question, Mohamed Abdi sent to the Adan Hagar karias, as he said, to arrange for the supply of some milk to the *illaloes*, leaving them some distance away. Shortly after, he was followed by Farah Suleman and two of the *illalo* corporals who were themselves members of the Dolbahanta tribe. They had seen three men returning to the karias and thought they might be the men who had returned the missing rifle to Garrero. The remaining sixteen *illaloes* then went to the Harawati balleh (rain pond) to have a drink and sit in the shade. Ten of them actually reached the balleh, the other six having stopped to urinate some 300 yards to the west of it. Just then a party of rer (sub-tribe or clan) Adan Hagar rer Ali Adan appeared singing. They came from the east and passed about 400 yards south of the balleh going west. Their numbers were variously estimated and it seems that they were about twenty or thirty strong, half of whom were armed with rifles.
>
> According to the prosecution witnesses, this party suddenly saw the *illaloes* at the balleh, stopped and one of its members fired a round at them, followed by a volley. They say that very shortly after, the rer Ali Adan were reinforced by about forty men (armed with about twenty rifles and a light automatic) of the Adan Hagar rer Farah Adan who came from the karias to the west, and that the *illaloes* did not return the fire until after the arrival of the second party and one of their number had been hit. They defended themselves to the best of their ability but eventually they were completely surrounded by the Adan Hagar who killed eight of them including Cpl. Nur Musa by rifle fire and hand grenades. At this point the Adan Hagar had succeeded in filtrating between the two parties (of ten and six respectively) and the survivors rose up and fled. In the flight three men were killed, including Abdi Badet. All the accused persons were alleged to be in the second party except Mohamed Ibrahim, who was supposed to have been in the first party.

The judge at the conclusion of the trial addressed the three assessors. All three expressed the opinion that the appellant Mohamed Ibrahim was not present at the fight (accepting his alibi), one of them expressing the view that it was his brother who had been taken for him. All three assessors expressed the opinion that the appellant Galvos Hirad took part in the killing of Nur Musa. The judge found both appellants guilty of murder under the provisions of the Indian Penal Code, ss. 34 and 302, and sentenced them to death. They were then properly informed of their right to appeal and the time within which it was to be lodged. The other accused persons were acquitted.

The appellants duly appealed from the conviction and sentence to the Protectorate Court of Appeal of the Somaliland Protectorate. The Court of Appeal had very wide powers amounting in effect to a rehearing. Counsel was again instructed by the Government to appear as advocate for the appellants on the appeal, but, owing to difficulties which will be mentioned later, counsel was not able to land in British Somaliland before July 2, 1942, and the appeal was heard by the Appellate Court which consisted of Major E. P. S. Shirley, on June 22, 1942, in the absence of counsel. The appellate judge heard the appellants in person and decided the appeal on a consideration of the record of the case, the judgment of the trial judge and the petition of appeal which had been submitted by counsel. The appellate judge dismissed both appeals. The sentences of death were subject under the law to the confirmation of the military governor. The sentences of death were confirmed by Major E. P. S. Shirley (acting secretary to the government) by command of the military government on June 26, 1942. Special leave to appeal against the judgment of the Protectorate Court of Appeal was granted by His Majesty in Council on Aug. 10, 1943.

The main ground of the appeal is that there has been no proper hearing of the case before the Protectorate Court of Appeal for the reason that the counsel assigned to the appellants was, in the circumstances to be next mentioned, unable to appear at the hearing and to conduct the appeal. The Poor Persons Defence Ordinance, 1939, provides as follows :

> 3 (1) Where it appears for any reason, that it is desirable, in the interests of justice, that an accused person should have legal aid in the preparation and conduct of his defence at his trial and that his means are insufficient to enable him to obtain such aid—(*a*) a certifying officer upon the committal of the accused person for trial ; or (*b*) a certifying officer at any time after reading the depositions recorded in any inquiry held under Chapter XVI of the Administration of Criminal Justice Ordinance into any of the offences specified in the Schedule hereto ; or (*c*) a certifying officer upon the framing of a charge against a native on trial for an offence against the Indian Penal Code, s. 304, or an attempt at, or the abetment of, such offence, may certify that the accused person ought to have such legal aid, and if it is possible to procure an advocate, such accused person shall be entitled to have an advocate assigned to him.
>
> (2) Any such accused person to whom an advocate has been assigned under the provisions of subsect. (1) of this section, shall, if convicted at such trial, be entitled, on his lodging an appeal with the Protectorate Court of Appeal, to have an advocate assigned to him for the preparation and conduct of such appeal.

It appears that counsel assigned to the appellants is a barrister-at-law, enrolled to practice as an advocate of the Supreme Court of the Colony of Aden and permanently practising in that colony, and is the only person enrolled to practice in British Somaliland and has been in that position for some four years. He has to travel by sea from Aden to Somaliland when required by the British Somaliland Government to defend accused persons on trial on capital charges, and, as stated, he was retained by that government to defend the appellants both in the trial court and again on the appeal which he was told would take place on June 22, 1942, at Hargeisa. The government had been in the habit of asking the Movement Control Office to arrange passages for counsel when his presence as counsel was required, but owing to the war there was no shipping available between Aden and British Somaliland by which counsel could arrive on June 22 as instructed and, in fact, the authorities in British Somaliland, being well aware of the position, had written to him to make any other possible arrangements if there happened to be any chance shipping. The difficulty of the passage across the Gulf of Aden was well-known and on some previous occasions the Protectorate Court of Sessions had adjourned a hearing in order that counsel should have time to come to Somaliland. No steamship accommodation was in fact available for the journey so as to enable him to appear on June 22, 1942, and it is not suggested that he could be expected to come by a native dhow or similar vessel at this time. However, the case was called on June 22, 1942. The appeal court judge, so far as the note goes, made no inquiry with regard to the absence of counsel, or as to the date when he might be expected to arrive, but proceeded with the case. He heard some very short statements by the appellants and dismissed the appeals. In these circumstances it is contended on behalf of the appellants that there was a disregard of the Poor Persons Defence Ordinance, 1939, s. 3 (2), and that the appeal has accordingly not been heard in accordance with the provisions applicable in the Protectorate and must be treated as not having taken place with the result that there was nothing which the acting secretary to the government could validly confirm so far as the sentence of death was concerned.

It seems to their Lordships that the provisions as regards the right of a convicted person are not of a merely directory character. Subsect. (2) provides that poor persons in the position of the appellants having been convicted at the trial are entitled as of right on lodging an appeal to have an advocate assigned to them for the preparation and also for the conduct of such appeal. In the case of Somali natives who would probably be illiterate and, therefore, completely unable to make any criticism on the written judgment of the trial judge even if they could read it, it is clear that the provision is of the utmost importance where the penalty is the death sentence. There does not seem to be any reason for a very technical construction to be given to the subsection in question. The necessity for an assignment of counsel for the purpose of "conducting an appeal" seems to their Lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their Lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the judge sitting as the appeal court and, in the view of their Lordships, the provisions of the Poor Persons Defence Ordinance 1939, s. 3 so far as regards the appeal have as a matter of substance been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable counsel to attend and their Lordships are informed that he in fact arrived in British Somaliland on July 2, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal.

The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel. (See HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. IX, p. 226, *et seq.*) This is a much stronger case. Just as a conviction following a trial cannot stand if there has been a refusal to hear the counsel for the accused, so it seems to their Lordships an appeal cannot stand where there has been a refusal to adjourn an appeal in which the appellant was entitled as of right to be heard by a counsel assigned to him by the government who was unable, without any default on his part, to reach the court in time to conduct the appeal.

The result is that the appeal to the Protectorate Court of Appeal which appears to have been properly lodged has not been effectively heard. The present appeal must, therefore, be allowed. Steps must be taken to restore the appeal for hearing either with counsel in question or some other advocate properly assigned to the appellants under circumstances which will enable him to conduct the appeal. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Henry S. L. Polak & Co.* (for the appellants); *Burchells* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

LOVELL *v.* BLUNDELLS & T. ALBERT CROMPTON & CO., LTD.

[KING'S BENCH DIVISION (Tucker, J.), **March 24, 1944.**]

Factories and Workshops—Shipbuilding yard—Wet dock—Boiler repairs—Safety of staging—Factories Act, 1937 (c. 67), *ss.* 60, 106, 159 *Shipbuilding Regulations*, 1931 (*S.R. & O.*, 1931, *No.* 133).

Master and Servant—Liability of master—Provision of safe system of working.

Plaintiff, a boilermaker in the employ of the defendants, in the course of overhauling the boiler tubes of a ship in wet dock, erected a temporary plank staging about four feet from the ground, using a plank and wedge which he found in the engine room and stoke hold respectively. He did not ask to be supplied with any staging and made no inquiry or examination of the board as to its suitability for the purpose. The staging collapsed and he was injured:—

HELD: (i) the defendants were in breach of their common law duty to provide a proper plank and appliances.

(ii) there was no evidence of contributory negligence.

(iii) neither sect. 26 of the Factories Act, 1937, nor the Shipbuilding Regulations, 1931, Pt. II, reg. 11, applied to a ship in wet dock.

[**EDITORIAL NOTE.** It has been the subject of some doubt whether the effect of the Factories Act, 1937, is to give the Shipbuilding Regulations a wider scope and that they now apply to a ship in wet dock as well as one in dry dock. The judgment here decides against that extension and the balance of authority is, therefore, also against it.

As to Power of Secretary of State to make Regulations, see HALSBURY, Hailsham Edn., Vol. 14, pp. 614-616, para. 1169; and for Cases, see DIGEST, Supp., Factories and Shops, Nos. 138a-138j.]

Cases referred to:

*(1) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.
(2) *Wilson* v. *Merry & Cunningham* (1868), 40 Sc. Jur. 486; 34 Digest 207, *1697 xiv.*
(3) *Fitzpatrick* v. *C. & H. Crichton* (1921), Ltd. (1941), unreported.
*(4) *Garcia* v. *Harland & Wolff, Ltd.*, [1943] 2 All E.R. 477.
*(5) *Miller* v. *William Boothman & Sons*, [1944] 1 K.B.D. 337; [1944] 1 All E.R. 333.
(6) *Wood* v. *London County Council*, [1941] 2 K.B. 232; [1941] 2 All E.R. 230; 110 L.J.K.B. 641; 165 L.T.B.

Action for damages for personal injuries based on the common law obligation to provide a safe system of working and upon breach of statutory duty under the Factories Act, 1937. The facts are fully set out in the judgment.

S. R. Edgedale for the plaintiff.

Montague Berryman for the defendants.

Tucker, J.: This is a claim for damages for personal injuries suffered in an accident on Dec. 29, 1942, when the plaintiff was employed by the defendant company as a boilermaker on the S.S. Odysseus, which was in a wet dock at Millwall. He had previously been in the employ of Messrs. Harland & Wolff, and he was temporarily in the employment of the defendants for the purpose of cleaning or overhauling the boilers of this ship at this dock, and at the time of the accident he had been working there for about a week. The operation he was actually engaged upon was known as expanding the tubes in order to make them steam-tight, and in order to do that he had to go through what is known as the furnace door into the combustion chamber, that is to say, he had to climb through an aperture about 18 inches high, and then proceed to do this job of expanding the tubes. The plaintiff would be able to do the expanding of the tubes to the extent of about three-quarters of each section by standing on the floor, but in order to get at the last four or five tubes he had to get something which would raise him from the ground. The plaintiff is not a very tall man, and to reach the roof of this chamber, which is about 10ft. high, he erected a staging consisting of a plank placed about 4ft. from the ground, to enable him to stand upon it and do this work on the tubes. I will refer later to where he got the plank from, but having got it he said he wedged it on the stays which project about 2ins. The plaintiff said:

> I used an ordinary wooden wedge which I found lying about in the stoke hole. I wedged it from underneath, between the board and the inside of the combustion chamber.

Having thus got a platform about 4ft. from the ground upon which to stand, he proceeded with the operation of expanding the tubes. He had been doing this for about an hour when the expander became stiff and he had to exert some extra pressure on the toggle-bar, which is used for turning the expander in the tubes. When he exerted that extra pressure, the staging upon which he was standing collapsed with the result that he was thrown or fell to the ground, and, although he only fell a distance of some 4ft., he sustained serious injuries. He broke one ankle and sprained the other, a very unfortunate combination of events which has completely disabled him from doing any work of any kind for a very considerable period of time.

In those circumstances, this action is brought on various grounds, most of which are very familiar. It is said that the defendants have been guilty of a failure to comply with their common law obligations to provide proper and suitable plant and appliances and a safe system of working, and also that they have been guilty of a breach of their statutory duties; first, a breach of those duties imposed by the Shipbuilding Regulations made under the Factories Act, 1937, and, secondly, under sect. 26 of the Act itself. In the defence it is denied that there has been any breach of these duties, and it is further said, and was originally said only, that the plaintiff had been guilty of contributory negligence for this reason :

> . . . that he failed to erect the said staging securely and safely and/or to wedge the said staging in the customary manner and/or so as to prevent it moving and/or failed to exercise reasonable care for his own safety.

There were other defences which have been withdrawn, one of them being that A he had precluded himself from claiming in this action by having accepted compensation under the Workmen's Compensation Acts, but that is no longer a live issue. There was also a plea of *volenti non fit injuria*, which has been repeated again in an amendment to which I now refer, but as to which I have not heard much in the course of the argument, although I think it is still a live defence.

B I allowed an amendment to be made. First of all, there was a minor amendment with regard to traversing the allegations in the statement of claim that the board or plank on which the plaintiff was standing broke or gave way as alleged, but the main amendment was in regard to the contributory negligence relied upon. The further contributory negligence was in not taking proper steps to obtain a plank from the right place, namely, from the shipwrights working on the ship, whom it is said he ought to have known were working there, and C in having taken a plank which he himself found in the engine room, and using it without proper examination and inquiry.

I allowed those amendments to be made for the reason that in the course of the case it appeared at one time as if a good deal of reliance was being placed on the allegation that the accident was brought about by the board breaking, which might indicate that the board had had some latent defect, and would not stand up to the plaintiff's weight, or the plaintiff's weight D having regard to the extra pressure at the time he was using this particular tool, and there was some question whether or not in the statement of claim it should not be specifically stated that the board was broken, whereas the allega- had simply been that the staging had given way. I considered the allegations in the statement of claim were sufficient to cover either of those events, but I thought that it was quite probable the defendants might be taken by surprise by finding that they had to meet, or might have to meet, a case of a board which E had broken and given way because it had been defective all along. Furthermore, it was not until the evidence of the plaintiff was given in the witness box, I think, that there was any indication to the defendants as to where in fact the plaintiff had got the board, and when it became apparent where he had obtained the plank, I thought it only right and fair to allow the defendants to raise any defence they desired to raise founded on this fact, and the defence F which they have sought to raise is, that he was negligent in getting the plank from the place where he says he did, without proper examination, and so forth.

The evidence before me is insufficient to satisfy me precisely what did happen, that is to say, whether the board broke because it was rotten. We have had very little evidence to suggest that it was, and, therefore, I am left in doubt whether there was a defect in the board, whether it had not been as tightly fitted as it might have been or perhaps should have been, that is to say, some error on the G part of the plaintiff in fitting in the wedge, or whether the board might not have been quite of the precise dimensions necessary to fill the space required. Those are all probabilities, and the evidence is insufficient to satisfy me precisely what did happen, but there is no doubt the staging did in fact give way or collapse, and that the plaintiff fell on to the floor.

It is said by the plaintiff that the first duty of an employer is to provide his employees with proper materials and to provide a safe system, and I now refer H to the well-known speech of LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (1). On p. 81 ([1937] 3 All E.R., at p. 642), LORD WRIGHT is quoting from LORD CAIRNS in *Wilson* v. *Merry & Cunningham* (2), and he says this :

> What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. To this must be added a third head, namely, to provide a proper system of working. By this is meant, not a warranty, but a duty to exercise (by himself and his servant and agents) all reasonable care.

Then later on, at p. 84 ([1937 3 All E.R., at p. 644]) he says :

> I think the whole course of authority consistently recognises a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow-servant or a merely temporary failure to keep in order or adjust plant and appliances or a casual departure from the system of working . . .

It is to be observed that one of the continuing obligations is the provision of proper plant and appliances. Did the defendants here provide, as it was their duty to do, proper or any plant and appliances ? What the plaintiff was engaged upon was not an operation which was inherently hazardous; it was the kind of operation in which he was put in the position in which many people are when they have to hang a picture in their own house, or do things of that kind. He had to have a plank or staging at some distance from the ground, in this case only 4ft., but none the less a plank upon which a man has to stand to perform an operation of this kind is, in my opinion, quite undoubtedly one of the appliances which it is the duty of the employer to provide, and it must be a proper appliance and reasonably safe. The principal thing I have to decide in this case is whether the defendants can be said to have supplied those appliances at all, and I have come to the conclusion that they did not.

The practice of these defendants apparently was to leave it to the boilermaker to obtain his own plank or staging, and, it is said, the customary thing was for the boilermaker, when he wanted a plank for a purpose of this kind, to go along to the shipwrights and give them the necessary dimensions of the plank in question, and the shipwrights would then cut him off a suitable plank, using their judgment as to what wood was suitable, because they would know what was the proper kind of wood to give him and would supply him with a suitable plank, and the man would then go back into the combustion chamber and put up the plank himself and use the wedge. The evidence was that it was not an operation in which it is impossible for a shipwright to come in and put the plank up and then go out and leave it erected for the man to come in and work on—that would be possible, but it would leave very little room, at any rate in this particular chamber, to get past the board in certain positions, and, therefore, it is very much easier for the man who is going to work on the plank or staging to put it up himself, and to let it down himself when he is coming out.

Whatever may be the usual practice of the defendants, this man had only been in their service for about a week, and it is not suggested that it had ever been explained to him precisely where he was to go to obtain the necessary plank, or whom he was to ask, or where that person was to be found. These matters are relevant only on the general practice of boilermakers. It was said : Well, a boilermaker will know from long experience that the proper thing to do is to find out if there are any shipwrights about, and then to ask them for the necessary plank or planks. In fact one independent witness called for the defendants said that the general practice was for any boilermaker to use any old bit of dunnage he found lying about on a ship which he thought to be suitable. There is no evidence that was the practice of the defendants, but, if they were relying merely upon what is said to be the common, general practice of boilermakers, that might be one of the things which might happen if they were not careful to inform a man where to obtain the proper material for this purpose. I am not deciding in this case that it is an improper or an unsafe system to allow a man to erect his own plank, although he is not a shipwright, when he has to expand the boiler tubes. I say nothing about that. That may be so in some cases. I am assuming there is nothing improper in that at all, but none the less I do hold that it is necessary for the employer to provide the necessary material that the man may use in that particular way himself, and, if he is an experienced man, speaking for myself, I see no reason why it should not be left to him to erect. In this case, in my view, there was no system prevailing in regard to this. The man had not been directed where to get it from. It was merely left to his own common sense, and he was not, in fact, ever provided with any material at all, with the result—and the not unexpected result—that he merely looked about to see what he could find, and he found a plank in the engine room, forming a floor board of some kind in the engine room, and a wedge in the stoke hole. We have no evidence whether it was a suitable one or what it was. I assume it was one which appeared to him to be suitable, and then he erected the staging himself, and later on it collapsed.

The defendants have certainly not established to my satisfaction that it collapsed as a result of any negligence on the plaintiff's part. It is possible it did, but there is certainly no evidence on which I can hold that he improperly put it up, and, as I have said before, the only thing I know about this staging is that it collapsed, and I know it had been erected without the defendants having supplied the necessary and proper material for it. In those circumstances, I think the defendants are in breach of their common law obligation which is laid down in the words I have already quoted of LORD WRIGHT in *Wilsons & Clyde Coal Co.* v. *English* (1), and, therefore, on that ground, I think the plaintiff is entitled to succeed, and the defendants have not established their original plea, nor their amended plea of contributory negligence, nor does the case amount to one in which the maxim of *volenti non fit injuria* can apply.

However, I may be wrong about all this, and, therefore, it becomes necessary to consider what other remedy the plaintiff may have on the facts as I have found them. It is said, first of all, that he is entitled to succeed against the defendants because they are in breach of the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901, s. 79, in respect of the construction and repairing of ships in shipbuilding yards. Two of these regulations are relied upon, and the one which I think is most helpful to the plaintiff is in Pt. II, and is reg. 11, which is as follows :

> A sufficient supply of sound and substantial material shall be available in a convenient place . . . for the construction of staging. All staging shall be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed. All planks intended to be used for staging shall be carefully examined before being taken into use, be re-examined before they are used again after the stages have been dismantled, by a person qualified to detect faults in timber.

Reliance is also placed on reg. 1, which deals with means of access :

> Safe means of access shall be provided to all parts of the ship to which persons employed may be required to proceed in the course of their employment.

I will deal first of all with that one.

Assuming that reg. 1 applies to this ship in this wet dock, in my view, on the facts in this case, there was no failure to provide a safe means of access. My reading of that is that that means a safe way of getting to his work, not a safe appliance for the purpose of performing his work when he has got there : that is a different thing altogether. If a workman is painting the side of a ship and so forth, there has to be safe provision made for him to get into that position, but once he has got there, if after that something goes wrong, it must be due to a failure to provide or maintain staging or whatever it is which is necessary to keep him in that position. I do not think on the facts in this case the regulations requiring the provision of safe means of access is at all applicable.

On the other hand, reg. 11 clearly is applicable, and the defendants are clearly in fault in regard to their statutory duty there laid down, if these regulations apply to a wet dock at all. That raises what, to my mind, is a problem that is not at all easy of solution, and I am glad to think that both STABLE, J., and ATKINSON, J., have found it not very easy, and that they have each arrived at different conclusions in regard to this matter. The question arises in this way. Counsel for the plaintiff has to show that the regulations to which I have referred, and which were made under the 1901 Act, are applicable to this case, and the way he does it is this. First, he refers to the Factories Act, 1937, s. 106, and that is in these words so far as is material :

> Subject as hereinafter in this section provided, the provisions of this Act hereinafter in this section mentioned shall apply to any work carried out in a harbour or wet dock in . . . repairing, refitting, painting . . . or breaking up a ship . . . that is to say : (*b*) the provisions of Pt. IV with respect to special regulations for safety and health.

Put shortly, that says that, subject as hereinafter provided, the provisions of this Act hereinafter mentioned, namely, the provisions of Pt. IV in respect of special regulations for safety and health—and for that I would substitute sect. 60 because that is the one which applies—shall apply to any work carried out in a wet dock on a ship. It then goes on :

> . . . and for the purpose of such provisions the ship shall be deemed to be a factory, and any person undertaking such work shall be deemed to be the occupier of a factory.

Therefore it being provided that sect. 60 is applicable, we turn to sect. 60 to see what it says, and we see :

> Power to make special regulations for safety and health. (1) Where the Secretary of State is satisfied that any manufacture, machinery, plant . . . is of such a nature as to cause risk of bodily injury to persons employed in connection therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Then power is given to make special regulations prohibiting the employment of or modifying the employment of persons during certain hours, and prohibiting the use of certain materials, and such special regulations may :

> . . . modify or extend with respect to any class or description of factory any provisions of Pt. I, Pt. II or this Part of this Act, being provisions imposing requirements as to health or safety ; and may impose duties on owners, employed persons and other persons, as well as on occupiers.

The result of that is that the Secretary of State now has power under the section to make those necessary regulations, if he has come to the conclusion that the work carried on may cause risk of bodily injury to persons employed in connection therewith. Once he makes those regulations, sect. 106 comes into force and it enables him to make them applicable to ships in dry docks. He has not done any such thing as far as I am aware, but it is said that by reason of sect. 159 he must be deemed to have done it, and the regulations which have in fact been made under the 1901 Act must be deemed to be regulations which he has made under sect. 60 after having had in mind the circumstances necessary for him to make such regulations. Sect. 159 is as follows :

> (1) Subject as hereinafter provided the enactments referred to in the Fourth Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule : Provided that any order, regulation, byelaw, requirement, appointment, or agreement made or certificate (other than a certificate given under the Factory and Workshop Act, 1901, s. 14), or notice given under any enactment repealed by this Act which is in force at the commencement of this Act shall continue in force and shall have effect as though it had been made or given under this Act, and, in so far as it could have been made or given under a particular provision of this Act, shall be deemed to have been made or given under that provision, and any such order or regulation made by the Secretary of State under a power which is exercisable under a corresponding provision of this Act by a different class of instrument, shall be deemed to be an instrument of that class, so, however, that any order or regulation of the Secretary of State which continues in force by virtue of this proviso may, in so far as may be necessary to bring it into conformity with this Act, be varied or revoked by an order made by him under this Act.

It is said that the effect of that section is that, as the regulations relied upon could have been made under sect. 60, they must be deemed to have been made under that particular section, and, of course, they are in full force and effect, notwithstanding the repeal of the 1901 Act under which they were made.

Different views about this matter have been taken by STABLE, J., and ATKINSON, J. STABLE, J., had to decide the matter in *Fitzpatrick* v. *C. & H. Crighton, Ltd.* (3), which is unreported, but part of the judgment in that case is set out in *Garcia* v. *Harland & Wolff, Ltd.* (4), the decision of ATKINSON, J., at p. 481. STABLE, J., took the view that the result of the section to which I have referred was to make these regulations applicable to a ship in a wet dock because they were deemed to have been made under sect. 60. ATKINSON, J., took the reverse view, and he said :

> Regretfully, I cannot bring myself to take the same view. It seems to me that all that those final words in sect. 106 do is to say this : " and for the purposes of such provisions," that is the provisions of sect. 60, " the ship shall be deemed to be a factory." It does not say " for the purposes of existing regulations the ship shall be deemed to be a factory," but " for the purpose of such provisions," that is, that the Secretary of State under sect. 60 shall have power to make regulations which shall refer to a factory in a wet dock, and to impose upon persons undertaking work there any duties which he thinks fit. I am asked to say that these regulations are to be deemed to be recast,

but in what way and in what form is the recasting to take effect ? I cannot for one moment think there is anything in the sections of the Act of Parliament which is to change the wording of the regulations. They are deemed to be kept alive. If they had been made under one form of order, and this Act required a different form of order, those regulations could be deemed to be made under the different form of order, and it seems to me that the final words of sect. 159 (1) really support very strongly the view which I take.

The quite recent case of *Miller* v. *William Boothman & Sons, Ltd.* (5), dealt with the Woodworking Machinery Regulations, 1922, which had originally been made under the Act of 1901, and the Court of Appeal had to consider the effect of the Factories Act, 1937, ss. 60 and 159, and, put shortly, the Court of Appeal decided that the Factories Act, 1937, s. 60, permits regulations to be made by the Secretary of State modifying the absolute obligation imposed by sect. 14 of the Act, and they arrived at that decision in this way. The Woodworking Machinery Regulations, 1922, had the effect of modifying sect. 14 of the Act, provided that you could modify an Act of Parliament by regulations, and as I understand *Miller* v. *Boothman & Sons, Ltd.* (5), the court decided that having regard to the language of sects. 159 and 60 of the Act of 1937, the regulations made under the Act of 1901 were not only kept alive, but were given amending powers. They recognised that regulations made under that former Act could modify the *prima facie* obligations of sects. 60 and 14 of the Act of 1937. Sect. 60 (2) (*c*) uses these words :

> . . . modify or extend with respect to any class or description of factory any provisions of Pt. I, Pt. II, or this Part of this Act, being provisions imposing requirements as to health or safety.

I do not find anything in that case which really helps me in deciding whether the view taken by STABLE, J., or that taken by ATKINSON, J., is the correct one. It does not seem to me that the point is really touched by *Miller* v. *Boothman & Sons* (5), and on the whole the reasoning of ATKINSON, J., is that which commends itself to my mind, and that is the decision which I propose to follow. If that is not right, I think the result of these sections would be to make any regulations that had been made under the Act of 1901, which could be brought within the provisions of sect. 106 of the Act of 1937, applicable to ships in dry docks, even though they purported to be dealing with some different subject-matter altogether, and I cannot believe that that is what was intended by the section.

In this particular instance, it is sought to make use of regulations which have been made about something which comes very near to a ship in a wet dock, namely, a ship in a dry dock, but they might have been referring to something quite different altogether, and I think that is an additional reason for coming to the conclusion that the reasoning of ATKINSON, J., is to be preferred.

There is another matter which I have to consider, because counsel for the plaintiff says : Well, if the regulations do not apply, I rely on the Factories Act, 1937, s. 26, which provides as follows :

> There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work.

That is dealing with a factory, and counsel for the plaintiff says it also applies to a ship in a wet dock, and with regard to that I have already indicated under reg. 1 that in my view on the facts of this case there was no failure to provide a safe means of access. But, if I am wrong about that, then I do not think sect. 26 applies to a ship in a wet dock at all. If it does, it can do so only because a ship must come within the definition of " factory " in sect. 151. Counsel for the plaintiff relies on sect. 151 (4). Sect. 151 reads in this way :

> (1) Subject to the provisions of this section, the expression " factory " means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely (*a*) the making of any article or of part of any article ; or (*b*) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article ; or (*c*) the adapting for sale of any article ; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control. And (whether or not they are factories by reason of the foregoing definition) the expression " factory " also includes

the following premises in which persons are employed in manual labour, that is to say: (i) any yard or dry dock (including the precincts thereof) in which ships or vessels are constructed, reconstructed, repaired, refitted, finished or broken up . . . (4) Any workplace in which, with the permission of or under agreement with the owner or occupier, two or more persons carry on any work which would constitute the workplace of a factory if the persons working therein were in the employment of the owner or occupier, shall be deemed to be a factory for the purposes of this Act, and, in the case of any such workplace not being a tenement factory or part of a tenement factory, the provisions of this Act shall apply as if the owner or occupier of the workplace were the occupier of the factory and the persons working therein were persons employed in the factory.

I think there are a number of reasons why sect. 26 does not apply to a ship in a wet dock. First, it is to be observed that nowhere else, except in sect. 106, is any provision made with regard to ships at all, and I think it would be very remarkable that such a thing as a ship, as to which there is so much legislation, should be inferentially included as a factory in a definition of this kind. Secondly I consider the enumeration of premises which are to be considered as factories, whether or not they come under the general description which includes "any yard or dry dock . . . in which ships or vessels are constructed," goes to show it was never the intention of the legislature to include a ship in a wet dock or a ship on the high seas, and I can see no reason why, if counsel for the plaintiff is right, a ship on the high seas should be excluded if somebody happened to be carrying on an operation of repairing some part of it on the high seas.

I also think that an operation of this kind, cleaning or repairing boilers, cannot be said to have been work carried on by way of trade or for purposes of gain. The argument is that the boiler is to be regarded as the premises of a factory for the purpose of its business, but I do not think the mere fact that the shipowner was having the boiler repaired makes it possible to say the premises were premises in which work was carried on by way of trade or for purposes of gain. Finally, I would say, without referring in detail to the judgment of MacKinnon, L.J., in *Wood* v. *London County Council* (6), that all his observations in that case seem to me to apply with even greater force to the ship in this case than they did to the kitchen in that case, and that is another reason for holding that it could never have been intended to include a ship in this definition of a factory, and I am, therefore, of opinion that, if the plaintiff had to ground his case either on the Shipbuilding Regulations or on the statute, he would have failed, but, as I have already indicated, I think he succeeds on his cause of action based upon the common law duty of the employer with regard to the provision of material and a safe system of working.

Judgment for the plaintiff for £1,500 *damages and costs.*

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

CHICHESTER DIOCESAN FUND AND BOARD OF FINANCE (INCORPORATED) *v.* SIMPSON AND OTHERS.

[House of Lords (Viscount Simon, L.C., Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds), **April 26, 27, May 1, 2, June 21, 1944.**]

Charities—Charitable purposes—Such charitable institution or institutions or other charitable or benevolent object or objects—"Or benevolent"—Validity.

The testator by his will gave £5,000 each to his executors, certain private legacies, certain sums to named charities, and the residue of his estate on trust "for such charitable institution or institutions or other charitable or benevolent object or objects as his executors might in their absolute discretion select." After the estate had been wound up and the residue distributed to numerous charities, those entitled on an intestacy claimed that the residuary gift was not a good charitable bequest by reason of the words "charitable or benevolent." For the appellants it was contended that the word "benevolent" when coupled with the word "charitable" even by the disjunctive "or" took its colour from its associate or was merely exegetical, and that, therefore, the gift was a valid charitable one:—

Held [Lord Wright *dissenting*]: upon the true construction of the clause, the words " or benevolent " *prima facie* indicated an alternative purpose and, as there was nothing in the will to justify a different interpretation, the gift was void for uncertainty.

Decision of the Court of Appeal ([1941] 1 All E.R. 193) *affirmed.*

[**EDITORIAL NOTE.** The authorities are very strongly in favour of the majority decision in this case and it has long been recognised among practitioners in such matters that, while a gift for " charitable and benevolent " purposes is valid, a gift for " charitable or benevolent " purposes is invalid. The rule no doubt works harshly in cases, but the present decision has now put the rule, much as it is disliked, beyond question.

As TO ALTERNATIVE CHARITABLE OR OTHER PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 167-169, para. 221 ; and FOR CASES, see DIGEST, Vol. 8, pp. 294-297, Nos. 719-740.]

Cases referred to :

*(1) *Houston* v. *Burns*, [1918] A.C. 337 ; 8 Digest 297, *739* ; 87 L.J.P.C. 99 ; 118 L.T. 462.
(2) *Blair* v. *Duncan*, [1902] A.C. 37 ; 8 Digest 295, *721* ; 71 L.J.P.C. 22 ; 86 L.T. 157.
*(3) *A.-G. for New Zealand* v. *Brown*, [1917] A.C. 393 ; 8 Digest 298, *748* ; 86 L.J.P.C. 132 ; 116 L.T. 624.
*(4) *A.-G. for New Zealand* v. *New Zealand Insurance Co., Ltd.*, [1936] 3 All E.R. 888 ; Digest Supp.
(5) *Hay's Trustees* v. *Baillie*, [1908] S.C. 1224 ; 8 Digest 296, *c*.
(6) *Paterson's Trustees* v. *Paterson*, [1909] S.C. 485 ; 8 Digest 296, *d*.
(7) *Mackinnon's Trustees* v. *Mackinnon*, [1909] S.C. 1041 ; 8 Digest 296, *e*.
(8) *Reid's Trustees* v. *Cattanach's Trustees*, [1929] S.C. 727 ; Digest Supp.
(9) *Bourne* v. *Keane*, [1919] A.C. 815 ; 8 Digest 251, *106* ; 89 L.J.Ch. 17; 121 L.T. 426.
(10) *A.-G.* v. *National Provincial & Union Bank of England Ltd.*, [1924] A.C. 262 ; Digest Supp. ; 93 L.J.Ch. 231 ; 131 L.T. 34 ; *affg.* S.C. *sub nom. Re Tetley, National Provincial & Union Bank of England, Ltd.* v. *Tetley*, [1923] 1 Ch. 258.
(11) *Income Tax Special Purposes Commrs.* v. *Pemsel*, [1891] A.C. 531 ; 8 Digest, 242, *1* ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53.
(12) *Jones* v. *Williams* (1767), Amb. 651 ; 8 Digest 256, *172*.
(13) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633 ; 8 Digest 327, *1099* ; 52 L.J.Q.B. 193 ; 48 L.T. 293 ; *revsg.* S.C. *sub nom. Saltash Corpn.* v. *Goodman* (1881) 7 Q.B.D. 106.
(14) *Wright* v. *Hobart* (1723), 9 Mod. Rep. 64 ; 8 Digest 318, *993*.
(15) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451 ; 8 Digest 296, *731* ; 65 L.J.Ch. 700 ; 74 L.T. 706.
(16) *Pigot's Case*, 11 Co. Rep. 27 (*b*) ; 12 Digest 360, *2991*.
(17) *Re Douglas, Obert* v. *Barrow* (1887), 35 Ch.D. 472 ; 8 Digest 298, *754* ; 56 L.J.Ch. 913 ; 56 L.T. 786.
(18) *Hunter* v. *A.-G.*, [1899] A.C. 309 ; 8 Digest 291, *687* ; 68 L.J.Ch. 449 ; 80 L.T. 732 ; *revsg. S.C. sub nom. Re Hunter, Hood* v. *A.-G.*, [1897] 2 Ch. 105.
(19) *Re Best, Jarvis* v. *Birmingham Corpn.*, [1904] 2 Ch. 354 ; 8 Digest 297, *744* ; 73 L.J.Ch. 808.
(20) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522 ; 8 Digest 293, *705*.
(21) *James* v. *Allen* (1817), 3 Mer. 17 ; 8 Digest 293, *708*.
*(22) *Ellis* v. *Selby* (1836), 1 My. & Cr. 286 ; 8 Digest 295, *726* ; 5 L.J.Ch. 214.
*(23) *Williams* v. *Williams, Williams* v. *Kershaw* (1835), 5 Cl. & Fin. 111, *n* ; 8 Digest 297, *747* ; 1 Keen, 274, *n.* ; 5 L.J.Ch. 84.
(24) *Dolan* v. *MacDermot* (1868), 3 Ch. App. 676 ; 8 Digest 298, *751*.
(25) *Re White, White* v. *White*, [1893] 2 Ch. 41 ; 8 Digest 249, *89* ; 62 L.J.Ch. 342 ; 68 L.T. 187.
(26) *Wilkinson* v. *Lindgren* (1870), 5 Ch. App. 570 ; 8 Digest 296, *732* ; 39 L.J.Ch. 722 ; 23 L.T. 375.
(27) *Re Jarman's Estate, Leavers* v. *Clayton* (1878), 8 Ch.D. 584 ; 8 Digest 295, *727* ; 47 L.J.Ch. 675 ; 39 L.T. 89.
(28) *Bowman* v. *Secular Society, Ltd.*, [1917] A.C. 406 ; 8 Digest 265, *270* ; 86 L.J.Ch. 568 ; 117 L.T. 161.
(29) *Re Sutton, Stone* v. *A.-G.* (1885), 28 Ch.D. 464 ; 8 Digest 298, *753* ; 54 L.J.Ch. 613.
(30) *Re Morgan, Morgan* v. *Morgan*, [1893] 3 Ch. 222 ; 44 Digest 540, *3577* ; 62 L.J.Ch. 789 ; 69 L.T. 407.
(31) *Grey* v, *Pearson* (1857) 6 H.L.Cas. 61 ; 44 Digest 533, *3502* ; 26 L.J.Ch. 473 ; 29 L.T.O.S. 67.
(32) *Re Ludlow, Bence-Jones* v. *A.-G.* (1923), 93 L.J.Ch. 30 ; Digest Supp.
(33) *Grimond* v. *Grimond*, [1905] A.C. 124 ; 8 Digest 296, *734* ; 74 L.J.P.C. 35 ; 92 L.T. 477.

APPEAL by the charities concerned from a judgment of the Court of Appeal (LORD GREENE, M.R., CLAUSON and GODDARD, L.JJ.), dated Jan. 15, 1941, reported [1941] 1 All E.R. 193, reversing a decision of FARWELL, J., dated

July 18, 1940, reported [1940] 3 All E.R. 538, where the facts are fully set out. In the courts below the case was reported *sub nom Re Diplock, Wintle* v. *Diplock.*

C. Harman, K.C., and *Humphrey H. King* (for *W. S. Wigglesworth* on war service) for the appellants.

Charles Romer, K.C., and *C. L. Fawell* for the respondents.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *H. O. Danckwerts* for the Crown.

Viscount Simon, L.C.: My Lords, the will with which we are concerned in this appeal is one in which a public-spirited testator has directed his executors to apply the very substantial residue of his property:

> . . . for such charitable institution or institutions or other charitable or benevolent object or objects in England . . .

as they should select. The Court of Appeal (Lord Greene, M.R., Clauson and Goddard, L.JJ.), overruling Farwell, J., has decided that this is not a valid testamentary disposition.

After studying the powerful judgment of Lord Greene, M.R., and weighing the arguments which have been presented to the House, I cannot doubt that a gift expressed in the terms which I have quoted, in the absence of context to vary its *prima facie* meaning, is void for uncertainty.

The fundamental principle is that the testator must by the terms of his will himself dispose of the property with which the will proposes to deal. With one single exception, he cannot by his will direct executors or trustees to do the business for him. That exception arises when the testator is minded to make gifts for charitable purposes, and where he directs his executors or trustees, within such limitations as he chooses to lay down, to make the selection of charities to be benefitted. This exception from the general principle that the testator has to decide in his will the specific destination of his property is allowed because of the special favour which the English law shows to charities and the conception of what is charitable for such purposes has been elaborately worked out so that the courts are able to determine whether a particular gift is charitable or not. But when, as here, the expression is "charitable or benevolent," it is impossible to attribute to the word "benevolent" an equal precision, or to regard the courts as able to decide with accuracy the ambit of the expression. It is not disputed that the two words "charitable" and "benevolent" do not ordinarily mean the same thing; they overlap in the sense that each of them, as a matter of legal interpretation, covers some common ground, but also something which is not covered by the other. It appears to me that it inevitably follows that the phrase "charitable or benevolent" occurring in a will must, in its ordinary context, be regarded as too vague to give the certainty necessary before such a provision can be supported or enforced.

Then, is there any special context in this will which would justify a different interpretation? I have listened with much sympathy to the efforts to find one, but it does not seem to me, notwithstanding the opinion of the late Farwell, J., that there is any context which might give to the impeached phrase a special meaning. The conjunction "or" may be sometimes used to join two words whose meaning is the same, but, as the conjunction appears in this will, it seems to me to indicate a variation rather than an identity between the coupled conceptions. Its use is analogous in the present instance to its use in a phrase like "the House of Lords or the House of Commons," rather than to its use in a phrase like "the House of Lords or the Upper Chamber."

I regret that we have to arrive at such a conclusion, but we have no right to set at nought an established principle such as this in the construction of wills, and I, therefore, move the House to dismiss the appeal.

Lord Macmillan: My Lords, the law, in according the right to dispose of property *mortis causa* by will, is exacting in its requirements that the testator must define with precision the persons or objects he intends to benefit. This is the condition on which he is entitled to exclude the order of succession which the law otherwise provides. The choice of beneficiaries must be the testator's own choice; he cannot leave the disposal of his estate to others. The only latitude permitted is that, if he designates with sufficient precision a class of persons or objects to be benefited, he may delegate to his trustees the selection of individual persons or objects within the defined class. The class must not be described in terms so vague and indeterminate that the trustees are afforded no effective guidance as to the ambit of their power of selection : see *Houston* v. *Burns* (1), per VISCOUNT HALDANE, at pp. 342, 343.

Unfortunately for the efficacy of their testamentary dispositions, testators or their advisers, as the many reported cases show, frequently fail to observe this rule and by the language which they employ leave their trustees at large in the selection of the persons or objects to be benefited, with the result that the bequest is held void for uncertainty. Thus a bequest to such public purposes as the testator's trustees may select is not " within the description of a particular class of individuals or objects " (per LORD DAVEY in *Blair* v. *Duncan* (2), at p. 44) ; nor is a bequest in favour of benevolent purposes to be selected by the testator's trustees sufficiently specific (see, e.g., *A.-G. for New Zealand* v. *Brown* (3), and *A.-G. for New Zealand* v. *New Zealand Insurance Co., Ltd.* (4)).

One class of objects, however, notwithstanding its generality and comprehensiveness, namely charitable purposes, has always been accepted as sufficiently definite to satisfy the rule, because of the favour which the law extends to charity. Most of the cases which have arisen have been due to a tendency on the part of testators to associate with the word " charitable " other words of vague import. The present is one of these. Here the bequest is in favour of :

> . . . such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select.

As the law of England stands it is impossible to sustain this bequest as valid. The testator has empowered his executors to distribute the residue of his estate *inter alia* among either charitable objects or benevolent objects and has thereby empowered them to devote the whole bequest, if they please, to benevolent objects, a class of objects which has over and over again been held by the courts to be too uncertain. Alike on authority and on principle the bequest is accordingly void.

In construing a will it is proper to read the instrument as a whole. By doing so it may sometimes be found that a testator has used a word or a phrase in a sense of his own, different from its ordinary connotation. If a testator were to make a bequest in favour of benevolent objects, adding " by which I mean charitable objects," the bequest might well be held to be valid. In the present instance, however, I cannot find any context either in the words of the bequest itself or elsewhere in the will which would justify imparting to the testator's use of the word " benevolent " any other than its ordinary wide signification. If the testator had written " charitable and benevolent " instead of " charitable or benevolent " the bequest would, on the authorities, have been sustained, for it would then have been read as in favour of such benevolent objects as are charitable or such charitable objects as are benevolent, charity in either way predominating. But again I find no warrant for reading conjunctively two words which the testator has expressly disjoined.

I confess it is somewhat disconcerting to find that the Court of Session in Scotland has in a number of instances taken a different view in construing words very similar to those now under consideration by this House. Thus it has been held competent for a testator in Scotland to empower his trustees to make a selection among " societies or institutions of a benevolent or charitable nature," *Hay's Trustees* v. *Baillie* (5) ; or among " charities or benevolent or beneficent institutions," *Paterson's Trustees* v. *Paterson* (6) ; or among " charitable or philanthropic institutions," *Mackinnon's Trustees* v. *Mackinnon* (7). The topic is very fully discussed in *Reid's Trustees* v. *Cattanach's Trustees* (8) where the introduction of " public institutions " as an alternative was held fatal to the bequest. Yet in Scots law the principle that a testator must himself designate his beneficiaries and cannot delegate to others the selection of beneficiaries from an indefinite class is equally well established ; and so too is the recognition of charitable objects as a sufficiently definite class.

It would be out of place to discuss here the validity of the processes of reasoning by which the courts in Scotland reached the decisions which I have just cited. I may remark that they seem to have turned mainly on an interpretation of the monosyllable " or," interposed between the word " charitable " and the other words in question, not as separating distinct and contrasted classes of objects but rather as an exegetical link between convertible and equivalent synonyms. The fact that in Scotland the term "charitable" has in law a less rigidly technical and artificial meaning than in England may also have had something to do with it. But I must not allow myself to be enticed into a further exploration of what for the present purpose is a foreign field, however attractive. This is an English case, and in my opinion the decision of the Court of Appeal is in conformity with the law of England and should be affirmed.

LORD WRIGHT: My Lords, the testator in this case after various bequests, left the residue of his estate, to his executors to apply to:

> . . . such charitable institution or institutions or other charitable or benevolent object or objects in England . . .

as in their absolute discretion they should select. He died in 1936. The will having in due course been proved the executors distributed the residue, amounting to over a quarter of a million sterling among some 140 institutions or objects which could properly be described as both charitable and benevolent. But some time afterwards certain next of kin claimed that the bequest of the residue was invalid and that the next of kin were entitled to have it. The question, of course, has to be determined on the language of the will. There was no suggestion that the testator did not mean to leave the residue to charities. The objection was that the bequest was invalid because the words "or benevolent" introduced a different category from "charitable" which preceded them. It was not questioned that, if the words had been "charitable and benevolent," the bequest would have been perfectly good. That would mean objects which were both charitable and benevolent. The word "or" it was said severed "charitable" from "benevolent," so that two different classes were meant, and the executors were thus faced with a choice between two different categories, and could have distributed the residue among objects which were benevolent but not charitable and that it was beyond the powers of the court when engaged in administering trusts to apportion the distribution between what was charitable and what was benevolent. The bequest it was said was void for uncertainty. By using "or" instead of "and" the testator had fallen into what was called a trap. The whole bequest was thus void.

No one would deny that charitable bequests, which may be good by general words for objects to be selected by the executors and which are free from certain restrictions such as the rule against perpetuities, and have certain immunities under the Income Tax Acts, should be scrutinised before their right to be classed as charitable is admitted, but it is a different matter to make the test depend on anything but matters of substance. Courts of equity have been criticised for their construction of particular words of bequest or their limitation of what bequests are permissible as charitable. In *Bourne* v. *Keane* (9) the House of Lords overruled a series of authorities extending from 1835 and upheld the validity of a bequest of personal estate for masses for the dead. There was no decision binding the House so as to prevent them holding as they did. In the present case the question here relates to the construction of the words of the particular will. These have to be construed as they occur in their context. The decision depends in my opinion on the meaning of the few relevant words. The question is whether the words "or other charitable or benevolent object or objects" mean in their setting two separate classes, the one class charitable and the other benevolent, regarded as distinct or separate, or whether they mean one class only, that is of objects which may be indifferently described as charitable or benevolent. There is no difficulty in the latter construction. There is no authority binding this House to exclude it in this particular case: the two words run so closely into each other in meaning and overlap so largely that it is a natural view: in addition the preceding sentence seems to me to confirm this construction simply as a matter of words. The difficulty arises from the want of definition which has always characterised this branch of law. If, in the case of a general bequest to charity, so much depends on the mere word which is to govern the executor's power of selection, the least that could be expected would be a precise definition of the meaning and scope of the dominant word, which is charity. The difficulty in a case like the present is not quite the same as the difficulty which has constantly faced the court in deciding whether a specific purpose named in a bequest is or is not charitable. That, indeed, has led to a host of decisions, often difficult to reconcile or explain.

LORD STERNDALE, M.R., dealt with both aspects of the difficulty in *Re Tetley* (10). The question there was the meaning of the word patriotic. He lamented the absence of "any principle which would guide one easily and safely through the tangle of cases as to what is and what is not a charitable gift . . . The whole subject is in an artificial atmosphere altogether." Dr. Allen, the learned author of LAW IN THE MAKING, 3rd Edn., p. 343, has dwelt upon the same difficulty. I confess I am convinced that the time has come when modern minds imbued with modern ideas should attempt to achieve a clear workable and comprehensive definition of what is meant by charitable and its cognate terms, such as benevolent, philanthropic and the like. That is a task for the legislature.

These reflections, however, will not help in deciding what is the true construction of this will. But I find to my regret, that I cannot approach this question or examine authorities which seem to me to throw any light on its decision until I have attempted to understand from the reports what charitable and other kindred words have been taken to mean. I do not think that I have found any accepted or satisfactory definitions. I may start with the Statute of 43 Eliz. (1601). That statute, or more correctly its preamble, together with analogies drawn from it, is still even now, it seems, taken as authoritative. The preamble will be found conveniently set out in the Mortman and Charitable Uses Act, 1888, s. 13 (2), which after reciting that in "divers enactments and documents reference is made to charities within the meaning purview and interpretation of the said Act," enacted that references to such charities should be construed as references to charities within the meaning purview and interpretation of the said preamble. In other respects the Act of 1888 repealed the Act of Elizabeth. That Act had provided a special proceeding under the Chancellor for the reform of deceits and breaches of trust touching land given to charitable uses. It had long become obsolete when it was repealed in 1888, subject to the limited saving of the preamble quoted above. That, however, did not contain any definition of the charities it referred to: what it contained was a list of charities so varied and comprehensive that it became the practice of the court of chancery to refer to it as a sort of index or chart. This was observed by LORD MACNAGHTEN in *Pemsel's* case (11), at p. 581. Charities had even before 1601 been subject to the equitable jurisdiction of the Court of Chancery. But the Act of 1601 did not give a definition of charities, but merely a collection of instances of a somewhat miscellaneous character. The collection included, in addition to objects which would ordinarily be considered to be eleemosynary objects, other objects, such as school of learning, repair of bridges, ports, havens and churches and other objects of general utility. It is difficult to find definitions of charity though as LORD MACNAGHTEN explained it has a legal technical sense in English law. But in 1767 LORD CAMDEN, L.C., in *Jones* v. *Williams* (12), defined it as a gift to a general public use which extends to the poor as well as the rich. In *Goodman* v. *Mayor of Saltash* (13), at p. 642, LORD SELBORNE, L.C., said:

> A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town or of any particular class of such inhabitants, is (as I understand the law) a charitable trust . . .

He cited *Wright* v. *Hobart* (14), in which LORD MACCLESFIELD established as a charitable trust an ancient grant of land for the pasture during three months of the year of the cows of as many of the inhabitants of a certain village as were able to buy three cows. These inhabitants might perhaps have been counted on the fingers of one hand. Not only by the original list in the Act of Elizabeth, but by the mass of decisions which have been given by the free use of analogies extending the original items between that date and the present, it is made clear that charitable trust in England is a very comprehensive term, including "purposes beneficial to the community," which LORD MACNAGHTEN stated as the fourth and most general of the four principal divisions in his definition of charity in its legal sense. This division was to cover purposes not falling under any of his other three divisions, which are trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion. That was in *Pemsel's* case (11), at p. 583. The question in the case was whether the word charity as used in the Income Tax Acts bore the same meaning in its application to Scotland as it did when applied in England

and Ireland. The House of Lords held that it did, even though the technical meaning of the word, that is its comprehensive meaning, which includes education or religious or other general charities, as well as charities for the relief of the poor, did not completely prevail in Scotland, but Lord Macnaghten concluded that he could not discover any great dissimilarity between the law of Scotland and the law of England with respect to charities. His definition has been subjected to certain criticisms, particularly the fourth division, but shows the extraordinarily wide and indeterminate range covered by the word A charity in England whenever it is to be construed in its technical legal sense. Lindley, L.J., after referring to the very wide and indefinite sense in which the word charitable is used in courts of equity, adds in *Re Macduff* (15), at p. 464:

> Probably not one man in a thousand understands what the sense is, and the sense itself is a very indefinite one.

This breadth is confirmed by the decisions upon charities. I shall be content to refer merely to two lists of instances; the first is that contained in Tolhill's B Cases in the High Court of Chancery, List 27, which contains decisions on charitable uses between 1598 and 1639, the second is the very full collection of decisions up to 1932 as to what are or are not charities in Halsbury's Laws of England, Hailsham Edn., Vol. 4, pp. 107 to 138. The wide range and variety are bewildering, and show how generously the court has availed itself of the licence to extend the Act of Elizabeth by analogy. But, all the same, C it is impossible not to feel sometimes how difficult particular decisions are to reconcile with others, or to understand why one charity is taken and another left, or not to feel that over-subtle or fine distinctions have been drawn. The absence of a modern and scientific definition cannot fail to introduce uncertainty, as the great mass of contested litigation shows. But what I am concerned with at the moment is that though charity is a very wide and comprehensive term, as shown in its particular applications, distinctions have at times been D drawn between charitable as a general term, and other similar general terms, as occasionally used where there is a disposition in favour of general objects. But the Court of Chancery has adopted charity or charitable as a sufficient general description in cases where testators have left bequests to such charitable objects as their executors may select. This has been held to be a sufficient definition to enable the court to administer the trust. But, if a second description is added and that second description is used disjunctively, not conjunctively, E the court washes its hands of the administration and holds the entire bequest invalid. The whole gift fails for uncertainty. There is, it is said, no general trust for charity binding the whole fund. The court will not disregard the invalid part of the bequest and administer the valid. Such is the rule of the court. Whether it is a wise or sensible rule is not here material to consider. By way of contrast, though the cases are not quite parallel, it may be noted F that the common law ever since *Pigot's* case (16) has held that, when in the same instrument there are both legal and illegal conditions, the legal conditions may *prima facie* be enforced whereas the part which is illegal cannot. Courts of equity have been more rigid and have refused to apply anything like their *cy pres* doctrine to such cases, or to make any apportionment. They have most nearly approached an apportionment in cases like *Re Douglas* (17), but that is regarded as a special and different type. Lord Davey discusses these G distinctions in *Hunter* v. *A.-G.* (18), at p. 324. But the strict rule only applies if it is sought to give the executors a real choice between two separate objects only one of which is charitable, that is, if the two substantives or adjectives are to be read disjunctively. If they are to be read conjunctively, then there is only one class or area of selection, and, if that is charitable, the bequest is good. Such a case is illustrated by *Re Best* (19), where the two adjectives charitable and benevolent, coupled it is true by "and," but "and" and "or" may be H interchangeable, were held to describe a single class, the members of which combine the qualities of charitable and benevolent. This is possible because of the wide and vague range of the word charitable and its close kinship with benevolent. Whether the words are used in any particular will as conjunctive or disjunctive must be a question of construction of the particular will. "Benevolent," which is the other material term here, is also a word of wide connotation, and almost interchangeable with charitable. That the two words overlap to a very great extent is clear. Lord Herschel, in *Pemsel's* case (11) is careful to equate charity and benevolence even as the words are popularly used. He sums up, at p. 572, that:

> . . . the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

He went on to include in this conception of charity the relief of what is often called spiritual destitution or need, and treats that as a form of "benevolent assistance." In these senses it seems to me that the word "benevolence" is used of the spiritual impulse, while charity is its embodiment in practice. LORD HERSCHEL would, I think, have used the same language in reference to the purposes, religious or educational or other purposes beneficial to the community to which LORD MACNAGHTEN referred. The provision of good water, or any scheme of social amelioration involves benevolent motives and their practical operation. It may indeed be that the benevolent motive is less apparent or in a sense is non-existent in such instances as the repair of sea banks or the furtherance of scientific research, which would fall outside the popular idea of charity. It might thus be said that some charitable purposes, in the sense adopted by English law, are not benevolent, and conversely that some benevolent acts are not charitable. LORD BRAMWELL, dissenting in *Pemsel's* case (11), gave as instances of purposes which he regarded as benevolent but not charitable in the legal sense, a fund for providing oysters at one of the Inns of Court or a trust to provide music on the village green. As to the latter, modern ideas would be disposed to treat the gift as both benevolent and charitable, as it would a fund for the provision of music in a London park; the fund for the oysters I should not be disposed to regard as either benevolent or charitable in any ordinary or technical sense. The leading case, *Morice* v. *Bishop of Durham* (20), is relied on as showing that the word "benevolent," used by itself or coupled as it was in that case with "liberal," is insufficient to evince a charitable purpose. LORD ELDON put the question whether, according to the ordinary sense, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this court would have enforced by decree and reference to a master. He decided in the negative and held that the intention was too indefinite to create a trust. There the words were not bound up with words or a context showing a charitable intention, but, on the contrary, showed the opposite. LORD ELDON said that upon such words the court could not have charged the executor with maladministration if he had applied the whole to purposes which, according to the meaning of the testator, were benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts. LORD ELDON said that there was no magic in words, and, if the real meaning of the words used had been charity or charitable purposes according to its technical use in the court, the appropriate consequences would follow. This qualification should be noted.

It may be that the word "liberal" gave a special colour to the word "benevolent," and took its scope outside charitable purposes. It might, for instance, have covered the case of the fund for providing oysters or other lavish entertainment. But in *James* v. *Allen* (21) the bequest was simply for benevolent purposes at the discretion of the trustees. SIR W. GRANT, M.R., was of opinion that the trust might have been applied to other than strictly charitable purposes and was too indefinite for the court to execute and failed altogether. This was the decision where the word benevolent stood by itself without any context showing or excluding a charitable intent. But later cases have shown that the word "benevolent" is not fatal to a finding of a charitable trust. It becomes a question of the construction of the particular will, whether its language sufficiently evinces a charitable trust. As LORD COTTENHAM, L.C., said in *Ellis* v. *Selby* (22), at p. 297:

> . . . the present, like other cases of construction, depends on the particular language which the testator has used, and very slight expressions may make a most material difference.

He held in that case that the expressions "to and for such charitable or other purposes" were too wide and held the bequest void. He said he was following an earlier decision of his own, when Master of the Rolls, in *Williams* v. *Kershaw*

(23), where the residue was to be applied " to and for such benevolent, charitable and religious purposes " as the executors should think most advantageous and beneficial. He read the three purposes as not conjointly used, but as describing three classes, benevolent, or charitable or religious. The two latter purposes would also be charitable in the legal sense, but that was not the case with benevolent. He held the disposition too uncertain to receive effect. It is to be noted there that he read " and " as " or ", and as having the same effect as " or " in the previous case. In each of these cases separate categories were held to be intended ; thus according to the decisions " and " and " or " were held to be interchangeable. That depended on the context and the lay-out of the sentences.

In *Dolan* v. *Macdermot* (24), Lord Cairns, L.C., held valid a bequest of personalty for such charities and other public purposes as lawfully might be " in a named parish." The Lord Chancellor said that the reasonable and fair construction of the will—remembering always that in construing a will of this kind the court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity —was that the testator directed his residue to be paid out for the benefit of the parish of Tadmartin " in public charities," using the term in the popular sense, and in " other public purposes." *ejusdem generis* as supplying and filling up a description of the purposes which, although within the Statute of Elizabeth and the technical doctrine of the court in regard to charities, are not within the popular meaning of the word " charities." I regard this decision as an object lesson in realistic construction. The local limitation does not, of course, affect the essential question, *Houston* v. *Burns* (1). That last-named case was an appeal from Scotland, where it was held that a bequest " for such public, benevolent, or charitable purposes " was invalid, on the ground that the three categories were to be read disjunctively. This decision was largely determined by considering the punctuation. It had been contended that the clause should not be read as applying to public or benevolent or charitable purposes, but that on its true reading it was for the benefit of benevolent or charitable purposes of a public nature in connection with the parish, and that so construed it was good, as benevolent or charitable purposes could be held to be charitable purposes. As to that contention, Lord Finlay, L.C., said, at pp. 341, 342 :

> It appears to me that without the punctuation which appears in the will as printed in the appendix, this is quite a possible construction and where the words are ambiguous a construction should be adopted which will make the bequest void.

He then went on to discuss the punctuation, and on that ground held that the clause was to be read disjunctively. Though the appeal was from Scotland, the Lord Chancellor states a general principle which seems often to be lost sight of, namely, the principle that the issue depends on the construction of the particular will. In addition the word " public " introduces a category different in character from either charitable or benevolent, *Blair* v. *Duncan* (2), which makes it much more difficult in any case to read the words as dealing with anything but separate categories. In the same way this House in *A.-G.* v. *National Provincial Bank* (10) held that the words " patriotic " purposes and " charitable " institutions and objects must be read disjunctively ; they describe disparate and separate classes. On the other hand, in *Re White* (25), the testator left his residue " to the following religious societies, viz." : there followed a blank. The word charity was not mentioned. The Court of Appeal, while recognising the possibility that a religious society was not necessarily charitable, came to the conclusion that they could not, " without splitting hairs," distinguish earlier cases which had held that a religious purpose was a charitable purpose, and that they ought to hold that the gift was for charitable purposes and was not void for uncertainty. They approved *Wilkinson* v. *Lindgren* (26), which may be referred to for the use which Lord Hatherley, L.C., made of the *ejusdem generis* rule. The bequest was for the benefit of certain institutions, which the court held were in part religious, or " to any other religious institutions " as the executors might think proper. The Lord Chancellor said that he did not see " how you can carry on the word ' other ' without carrying on ' religious ' also.". The gift was held valid.

I have referred to these cases as showing that the construction of a will cannot be reduced to the mere application of a fixed general formula. I think this is also illustrated by *A.-G. for New Zealand* v. *Brown* (3), a decision of the Privy Council, which showed that " and " could and should be read as " or ". The bequest was in trust for such charitable, benevolent, religious and educational institutions " as the trustees should select." It was contended that the word " charitable " governed or at least explained the following words, so that " benevolent " objects must be read as though the words meant such benevolent objects as were in their nature the proper subject of a charitable gift. LORD BUCKMASTER rejected this contention, but he did not do so without examining other parts of the will, particularly the investment clause, in order to ascertain the testator's intention. The importance of the decision, which does not bind this House, is that, though the decision in *Re Jarman's Estate* (27), to which I refer later, was cited, the question was not solved by a single absolute formula such as LORD PARKER (who was a member of the Board in the *New Zealand* case (3)), enunciated shortly afterwards in the form of the proposition that a gift for charitable or benevolent purposes is void for uncertainty: *Bowman* v. *Secular Society* (28), at p. 441. This would no doubt be so provided that on the true construction of the gift the purposes were to be read disjunctively. That must depend on the language of the gift. But the point had not been argued and was not necessary for the decision of that case. Such general observations have no coercive value as precedents.

Re Jarman (27) may or may not have been right in the language of the particular gift. HALL, V.-C., there held that a bequest to any charitable or benevolent purpose which the executor should agree upon was indefinite and inoperative, so that the gift failed. But it cannot, in my opinion, be construed as stating a general proposition of law that a gift for charitable or benevolent objects must be alternative or refer to two classes of objects. If it did, it cannot, in my opinion, be justified. Since that decision *Re Sutton* (29), and *Re Best* (19), have been decided. Their effect was that a gift for such charitable and benevolent institutions as the trustees should determine is not void for uncertainty, but is a good charitable gift. It was held that the testator meant that the object of the gift should be both charitable and benevolent. That is a natural construction, because not only are the two words, being both vague, practically indistinguishable, though perhaps in theory capable of some distinction, but, as FARWELL, J., said in *Re Best* (19), the testator may have wished that the two qualities should coincide in all the objects of the gift. Hence only one class is intended, combining both attributes. I think the same conclusion can be reached where the two adjectives are coupled by " *or* " instead of " and." These two particles are often to be read interchangeably, as I have shown. The testator, in the present case, is not likely to have thought of charitable and benevolent as describing two different classes of objects. He would *prima facie* mean a class of object which could be indifferently described as charitable or benevolent, that is, one class having the same two-fold characteristics, if indeed he thought of them as more than two epithets having the same meaning. Such tautology is not uncommon. Perhaps also he may have desired that his money should not be devoted to building bridges or the like. This construction, which seems *prima facie* not only probable but sensible, is, I think, confirmed by the frame of the sentence. The word " other " (" other charitable or benevolent object or objects in England ") seems to me to carry over the word charitable from the previous sentence. If the words had been " or other benevolent objects," I do not think that anyone would seriously contest that what was meant was " other charitable objects capable also of being characterised as benevolent." The repetition of " charitable " strengthens that construction. So does the context. If " charitable " and " benevolent " had been completely different descriptions, instead of two descriptions, both vague and inderterminate, overlapping, and capable of being applied to the same objects, the result might be different. Thus a gift of pigs or cows would clearly present an alternative : the two descriptions could not be applied indifferently to the same animals. But a disposition in favour of dishonest or unprincipled men would not present a true alternative, though it might on other grounds be void for uncertainty. Only the adjectival description is alternative, and both adjectives are to be applied indifferently to the same objects, there is, then, only one class and not two. If the testator had expressly stated that only one class was meant, that statement would have received effect. But the same result may be reached by considering the context. This way of looking at the question has been adopted by the eminent Scottish judges, LORDS DUNEDIN, KINNEAR, MACLAREN and DUNDAS, who have held that certain dispositions in favour of charitable or benevolent objects or the like referred as a matter of construction to one class and not two classes. I refer in particular to the decisions in *Hay's Trustees* v. *Baillie* (5), and *Paterson's Trustees* v. *Paterson* (6). The Scots law has not been argued before your Lordships, but I think that these decisions involve the application of rules of construction common both to English and Scottish law. A

For myself, I would allow the appeal and restore the judgment of FARWELL, J.

LORD PORTER: My Lords, it is common ground and undoubted law that in construing a will the object of the court is to try to ascertain the intention of the testator. But it is the expressed intention which must govern. The principle is succinctly expressed by LINDLEY, L.J., as he then was, in *Re Morgan* B (30), at. p. 227:

> Now I do not see why, if we can tell what a man intends, and can give effect to his intention *as expressed*, we should be driven out of it by other cases or decisions in other cases.

The italics are mine.

In construing what the testator has said it is permissible to consider that he did not intend to die intestate, see *per* LORD ST. LEONARD, in *Grey* v. *Pearson* (31). C

But technical words must be interpreted in their technical sense and "charity" or "charitable" are technical words in English law, and must be so construed unless it can be seen from the wording of the will as a whole that they are used in some other than their technical sense. For this purpose and in order to discover the testator's intention it is the duty of the court to take into consideration the whole of the terms of the will and not to confine itself to the disputed D words or their immediate context.

In the present case the words whose interpretation is contested are "charitable or benevolent." It is admitted on behalf of the appellants that, if the word "benevolent" stood alone, it would be too vague a term and the gift would be void, see *James* v. *Allen* (21), but it is said that, when coupled with the word "charitable" even by the disjunctive "or," it either takes its colour from its associate or is merely exegetical and the phrase is used as implying either E that "charitable" and "benevolent" are the same thing or that benevolent qualifies charitable so as to limit the gift to objects which are both charitable and benevolent.

In my view the words so coupled do not naturally bear any of the meanings suggested. The addition of "benevolent" to "charitable" on the face of it suggests an alternative purpose and I do not see why in this collocation "benevolent" should be read as "charitable benevolent." Nor do I think that it can F be said to be merely exegetical. *Prima facie* these are alternative objects and, even if they were not, the word "charitable" to be exegetical of "benevolent" should follow and not precede it. The wording should be "benevolent or charitable" meaning "benevolent, *i.e.*, charitable"—not charitable or benevolent meaning charitable, *i.e.*, benevolent. In the latter case the gift might still be said to be given to too wide a class, *viz.*, to benevolent objects G and not to charitable ones.

But in truth, however anxious one may be to strain the language used so as to benefit charities only, the weight of authority is too great to be readily overthrown. Two matters of principle in the interpretation of wills are firmly established:

(i) The testator must make his own will and not leave his executors to make their choice of the objects of his bounty, subject to this that a general gift to H charity will be upheld. It is not however enough that he should leave property under a disposition in pursuance of which his assets may be disposed of to charities or for some other purpose, not even though his executors in fact apply them only to charitable purposes. "The question is," said SIR W. GRANT, M.R., in *James* v. *Allen* (21), at p. 19:

> . . . what authority would this court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied

to other than strictly charitable purposes, the trust is too indefinite for the court to execute.

The same principle is enunciated in *Hunter* v. *A.-G.* (18), where LORD DAVEY, at p. 323, in saying that the charitable purposes must not be mixed up with other purposes of such an indefinite nature that the court cannot execute them, gives as illustrations of such mixing the conjunction of:

> Charitable or benevolent, or, charitable or philanthropic, or, charitable or pious.

A The various tribunals in England which have expressed their views as to this combination have all tended the same way.

So long ago as 1836 LORD COTTENHAM, L.C., expressed the opinion in *Ellis* v. *Selby* (22), at p. 299, that a gift to "charitable or other purposes" was void. Similar opinions are to be found in *A.-G.* v. *Brown* (3), in *Houston* v. *Burns* (1), and *A.-G. for New Zealand* v. *New Zealand Insurance Co.* (4), to quote but three from amongst those discussed in your Lordships' House or in the Privy B Council. Indeed in *Williams* v. *Kershaw* (23) a bequest of property for benevolent charitable and religious purposes was held void because it was considered that the testator could not have intended the recipient purposes to be benevolent and charitable and religious all at the same time, and, therefore, that "and" must be read disjunctively. I need not refer to the numerous cases decided in courts of first instance and in the court of Appeal expressing a view similar to that contained in those quoted.

C If the authorities be extended beyond those decided in a final Court of Appeal, the exact combination "charitable or benevolent" is to be found and was held void in *Re Jarman's Estate* (27).

Nor is the force of these and the many other authorities to the same effect weakened by the fact that a bequest for benevolent *and* charitable purposes has been held a valid gift: see *Re Best* (19), since the conjunction in that case D is effected by using "and", not "or." Nor by the decisions in *A.-G.* v. *Brown* (3), where the wording was "charitable, benevolent, religious and educational institutions, societies, associations and objects," and in *Re Baron Ludlow* (32), where the wording was "for the benefit of the schools and charitable institutions and poor, and other objects of charity or any other public objects." In each of these last two cases it was held the complex phrases used must properly be construed so that "benevolent" or "public", as the case might be, took its E colour from charitable and must be read as *ejusdem generis* with it. In so complex a form of words the *ejusdem generis* rule might well be prayed in aid whereas in a simpler form it might be inapplicable.

But in truth the terms in which other wills are framed are but a loose guide to the construction of that in question. Each will must be interpreted in the light of its own wording.

F No doubt the testator in the present case wished his estates to go to objects of a benevolent character or, as GODDARD, L.J., has it, to "charity" in the popular sense, but "charity" in that sense is not coterminous with "charity" in the technical sense, and I can find nothing in the wording of the will to lead to a different result.

The fact that in another clause of this will he gave certain specific legacies leads nowhere, and a gift in the case of institutions limited to charitable ones, G followed by a gift to "other charitable or benevolent objects," to my mind suggests a widening of his beneficence in the latter case rather than a general charitable intent, if charity be used in its technical sense.

The appellants, however, gain their strongest support from the Scottish decisions. In those cases "societies or institutions of a benevolent or charitable nature," *Hay's Trustees* v. *Baillie* (5), "such charitable or benevolent institutions," *Paterson's Trustees* v. *Paterson* (6), and "charitable or philanthropic institutions," H *Mackinnon's Trustees* v. *Mackinnon* (7), have all been held valid charitable trusts, whilst in *Reid's Trustees* (8) a bequest in the form "poor persons in Eskdale or such charitable, educational, or benevolent societies or public institutions in Scotland" failed only, it appears, because of the addition of "public institutions."

In all cases where the gift was held good, the *ratio decidendi* appears to have been that the testator was designating one class of recipients, *i.e.*, charities, not two or more separate classes of beneficiaries.

But Scots law differs from English law on this point, probably because it approaches the subject from a different angle. In the first place the Statute of Elizabeth, 43 Eliz. c. 4, the benevolently interpreted preamble of which forms the basis for determining what are charities in English law, never applied to Scotland, and in the second charities, speaking generally, are not controlled by the Scots courts.

The ambit of " charity " in Scotland may be narrower than it is in England; at any rate Lord Moncrieff thought so, as appears from his dissenting judgment in *Grimond* v. *Grimond* (33), and afterwards approved in your Lordships' House. Whether it be narrower or not it differs, and I do not think your Lordships can obtain any satisfactory guidance from the decisions in the Scottish courts in a case where the validity of a gift in an English will depends upon its charitable nature.

I find myself in entire agreement with the judgment of Lord Greene, M.R., and agree that the appeal should be dismissed.

Lord Simonds: My Lords, the question raised in this appeal turns upon the meaning and effect of the will of Caleb Diplock, who died on Mar. 23, 1938. By his will, which was dated Nov. 3, 1919, the testator, after appointing executors and making certain bequests and devises, to which I do not think it necessary to refer, gave the residue of his estate to his executors upon trust for sale and conversion, and subject to certain payments thereout, directed them to apply the residue:

> . . . for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executor or executors may in their or his absolute discretion select, and to be paid to or for such institutions and objects, if more than one, in such proportions as my executors or executor may think proper.

The testator added certain administrative directions which do not assist in the construction of the words that I have cited.

The will was duly proved on May 16, 1938, and the executors forthwith proceeded to a distribution of the testator's large estate among a number of institutions, one of which was the appellant, the Chichester Diocesan Fund and Board of Finance (Incorporated). After the estate had been distributed the validity of the residuary bequest and the propriety of the distribution were challenged by certain persons who claimed to be some of the next-of-kin of the testator and accordingly to be entitled to a share of his residuary estate as upon his intestacy. On June 10, 1940, the originating summons, out of which this appeal arises, was issued by the executors in the Chancery Division for the determination of the single question whether the trust of residue contained in the will, which I have already stated, was a valid charitable trust or was void for uncertainty or otherwise. To this summons the appellant institution, the claimant next-of-kin and the Attorney-General were made defendants. My Lords, I mention these facts not because they can in any way affect the construction of the will which your Lordships have to construe, but because they explain why it was necessary, or at least desirable, that any other party than the Attorney-General should be heard to argue the present case. In the ordinary case it is the Attorney-General alone, representing the Crown as *parens patriae*, who is heard upon the question of validity or invalidity of such a bequest as that now under consideration. In the present case the actual distribution of the testator's estate and the pendency of proceedings by the next-of-kin for its recovery, in which this very question of validity would be vital, made it necessary to take the unusual course of adding the appellant institution as a defendant as representative of all the institutions which had received a share of the estate. But this fact is, as I have said, irrelevant to the construction of the will. Equally irrelevant are the facts which are brought to your Lordships' attention that the estate is a large one, that the next-of-kin are not near relatives, that the discovery of a possible flaw in the will was fortuitous, and that the proceedings were belated. The construction of this will is the same, whether its invalidity brings an unexpected windfall to distant relations or its validity disappoints the reasonable hopes of a dependent family.

My Lords, in stating the question for your Lordships' consideration I have said that it turns upon the meaning and effect of the testator's will. Advisedly I have put meaning before effect. For I approach this will, as I approach any other will, with the resolve to find the testator's intention from the language that he has used. When I have found it, I consider its effect. If there is an ambiguity, it may be that I am at liberty to choose that construction which will give legal effect to the instrument rather than that which will invalidate it. Where the testator's words would, if no question of invalidity arose, leave no doubt in my mind, I am not at liberty to create an ambiguity in order then to place what is sometimes called a benignant construction upon the will.

My Lords, the words for your consideration are these, "charitable or benevolent": the question is whether in the context in which they are found in his will these words give to the executors a choice of objects extending beyond that which the law recognises as charitable. If they do not, that is the end of the matter: the trust is a good charitable trust. If they do, it appears to be conceded by counsel for the appellant institution that the trust is invalid, but in deference to the argument of the Attorney-General, who invited your Lordships to take a different view, I must say a few words at a later stage.

My Lords, of those three words your Lordships will have no doubt what the first, "charitable," means. It is a term of art with a technical meaning and that is the meaning which the testator must be assumed to have intended. If it were not so, if in this will "charitable" were to be given not its legal but some popular meaning, it would not be possible to establish the validity of the bequest. The last of the three words "benevolent" is not a term of art: in its ordinary meaning it has a range in some respects far less wide than legal charity, in others somewhat wider. It is at least clear that the two words, the one here used in its technical meaning, the other having only, and accordingly here used in, a popular meaning, are by no means coterminous. These two words are joined or separated by the word "or", a particle of which the primary function is to co-ordinate two or more words between which there is an alternative. It is, I think, the only word in our language apt to have this effect: its primary and ordinary meaning is the same, whether or not the first alternative is preceded by the word "either."

My Lords, averting my mind from the possible ill effects of an alternative choice between objects "charitable" and objects "benevolent," I cannot doubt that the plain meaning of the testator's words is that he has given this choice and that, if he intended to give it, he could have used no words more apt to do so. Is there then anything in the context which narrows the area of choice by giving to the words "or benevolent" some other meaning than that which they primarily and naturally have? And, if so, what is the other meaning which is to be given to them? Let me examine the second question first. Since the test of validity depends on the area of choice not being extended beyond the bounds of legal charity, a meaning must be given to the words "or benevolent" which retain them within these bounds. This result, it has been contended, may be reached by giving to the word "or" not its primary disjunctive meaning but a secondary meaning which may perhaps be called exegetical or explanatory. Undoubtedly "or" is capable of this meaning: so used, it is equivalent to "alias" or "otherwise called": the dictionary examples of this use will generally be found to be topographical, as "Papua or New Guinea." But, my Lords, this use of the word "or" is only possible if the words or phrases which it joins connote the same thing and are interchangeable the one with the other. In this case the testator is assumed to use the word "charitable" in its legal sense: I see no possible ground for supposing that he proceeds to explain it by another word which has another meaning and by no means can have that meaning. I must reject the exegetical "or." Then it was suggested that the words "or benevolent" should be construed as equivalent to "provided such objects are also of a benevolent character," that is to say, the objects must be charitable but of that order of charity which is commonly called benevolent. I think that this is only a roundabout way of saying that "or" should be read as "and," that the objects of choice must have the two characteristics of charitable and benevolent. It is possible that a context may justify so drastic a change as that involved in reading the disjunctive as conjunctive. I turn then to the context to see what justification it affords for reading the relevant words in any but their natural meaning. Reading and re-reading them, as your Lordships have so often done in the course of this case, I can find nothing which justifies such a departure. It is true that the word "other" introduces the phrase "charitable or benevolent object or objects " and to this the appellants attached some importance, suggesting that since " other " looked back to " charitable institution or institutions," so all that followed must be of the genus charitable. There can be no substance in this, for in the phrase so introduced the word " charitable " is itself repeated and is followed by the alternative " or benevolent." Apart from this slender point it seemed that the appellants relied upon what is called a general, a dominant, an over-riding charitable intention, giving charitable content to a word or phrase which might otherwise not have that quality. That such a result is possible there are cases in the books to show : some of them have been cited to your Lordships. But here again I look in vain for any such context. Upon the plain reading of this will I could only come to the conclusion that the testator intended exclusively to benefit charitable objects if I exercised the words " or benevolent " which he has used. That I cannot do.

Coming to the conclusion that upon the true construction of this will the executors may if they think fit distribute the testator's estate among objects which are benevolent but not charitable, I then ask what is in law the effect of such a disposition. My Lords, it may not have come as so rude a shock to some of your Lordships as it did to me to hear it suggested that there could be any doubt but that it is utterly invalid. But in fact the learned Attorney-General, if I understood his argument, categorically invited your Lordships to hold that a bequest for charitable or benevolent objects simpliciter is in English law a good and effective bequest, and urged that *Re Jarman* (27), which decided the contrary should be overruled. In other words his contention was that to enlarge the executors' area of choice so as to include benevolent objects which are not charitable with objects which are charitable does not make the whole gift fail for uncertainty. I do not see how, if his proposition is a sound one, it could be limited to the introduction of benevolent objects : philanthropic objects, liberal objects, perhaps patriotic or public objects, must come within the scope of this new doctrine. Nor, if a gift for charitable or benevolent objects is valid, could it be any longer contended with any show of logic that a gift for benevolent objects alone is invalid. My Lords, I suggest, that this proposition runs counter to authority and principle. Were it necessary to examine the authorities, your Lordships would find that a more formidable task than the overruling of *Re Jarman* (27) lay before you. I say nothing of a chain of cases which goes back to SIR WILLIAM GRANT and LORD ELDON, who themselves rested on ancient precedent, see *Morice* v. *Bishop of Durham* (20). I refer only to the fact that in recent times LORD DAVIES in *Hunter* v. *A.-G.* (18), and LORD PARKER in *Bowman* v. *Secular Society* (28), have selected such words as " charitable or benevolent " as the very type of gift which fails by reason of the admixture of charitable with non-charitable objects. There is good reason why this should be so. It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power : to him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries. To this salutary rule there is a single exception : a testator may validly leave it to his executors to determine what charitable objects shall benefit, so long as charitable and no other objects may benefit. To explain or to justify this exception is unnecessary. It conveniently and securely rests to-day upon the theory that a charitable trust can be executed by the court, but a so-called benevolent trust cannot. For the court knows what is charitable by reference to the preamble to the Statute of Elizabeth, to the objects there enumerated and all others which " by analogies are deemed within its spirit and intendment," but what is benevolent the court knows not. It is possible that the exception was originally established on some broader ground of favour to charity. But into this I need not enter. It is sufficient to say that, this exception in favour of charity having been long established, there is no ground for extending it in favour of objects which are not charitable.

My Lords, I concur in the motion that the appeal should be dismissed.

Appeal dismissed.

Solicitors : *Thomas Eggar & Son* (for the appellants) ; *White, Leonard Nichols & Co.* (for the respondents) ; *Treasury Solicitor* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

THE RELIANCE PERMANENT BUILDING SOCIETY *v.* HARWOOD-STAMPER.

[CHANCERY DIVISION (Vaisey, J.), **May 15, 16, 17, June 7, 1944.**]

Building Societies—Mortgage—Exercise of power of sale—Ensuring sale at best price—Law of Property Act, 1925 (*c.* 20), *ss.* 101, 106 (3)—*Building Societies Act,* 1939 (*c.* 55), *s.* 10.

A The plaintiff building society was the mortgagee of certain property belonging to the defendant. In 1940 the plaintiffs entered into possession and in December, 1942, sold the property by private treaty for £700. The plaintiffs claimed £503 4*s.* 7*d.*, the difference between the amount necessary to redeem the mortgage and the realised price. The defendant contended that the market value of the property at the time of the sale was approximately £1,800, that the plaintiffs failed in the duty imposed upon them by B the Building Societies Act, 1939, s. 10, to take reasonable care to ensure that the property was sold at the best price which could reasonably have been obtained and counterclaimed for damages. The plaintiffs placed the property on the books of only one estate agent, did not advertise the sale, and sold by private treaty and not by public auction :—

HELD : (i) a building society mortgagee has by the Building Societies C Act, 1939, *s.* 10 been placed in the position of a fiduciary vendor subject to 3 qualifications : first, that of having perfect liberty to sell when he thinks proper without being under any obligation after that to nurse the property ; secondly, that he has the various methods of sale open to him indicated in the Law of Property Act, 1925, s. 101 ; thirdly, that he has the benefit of the protection extended to mortgagees by the Law of Property Act, s. 106 (3).

D (ii) in the circumstances of the case the plaintiff did just fulfil his obligation under the Building Societies Act, 1939, s. 10.

[**EDITORIAL NOTE.** It is common knowledge that the law allows the mortgagee a very free hand in exercising his power of sale and only requires that he shall not sell at a gross under-value. The Building Societies Act, 1939, s. 10, enacted that a building society mortgagee should take reasonable care to ensure that the price obtained is the best price. This obviously is placing a higher duty on the building society mortgagee E than is placed on mortgagees generally unless the words of the section have some special meaning. It is here held that this view of the section is the true view and that a building society has now to exercise its power of sale as if it were a trustee exercising a power of sale, with the modification above stated.

AS TO DUTY OF MORTGAGEE WHEN EXERCISING POWER OF SALE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 435, 436, para. 640 ; and FOR CASES, see DIGEST, Vol. 35, pp. 502-504, Nos. 2331-2358.]

Cases referred to :

F *(1) *Warner* v. *Jacob* (1882), 20 Ch.D. 220 ; 35 Digest 507, *2381* ; 51 L.J.Ch. 642 ; 46 L.T. 656.

*(2) *Farrar* v. *Farrars, Ltd.* (1888), 40 Ch.D. 395 ; 35 Digest 492, *2229* ; 58 L.J.Ch. 185 ; 60 L.T. 121.

*(3) *Kennedy* v. *De Trafford,* [1896] 1 Ch. 762 ; *affd.*, [1897] A.C. 180 ; 35 Digest 504, 2356 ; 66 L.J.Ch. 413 ; 76 L.T. 427.

*(4) *Belton* v. *Bass, Ratcliffe & Gretton, Ltd.*, [1922] 2 Ch. 449 ; 35 Digest 508, *2399* ; G 91 L.J.Ch. 216 ; 127 L.T. 357.

(5) *Robertson* v. *Norris* (1857), 1 Giff. 421 ; 35 Digest 502, *2332* ; 30 L.T.O.S. 253.

(6) *Nash* v. *Eads* (1880), 25 Sol. Jo. 95 ; 35 Digest 503, *2337*.

*(7) *Grove* v. *Search* (1906), 22 T.L.R. 290 ; 43 Digest 910, *3156*.

(8) *Dance* v. *Goldingham* (1873), 8 Ch. App. 902 ; 43 Digest 912, *3531* ; 42 L.J.Ch. 777 ; 29 L.T. 166.

ACTION by a mortgagee to recover the difference between the sum realised H on the sale of the mortgaged property and the amount outstanding under the mortgage. The facts and contentions are fully stated in the judgment.

Charles Harman, K.C., and *R. T. Monier-Williams* for the plaintiffs.

C. B. Guthrie for the defendant.

VAISEY, J. : This case possesses a wider interest and a greater importance than arises from its own particular facts because it involves the consideration of the Building Societies Act, 1939, s. 10, which has not, I understand, so far received any judicial interpretation. I shall first refer to the terms of that section in order to express my view as to its meaning and its effect. The section is a short one and is in these terms :

> Where any freehold or leasehold estate has been mortgaged to a society as security for an advance, it shall be the duty of any person entitled by virtue of the mortgage to exercise any power, whether statutory or express, to sell the estate, to take reasonable care in exercising that power to ensure that the price at which the estate is sold is the best price which can reasonably be obtained ; and any agreement, if and in so far as it relieves, or may have the effect of relieving, a society or any other person from the obligation imposed by this section, shall be void. A

Two views on this enactment have been submitted to me. Counsel for the plaintiff building society in the present action asks me to say that the section has no particular meaning and no particular effect. He puts forward the view that the section is a mere reminder to building societies of their pre-existing responsibilities and a mere reassuring resume for the comfort of mortgagors of what their rights in this matter are. On the other hand, counsel for the defendant mortgagor submits that the section imposes on building societies an even higher B liability than that which is laid upon fiduciary vendors generally, such as trustees for sale or trustees with power of sale or tenants for life, and involves the building society in responsibility for the consequences of even honest mistakes or errors of judgment ; and he contends that the section introduces the conception of negligence as understood at common law and in these ways imposes upon building societies what he repeatedly described as a very onerous and responsible duty. C

A middle view may well be that the building society as mortgagee, when exercising its power of sale, is by this section merely added to the list of fiduciary vendors and that the same considerations apply to the exercise of a mortgagee's power of sale as would apply to an ordinary trustee for sale or trustee with a power of sale or tenant for life or other limited owner exercising a power of sale under the Settled Land Act, 1925.

I think it is necessary for me to consider briefly first what is the measure of D liability in the case of a mortgagee exercising a power of sale apart from the special provisions of the section to which I have referred ; and secondly, what is the measure of liability of the ordinary fiduciary vendor, leading me to the third question which is this : Is the building society mortgagee now by reason of the section under the former measure of liability or the latter measure of liability or under some other and what measure of liability of a novel description ? I realise that the answer which I give to the third question is one of serious E importance not only to the plaintiffs in the present case, but to building societies generally.

First, as to the measure of liability on a mortgagee selling the mortgaged property under the general law and irrespective of the Building Societies Act. I was referred to several passages in the well-known text-books. First of all in FISHER AND LIGHTWOOD, LAW OF MORTGAGE, 7th Edn., at p. 412, these words occur : F

> The sale must also be effected with proper discretion ; for the mortgagee is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had ; and a sale made at a fraudulent undervalue will be set aside. But the court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud.

In my view, the first sentence which I have read, if the first half of it is taken G alone, puts the obligation of the mortgagee too high. I do not think that the authorities justify the statement that an ordinary mortgagee " is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had." The second part of the sentence—which seems to me a little inconsistent with the first—states the truism, as it appears to me, that a sale made at a fraudulent undervalue will be set aside. Observe that the words used in the text-book are, " to get the best price." H

In HALSBURY, LAWS OF ENGLAND, Hailsham Edn., Vol. 23, at p. 435, there is a notable variation in the language used. There it is stated in this way :

> A mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He has his own interest to consider as well as that of the mortgagor, and provided that he keeps within the terms of the power, exercises the power *bona fide* for the purpose of realising the security, and takes reasonable precautions to secure a proper price, the court will not interfere, nor will it inquire whether he was actuated by any further motive.

The words used are " a proper price " and not the best price. The statement goes on :

> A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him, provided the amount is fixed with due regard to the value of the property.

In COOTE ON MORTGAGES, 9th Edn., at p. 927, the statement is made, in my judgment, with complete accuracy :

> The only obligation incumbent on a mortgagee selling under a power of sale in his mortgage is that he should act in good faith. Whether selling under an express or statutory power, he may generally conduct the sale in such manner as he may think most conducive to his own benefit, unless the deed contains any restrictions as to the mode of exercising the power, provided he acts *bona fide* and observes reasonable precautions to obtain a proper price.

The price there mentioned is a proper price and not the best price.

That seems to me to state the position of the mortgagee with accuracy. The mortgagee, of course, sells primarily for his own benefit. The object of the sale is to realise the security and recover the money which he has lent. He is entitled to think of himself first. He must not, of course, ignore the mortgagor, but the whole purpose of the sale is to get his money back, and that I understand to be the whole root of the difference between the ordinary case of the mortgagee and the ordinary case of the fiduciary vendor.

Of the well-known cases which were cited to me in argument the earliest in point of date is the leading case of *Warner* v. *Jacob* (1). The headnote to the case I think is sufficiently clear and adequately sums up the position and is in these terms :

> If a mortgagee exercises his power of sale *bona fide* for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud. A mortgagee in exercising his power of sale is not (except as to the balance of the purchase-money after a sale) a trustee for the mortgagor even if the mortgage is in the form of a trust for sale.

The passage which has been so often quoted from the judgment of KAY, J., in that case is in practically the same terms as the headnote which I have already read, and includes this sentence at the top of p. 224 :

> It is a power given to him for his own benefit, to enable him the better to realise his debt.

The next case, a decision of the Court of Appeal, is the equally well-known case of *Farrar* v. *Farrars, Ltd.* (2). The headnote shows that there were three mortgagees in possession, of whom Farrar was one, and acted as their solicitor in the transaction. They sold under the power of sale in their mortgage deed to a company formed for the purpose of purchasing the property. The company was to some extent promoted by Farrar who became the solicitor to the company and had a substantial interest as a shareholder. It was held, among other things, first, that the sale could not be set aside on the simple ground that Farrar was a shareholder in the company, " for that a sale by a person to a corporation of which he is a member is not either in form or substance a sale by him to himself along with other people." But it was held that there was such a conflict of interest and duty in Farrar, of which the company had notice, as to throw upon them—that is, the purchasing company—the burden of upholding the sale. It was held further in point of fact that the company had discharged themselves of this burden by showing that Farrar " had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale."

The passage in the judgment of LINDLEY, L.J., which I think I should read, is a short passage at p. 413, which states that Farrar :

> . . . in no way disregarded his duty to his mortgagors, on the contrary, he was doing the utmost in his power to find a purchaser at the best price that could be got. At this time his interest was to get the best price he could, for his security was by no means ample, he was pursuing that interest, and was discharging his duty at the same time, and he had no conflicting interest in the matter.

There was then the case which went to the House of Lords of *Kennedy* v. *De Trafford* (3), and again the judgment of LINDLEY, L.J., is very often referred to, and at p. 771 there is this illuminating passage :

Now upon what ground can the sale be impeached ? The Vice-Chancellor begins his judgment by referring to the cases of *Warner* v. *Jacob* (1) and *Farrar* v. *Farrars, Ltd.* (2), which contain the principles applicable to this case, and then he says : " Now in this case it is not suggested that the mortgagees did not act *bona fide* ; and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an undervalue so gross as to be in itself evidence of fraud." If that is so, and I am satisfied it is, upon what ground can the sale be set aside ? It is very difficult indeed to see how it can be set aside, but on an examination of the Vice-Chancellor's judgment I think I see what led him to set it aside. He was led to do so—and I think he was a little misled—by some language which I used in delivering the judgment of the court in *Farrar* v. *Farrars, Ltd.* (2), where I said this : " If in exercise of his power he "—that is, the mortgagee—" acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Now, the Vice-Chancellor has come to the conclusion that reasonable precautions to obtain a proper price were not used. The reason why these words were added was this : A mortgagee is not a trustee of a power of sale for the mortgagor at all ; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right, or proper, or legal, for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor : that is all. If it could be said in this case that the mortgagees had done any of those things, I can understand setting aside the sale ; but when one comes to the facts it appears to me that, instead of not taking " reasonable precautions," in the sense in which those words are used in *Farrar* v. *Farrars, Ltd.* (2), to obtain a purchaser at a good price for this property, the mortgagees, through their solicitor, acted from first to last in an honourable and businesslike manner, without in the least sacrificing the interests of the mortgagors.

That case went to the House of Lords, and the headnote which I think sums up the result of the case sufficiently for my present purpose is as follows :

> The only obligation incumbent on a mortgagee selling under and in pursuance of a power of sale in his mortgage is that he should act in good faith. In determining whether the mortgagee's conduct in that respect comes up to the required standard regard must be had to the circumstances of the particular case.

There is, I think, one other case to which I should refer, although I do not think it was cited at the Bar, and that is *Belton* v. *Bass, Ratcliffe and Gretton, Ltd.* (4). The passage to which I desire to refer is in the judgment of Russell, J., as he then was, at p. 465, and is in these terms :

> In *Robertson* v. *Norris* (5), Stuart, V.-C., cited Lord Eldon as an authority in favour of the principle that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of his power of sale, and added that if he used the power for any purpose other than to secure repayment of the mortgage, to effect other purposes of his own or to serve the purpose of other individuals, that would be a fraud on the exercise of his power, and the sale would be vitiated against the purchaser. Sir George Jessel in the Court of Appeal would have none of this. The case is that of *Nash* v. *Eads* (6). The court consisted of Sir George Jessell, and Cotton and Lush, L.JJ., and held that there was no foundation for this proposition. Sir George Jessell said : " The mortgagee was not a trustee of the power of sale for the mortgagor, and if he was entitled to exercise the power, the court could not look into his motives for so doing. If he had a right to sell on June 1, and he then said, ' The mortgagor is a member of an old county family, and I don't wish to turn him out of his property, and will not sell it at present,' and then on July 1 he said, ' I have had a quarrel with the mortgagor, and he has insulted me ; I will show him no more mercy, but will sell him up at once '—if all this was proved, the court could not restrain the mortgagee from exercising his power of sale, except on the terms of payment of the mortgage debt. The court could not look at the mortgagee's motives for exercising his power. Lord Eldon had never said anything of the kind which Stuart, V.-C., supposed him to have said. The Vice-Chancellor was entirely mistaken, and must have been citing the judgments to which he referred from his recollection, without looking at the reports. Of course there were some limits to the powers of the mortgagee. He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself. But he was not bound to abstain from selling because he was not in urgent want of his money, or because he had a spite against the mortgagor."

I think that that passage among others supports the view which I take that the statement in Fisher and Lightwood about obtaining " the best possible price " is inaccurate, and that the statements in Halsbury, Laws of England and Coote on Mortgages, that it is the duty of the mortgagee to obtain a proper price, are accurate.

That being the position of the mortgagee exercising this power of sale, let me contrast quite briefly the position of the ordinary fiduciary vendor. He, of course, must think of himself not at all ; he is thinking and acting for the benefit of others. He must use reasonable diligence in the manner of the sale, and taking the example of the limited owner selling under the Settled Land Act, there is no doubt that it is his duty to obtain the best consideration in money that can reasonably be obtained. There are many cases which illustrate the obligations of a trustee for sale. I have looked at one of them which I think is of some interest and which may have some analogy to the present case, *Grove* v. *Search* (7). There the headnote reads thus :

> A testator who died in Sept., 1904, devised and bequeathed his residuary estate to trustees upon trust for sale with a power of postponement, and upon trust out of the proceeds to pay his debts, an annuity to his widow, and a yearly sum for the maintenance and education of his children. Part of the testator's estate was a freehold house, let to a tenant for 21 years from Sept. 29, 1898, at a yearly rent of £225, the lease being determinable at the tenant's option at the expiration of 7 years. The house, which was subject to a mortgage for £3,500, was valued for probate at £4,100, the trustees having accepted that valuation from the beneficiaries' solicitor, who had some knowledge of property in the district. In Jan., 1905, the trustees, on the advice of a firm of auctioneers and estate agents, whose manager, though not a qualified valuer, had viewed and reported on the house, offered to sell the house to the tenant for £4,000, but this offer, as well as another to sell for £3,700, was refused by the tenant, who, however, offered to purchase it for £3,000. The trustees, who had heard that the tenant was likely to exercise his option to determine the lease, and had obtained a further report that the property had considerably deteriorated in value since the date of the lease, agreed, after taking the advice of counsel, to accept the tenant's offer, and a contract was entered into in Feb., 1905. Held, in an action by the beneficiaries, who impeached the contract on the ground that the price was grossly inadequate, and that the trustees had not taken steps to ascertain the best price obtainable for the property, and that the trustees had not informed them of the existence of the negotiations, that there was no obligation to consult the beneficiaries' solicitor, and that the trustees having acted on the advice of a firm of high reputation, and there being no evidence that there was any market for such a house at a higher price or at any price, the contract could not be impeached.

After stating the facts, Kekewich, J., at p. 291 said that:

> The question to be decided was stated by Mellish, L.J. (quoting from Turner, L.J.), in *Dance* v. *Goldingham* (8) as follows : " The true question on which the validity of such a sale must depend seems to me to be this : Was or was not the sale made under such circumstances and in such a manner as that the *cestuis que trustent* ought to be held bound by it ? If it was, the title of the purchaser could not, I conceive, be impeached. If it was not, his title would, I apprehend, be liable to impeachment at the suit of the *cestuis que trustent*." It was said that this sale ought to be impeached on two grounds—first, undue haste ; secondly, improvidence. As to the first ground, it was true that little time had elapsed between the testator's death and the realisation. The trustees thought they ought to sell at once. There was a direct trust for sale, followed, no doubt, by a power of postponement. According to his Lordship's experience in Chambers, when a trust was in this form it was very seldom for the advantage of the trust estate that the sale should be postponed. It was usually better that the sale should take place as soon as was reasonably possible. Looking at all the circumstances of this case, his Lordship came to the conclusion that the trustees were quite right in desiring to realise the testator's estate as quickly as possible.

The learned judge then refers to there being a lease and the report continues :

> In those circumstances it was impossible for the trustees to sell the house properly except to the tenant himself, since they could not know whether the notice to determine would be given or not, but that consideration did not apply in the least to a sale to the tenant ; and his Lordship saw no evidence of any undue haste on the part of the trustees. Then, as to improvidence. No doubt the trustees were bound to get the best price they reasonably could for their *cestuis que trustent.* What improvidence was there here ? It was said that the trustees had consulted the solicitors of the beneficiaries as to the value of this property for probate, and had accepted the valuation of the solicitors, and that they did not consult them again with reference to the sale ; but, in his Lordship's opinion, there was no obligation on the trustees to communicate with the solicitors of the beneficiaries at all. Then it was said that the trustees never had a valuation of the property made at the time. What they did was to instruct Messrs. Debenham & Tewson not to sell, but to report with a view to a sale.

After referring to a report on the house which the trustees had obtained, the report adds:

> When the offer of the £3,000 was made the trustees at first would have nothing to do with it, seeing that the property was mortgaged for £3,500 and was valued for probate

at £4,100, and they refused to consider the matter unless they had a report in writing under the signature of the firm. That report was duly written and signed by the firm, and the trustees acted upon it. There was some evidence at the trial [and this seems to me to be of importance] that a little more might have been got for the property, but evidence of that kind ought always to be accepted with a large pinch of salt. There was certainly a depression in the market at the time of the sale, and that weighed very much with Debenham & Tewson. His Lordship was not convinced on the evidence that there was any market for a house of this kind at a large price or at any price, and it might have been in the market at the present moment. Suppose the trustees had taken a different course, and had not accepted the offer, and had taken the risk of Griffin keeping on the lease, in his Lordship's opinion they would have acted very culpably. Of course, they might have taken another opinion, but they were advised by a firm of a very high reputation, and he did not think it necessary that they should take another opinion. He had no reason to doubt that Messrs. Debenham gave good advice, notwithstanding that the price was £500 less than the mortgage debt, and more than £1,000 less than the probate valuation. The most that could be said against the trustees was that they had committed an error of judgment, but he was not convinced even of that. Taking the test laid down by MELLISH, L.J., it would be wrong to impeach this contract. Mr. Griffin [the purchaser] was, therefore, entitled to specific performance, and the trustees must be kept harmless at the expense of the trust estate.

That case is in some respects not without some analogy to the present case, and I come now to the third question that I propounded to myself: What is the measure of responsibility which lies on the building society as mortgagee? Is it that which lies upon the ordinary mortgagee; is it that which lies upon the ordinary fiduciary vendor; or is it some other, and, if so, what measure? I have come to the conclusion that the obligation which lies upon the building society mortgagee selling under its power of sale is that of the ordinary fiduciary vendor. I think that this section was intended to add the building society mortgagee to the class of persons who are counted as fiduciary vendors. But, when I say that, it must, I think, be qualified in three ways. First, it is perfectly obvious I think when one examines the position that the building society mortgagee when it sells, may consult its own convenience as regards the type of sale. I cannot get from this section any indication that there is a duty upon the building society mortgagee to nurse the property. I think that, having once made up its mind that it desires to realise its security it is in exactly the same position as that of a trustee vendor under an obligation to effect a sale at once.

Secondly, I think the statement must be qualified by looking first at the Law of Property Act, 1925, s. 101, which gives a very wide discretion to the mortgagee in regard to the mode of sale—that is to say, the mortgagee may sell the mortgaged property either as a whole or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, to buy in or to rescind contracts, and so forth. I cannot take the view that the Building Societies Act, 1939, s. 10, has, so far as regards building society mortgages, repealed or made of no effect that particular section.

Even more important, there is a third qualification, which I think must be put upon this matter, and that is to be found in the Law of Property Act, 1925, s. 106 (3), which provides:

> The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected therewith, or, where the mortgage is executed after Dec. 31, 1911, of any power or provision contained in the mortgage deed.

So I think that the building society mortgagee has now been placed in the position of a fiduciary vendor subject to the three qualifications: first, having perfect liberty to sell when it thinks proper without being under any obligation after that to nurse the property; secondly, having the various methods of sale open to it indicated in the Law of Property Act, 1925, s. 101; and, thirdly, having the benefit of the protection extended to mortgagees by sect. 106 (3) of the same Act.

I come now to the facts of the present case and I do not propose to go into them at very great length but rather to state the conclusions at which I have arrived. The action is one by the Reliance Permanent Building Society as plaintiffs against Gordon Thomas Harwood-Stamper as defendant. The writ, which is specially indorsed, claims the recovery of the sum of £503 4*s*. 7*d*. being the difference between the sum of £700 realised on the sale of the mortgaged property—which was a house known as Newbold House at Ruislip in the county of Middlesex—and the amount which was required to redeem the mortgage, which is £1,203 4*s.* 7*d.* The claim is, therefore, for the sum of £503 4*s.* 7*d.*

The defence admits the mortgage; denies that the amount claimed is due; pleads, as the fact is, that on May 23, 1940, the plaintiffs entered into possession of the property and also sold the property by private treaty on or about Dec. 2, 1942, for the sum of £700 as I have mentioned. It is then pleaded:

> The market value of the said premises at the date of the said sale and at all material times prior thereto was approximately £1,800, but the plaintiffs in the exercise of their power of sale did not as was their duty to the defendant take reasonable care to ensure that the said premises were sold at the best price which could reasonably have been obtained therefor, but acted negligently and without good faith and the defendant will rely on the provisions of the Building Societies Act, 1939, s. 10.

Particulars of breach of duty, negligence and lack of good faith are then given. They are:

> (*a*) Failure to advertise or adequately to advertise the said premises for sale. (*b*) Failure to put the premises in the hands of estate agents in the district or in the hands of estate agents in the district most likely to secure a purchaser. (*c*) Failure to take any or any sufficient steps to find a purchaser. (*d*) Failure to offer the said premises for sale by auction. (*e*) Selling the said premises by private treaty at a gross undervalue.

The defence goes on to say:

> If (contrary to the defendant's contention) it is held that the plaintiffs are entitled to recover herein the said sum of £503 4*s.* 7*d.* or any sum the defendant claims to set off against the same so much as is found due to him on the counterclaim herein as is necessary to extinguish the same.

Then there is a general traverse and the counterclaim repeating the material parts of the defence, alleges:

> By reason of the plaintiffs' aforesaid breaches of duty and of good faith and by reason of their said negligence the defendant has lost the difference between the aforesaid market value and the sale price, namely, the sum of £1,100, and has suffered damage.

Then there is a counterclaim for damages. The reply and defence to the counterclaim denies that the market value of the premises in question at any material time was approximately £1,800; the plaintiffs deny every allegation of breach of duty, negligence and lack of good faith, and so forth, and they deny that the defendant is entitled to anything on the counterclaim.

When the action came on—not having then, of course, fully considered what I regarded as the not very easy point as to the meaning of this section in the Act of 1939—I was confronted with the difficulty of deciding upon whom lay the onus of proof in this particular case. I decided that the onus lay upon the defendant who, in effect, was attacking the propriety of the sale. I am not wholly convinced that I was right in so deciding, but I do not think any harm has been done because the facts in a very lengthy hearing have now, I think, come out quite clearly before me. I should like, however, to reserve the right, if ever such a case comes before me again, to reconsider the question of where the onus lies. If this section, as I think it does, puts a positive obligation upon the building society, it may well be that, if there is a striking disparity between the amount realised and the amount of the mortgage, the onus lies upon the plaintiffs to show that they have fulfilled their obligations under the section. I will not pause to consider that further, but I do wish to safeguard myself against being necessarily bound to hold that the onus is where I held it to have been in this particular case.

The story of the matter, into which I do not propose to go at length, is largely set out in the bundle of correspondence. Several facts are, to my mind, abundantly clear. First of all, this was a troublesome property to deal with and I do not think I am doing the defendant an injustice when I say that he was a troublesome customer to the building society. He was difficult to get hold of; he was difficult to get money out of; and quite obviously he was not one of those customers on the books of the society whom they looked upon as one who would not give them any particular trouble. He told me in the witness box (and it may well be the fact) that, after the building society had gone into possession in May of 1940, he thought that the whole matter was at an end so far as he was concerned and that the building society had taken the property, as I understood him, in satisfaction of the debt. I have some hesitation in believing that, but it may possibly be true.

The property was undoubtedly in a bad state of repair; it was in bad repair when the defendant bought it in the year 1935; and, although he spent some considerable amount of money upon it, I do not think it was ever in good repair. I should think from the evidence which was laid before me it was a property which would degenerate very quickly if left unoccupied and in any way neglected; there were structural defects as well as decorative ones, and in these days when even the smallest repairs can only be done with difficulty, I think that it was essentially a property which might well go down in value very quickly.

The exact steps which the building society took in order to get a purchaser at all were, no doubt, rather few in number. Counsel for the defendant, without any sinister intention, referred many times to the section as imposing a duty upon the building society to take steps to ensure that the estate is sold at the best price, but all that section says is that the building society shall "take reasonable care to ensure that the price is the best price which can reasonably be obtained."

The word "ensure" has puzzled me a good deal. I think it is used in the common and colloquial sense in which "making sure" is used—that is to say, being equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee. I think that the "reasonable care" which has to be taken is to make sure, to assure oneself, that the price at which the estate is proposed to be sold is the best price which can reasonably be obtained; that is to say, as I understand it, taking as a postulate that a sale had to be effected in November or whatever month it was in 1942, did the society through its officer satisfy itself that at that moment no better price was available?

With a certain amount of hesitation I have come to the conclusion that the building society did just fulfil its obligations under the section. It is a matter of extreme difficulty to reconstruct the position as it stood in the last three months of the year 1942. I had a good deal of evidence that the value of the property was considerably more than £700, and so no doubt it was—I accept that—if you value the property with regard to its prospects, treating it more or less as a lock-up investment; but I cannot think that the value of the property to a person who was entitled to hold on to it has really any relevance here, if I am right in holding that a building society mortgagee, no less than any other mortgagee, is entitled to say: "I will not wait for my money any longer and I am going to realise my security for the best amount I can get."

I have found great difficulty in formulating exactly in my mind what the secretary of the building society, should have done in order to take the requisite statutory reasonable care to make sure, to assure himself—that is, to ensure—that the price which he was getting for this property was the best which could be reasonably obtained at that time. It is suggested that he ought to have gone to more estate agents than the one firm into whose hands he put himself or put his society. I am not convinced of that. It may be that he ought to have done that. I am still less convinced that he ought to have advertised this property, for I think that the drafting of an advertisement in the circumstances of disrepair, and so forth, in which this house was, would have been extremely difficult and might well have been highly depreciatory. I am even less convinced that there ought to have been an auction sale. Auction sales during war, I think it is common knowledge, have been sometimes in regard to exceptional property very successful, but in many other cases they have been most unsatisfactory; and when a property is known to have been put up, not to have reached the reserve and to have been withdrawn, it loses reputation in the neighbourhood. I think, therefore, it may well be the case that the steps which counsel for the defendant suggests ought to have been taken would in point of fact have made bad worse.

I am not altogether satisfied with the way in which the society has dealt with this matter, and, in particular, I think that they ought to have kept a much more careful record of the various steps which they took in regard to it. I think there should have been a properly documented file to show exactly how they were, during the period following their entry into possession, endeavouring or intending to carry out their duties under this section. I think that the secretary's very sketchy way of treating this matter when he was in the witness box and his vague reference to letters which he afterwards admitted were not in existence is a little typical of the rather rough and ready way in which this matter was dealt with.

I think that the building society must now take just as much care as a trustee has always had to take in relation to trust money, so that just as when a trustee is challenged by the beneficiary to account for what he has done, so I think a building society must be prepared, when challenged by the mortgagor, to show exact particulars of the care which he has taken to make sure that the price which has been obtained for the property is a price upon which no advance was available at the moment. I think that the secretary, who is no doubt a very competent official of the building society, must remember in future that this section places him or places his society under a peculiar position of obligation towards the mortgagor, and that the attitude which could be taken up by the ordinary mortgagee of saying : " I have sold at a proper price ; I have got my money and there is an end to it " is not the sort of attitude which can in future be taken up by a building society. In my view, the statement that the mortgagee in ordinary circumstances must obtain, not the best price but a proper price, has now been varied in the case of a building society by reference in this section to the " best price."

If I am wrong in my interpretation of the evidence and in the view which I take of this case, and, if it be the fact that some other court should hold that the building society instead of having just fulfilled the obligations in fact did not quite fulfil them, then I hold as a matter of fact that I am not satisfied on the evidence that any higher price could at the relevant date have been obtained than the £700, so that perhaps the matter would have reached much the same result as it does upon the view that I take of the section. On the whole, I think that justice will be done in the circumstances of this case by giving the plaintiffs judgment for the amount which they claim but without costs. On the counterclaim I propose to make no order of any kind either as to costs or otherwise.

Judgment for the plaintiffs on claim. No order as to costs. No order on the counterclaim.

Solicitors : *Shaen, Roscoe & Co.* (for the plaintiffs) ; *Beardall, Fenton & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BANK OF BARODA LTD. *v.* PUNJAB NATIONAL BANK, LTD. AND OTHERS.

[PRIVY COUNCIL (Viscount Maugham, Lord Macmillan and Lord Wright), **May 18, 1944.**]

Privy Council—India—Bills of Exchange—Cheque—Post-dated cheque marked "Good for Payment"—No ostensible authority of manager to certify post-dated cheques—Certification not an acceptance—Estoppel—Custom—Bills of Exchange Act, 1882 (c. 61), *s.* 13 (2)—*Indian Negotiable Instruments Act,* 1881 (*No.* 2 *of* 1881), *s.* 7.

On June 13, 1939, the second respondent presented to the respondent bank a cheque dated June 20, 1939, drawn on the appellant bank by the third respondent in favour of the second respondent. The cheque was crossed " & Co." and on the face of it was written " Marked good for payment on 20.6.39. For the Bank of Baroda, Ltd., M.P. Amin, Manager." The amount of the cheque was not debited to the third respondent's account and there was no ear-marking of funds or cover for it. The second respondent indorsed the cheque generally and gave it to the manager of the respondent bank with two letters in which he asked the respondent bank to credit his account with the amount stated on the cheque and also requested an overdraft which he promised to adjust on June 20, 1939. The respondent bank made no inquiries and did not question the validity of the certification. The respondent bank on the same day gave the second respondent its cheque drawn on the Imperial Bank of India which was duly cashed by the second respondent. The respondent bank debited the account of the second respondent with the amount. On June 20, 1939, the respondent bank presented the cheque drawn on the appellant bank, but payment was refused and the cheque returned with a note attached "Not arranged for." The respondent bank contended (i) that the certification amounted to an acceptance within the definition of the Negotiable Instruments Act (India), 1881, s. 7, or, alternatively, that it was an acceptance by reason of a custom or usage; (ii) that the certification amounted to a contract; (iii) that the certification created an estoppel and they relied upon the doctrine of *Pickard* v. *Sears* (8) and *Jorden* v. *Money* (9):— A

HELD: (i) the certification or marking in question was not an acceptance within the meaning of the Bills of Exchange Act, 1882, or the Negotiable Instruments Act (India), 1881, or at common law.

(ii) there was no consideration for any promise between the respondent bank and the appellant bank and, therefore, the certification did not amount to a contract.

(iii) there was no estoppel because the doctrine under which the respondent bank claimed was limited to a representation as to an existing fact, and here the representation related to the future. B

(iv) the ostensible authority of the manager of the appellant bank did not extend to cover the certifying of post-dated cheques nor did he have the actual authority to do so.

[**EDITORIAL NOTE.** The "marking" of cheques is not often resorted to in countries governed by English law, and its consideration by the court seems to have been limited by the consideration of marking in connection with clearances. The principal question here is whether the marking could be treated as an acceptance and whether a cheque can be accepted. The question whether a cheque can in any circumstances be accepted is left open, though it is obviously thought that a cheque is a type of negotiable instrument which does not admit of acceptance, and it is decided that, in any event, the marking or certification here in question was not an acceptance. C

AS TO ACCEPTANCE OF NEGOTIABLE INSTRUMENTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 633-637, paras. 868-877; and FOR CASES, see DIGEST, Vol. 6, pp. 56-68, Nos. 449-549.] D

Cases referred to:

*(1) *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337; 17 Digest 7, *31*; 44 L.J.Ex. 157; 33 L.T. 272; *affd.* (1876), 3 App. Cas. 476.

(2) *Ramchurn Mullick* v. *Luchmeechund Radakissen* (1854), 9 Moo. P.C.C. 46; 6 Digest 10, *9*; *sub nom. Radakissen and Doss* v. *Ramchurn Mullick*, 2 C.L.R. 1664; *sub nom. Mullick* v. *Radakissen*, 23 L.T.O.S. 25. E

(3) *Macbeth* v. *North & South Wales Bank*, [1908] 1 K.B. 13; *affd.*, [1908] A.C. 137; 6 Digest 32, *209*; 77 L.J.K.B. 464; 98 L.T. 475.

*(4) *Robson* v. *Bennett* (1810), 2 Taunt. 388; 6 Digest 60, *473*.

*(5) *Gaden* v. *Newfoundland Savings Bank*, [1899] A.C. 281; 3 Digest 225, *591*; 68 L.J.P.C. 57; 80 L.T. 329.

(6) *Keene* v. *Beard* (1860), 8 C.B.N.S. 372; 6 Digest 10, *10*; 29 L.J.C.P. 287; 2 L.T. 240. F

(7) *Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889; 6 Digest 10, *14*; 71 L.J.Ch. 478; 86 L.T. 410.

(8) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 21 Digest 290, *1032*.

(9) *Jorden* v. *Money* (1854), 5 H.L. Cas. 185; 21 Digest 292, *1041*; 23 L.J.Ch. 865; 24 L.T.O.S. 160; *revsg. s.c. sub nom. Money* v. *Jorden* (1852), 2 De G.M. & G. 318.

(10) *Forster* v. *Mackreth* (1867), L.R. 2 Ex. 163; 6 Digest 52, *398*; 30 L.J.Ex. 94; 16 L.T. 23. G

APPEAL by the defendants from a decision of the Supreme Court of Calcutta. The facts are fully stated in the judgment of the Board delivered by LORD WRIGHT.

Sir Thomas Stangman, K.C., and *J. M. Pringle* for the appellants.

D. N. Pritt, K.C., and *S. A. Kyffin* for respondents.

H

LORD WRIGHT: The appellant is a company doing banking business, established in the State of Baroda, under the Baroda Companies Act, 1896-7, and having its registered office in Baroda with branches in British India. The respondent is a bank incorporated under the Indian Companies Act. Both banks have branches in Calcutta. M. P. Amin was manager of the Calcutta branch of the appellant bank. Bhagwan Das was manager of the Calcutta branch of the respondent bank. One Mitter the second defendant became a customer of the appellant bank at Calcutta. In May 1939 the third respondent

Ghose opened an account with the appellant bank on the understanding that he should be allowed "temporary accommodation from time to time." That account was guaranteed by Mitter.

On June 13, 1939, Ghose's account with the appellant bank showed an opening debit balance of Rs. 1,26,339 reduced during the course of the day to Rs. 89,274. On the same date Mitter's account with the respondent bank was overdrawn to the extent of about Rs. 35,000. On that day, Mitter brought to the respon-
A dent bank two cheques drawn by Ghose on the appellant bank both in favour of Mitter and both dated June 13, 1939; both cheques were marked on their face with the words "Marked good for payment up to 20th June, 1939," and signed by Amin on behalf of the appellant bank. One cheque was for Rs. 1,40,000 and the other for Rs. 1,35,000. Mitter informed Bhagwan Das that the cheques would not be paid until June 20, 1939, and asked to be allowed to draw Rs. 2,40,000 against them. Bhagwan Das said he wanted a cheque the
B date of which was the same as that on which payment was to be made. Mitter then took away the cheques and returned a little later on the same day with one cheque dated June 20, 1939, drawn by Ghose on the appellant bank in favour of Mitter or order, for Rs. 2,75,000. The cheque was crossed "& Co." and on the face of it were written crosswise the words "Marked good for payment on 20.6.39. For the Bank of Baroda, Ltd., M. P. Amin, Manager." It has not
C been questioned that the signature was that of Amin. Mitter indorsed the cheque generally and handed it to Bhagwan Das, with two letters, in which he asked the respondent bank to credit Rs. 2,75,000 to his account "on realisation on due date," and also requested an overdraft of Rs. 2,40,000, besides the previous balance, which he promised to adjust on June 20, 1939.

The respondent bank on the same day gave Mitter its cheque for Rs. 2,40,000, on the Imperial Bank of India at Calcutta which Mitter duly cashed. The
D respondent bank debited Mitter's account with the amount.

Meantime the appellant bank had become suspicious of the conduct of Amin and had sent two senior officials to keep Amin under observation. On June 19 Amin was suspended and early next day a notice was sent to the respondent and other banks that Amin's power of attorney had been cancelled and another branch manager appointed. On June 20 the respondent bank, who, though they had not yet received the notice, had become apprehensive, sent their
E cashier and their accountant to the appellant bank, as soon as it opened for business that morning, to present the cheque marked as above which Bhagwan Das had indorsed generally for Rs. 2,75,000, over the counter for payment. Ghose's account was then in credit to the extent of annas 7 pies 3 only. The appellant bank refused payment and returned the cheque with a memorandum attached "not arranged for." After some correspondence the respondent
F bank on July 31, 1939, commenced the present suit against the appellant bank, and also against Mitter and Ghose. As against the appellant bank, the respondents claimed as holders for value of the certified cheque, and also based their claim on a custom or usage, and in the alternative on estoppel. They claimed against Ghose as drawer and against Mitter as indorser. The two latter did not appear, nor did they give evidence at the trial; indeed, they were then the subject, along with Amin, of criminal proceedings in connection with their part
G in the affair. It was not suggested that either Bhagwan Das or the respondent bank were actually party or privy to the fraud, however irregular from a banking point of view was the discounting of a post-dated cheque, quite apart from the original request to have a single cheque in place of the two brought in the first instance. It does not appear whether the cheque was post-dated at the request of the drawer, Ghose, or of Mitter. It seems that the amount of the cheque was not debited to Ghose's account and that there was no earmarking of funds
H or cover for it. Ghose's account, as already observed, was heavily overdrawn when the cheque was taken as security for the loan. It may be said that the respondent bank was not affected by irregularities of indoor management on the part of the appellant bank's manager, of which they had no notice, but the fact that money was lent on the post-dated cheque on June 13, though on its face it was only payable on June 20, and was marked for payment on that date, was a departure obvious on the face of the cheque from any practice there might be in these matters. The respondent bank, however, made no inquiries, and did not question the validity of the certification or marking. The effect

of this will be considered later.

At the trial before Panckridge, J., the evidence called included some Calcutta bankers, who deposed on the question of there being a practice in Calcutta to mark or certify cheques, but it is clear that on any view there was no satisfactory evidence that it was usual to certify post-dated cheques. Panckridge, J., held the appellant bank liable on the cheque on the ground that they were acceptors because in his judgment the certification constituted an acceptance within the meaning of the Negotiable Instruments Act (India), 1881, though he A went on to hold as a further ground that the evidence showed that bankers at Calcutta are by usage liable on cheques certified by them when presented by parties entitled thereto. He did not deal specifically with the case that the cheques were post-dated.

On appeal the judgment of the trial judge was affirmed. The Chief Justice who delivered the judgment of the court decided the case on the ground that the marking or acceptance of the cheque was in law an acceptance by the appellant B bank, and accordingly the question of usage did not arise. He said, however, that the evidence was insufficient to enable him to hold that the custom alleged was established. He was prepared to consider the evidence as showing that banks in Calcutta which mark cheques regard the certification as an acceptance which makes them legally liable to pay and that they honour their obligation. The Chief Justice did not deal at length with the objections to certifying post- C dated cheques, though in the memorandum of appeal it was expressly urged that to certify a post-dated cheque was outside the manager's authority and was outside any custom or usage.

In the court below the pleadings and issues were not very precise or formal, and before this Board the appeal has been presented and argued on the basis of the substantial issues.

The first and principal issue was whether the certification amounted to an D acceptance within the definition contained in the Negotiable Instruments Act (India), 1881, s. 7, which defines an acceptor as the drawee of a bill of exchange who has signed his assent upon the bill, and delivered the same. By sect. 6 a cheques is defined as "a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

There is no provision in the Negotiable Instruments Act (India), 1881, as to a post-dated instrument such as there is in the English Bills of Exchange Act, 1882, E s. 13 (2), which says that a bill is not invalid by reason only that it is ante-dated or post-dated. There are certain differences between the English Act and the Indian Act, which preceded the former by a year. But substantially the two Acts correspond. Both have been based on the law developed by the English courts as a part of the law merchant, which the common law originally received on the basis of what was proved to the court to be the custom of European F business men in their dealings, but which eventually, under the name of the law merchant, was integrated with and became a part of the common law. The law of negotiable instruments was peculiarly adapted to codification, because it was so largely precise and formal. Hence the English Act was described as a codifying Act, and so in fact was the Indian Act. Both were based on the English decisions and hence these and later decisions of either country are commonly cited and relied upon. And in addition decisions from other common law juris- G dictions are frequently cited as in the present case is done by the Chief Justice. But the law merchant is not a closed book nor is it fixed or stereotyped. This was explained by Cockburn, C.J., in *Goodwin* v. *Robarts* (1), at p. 346 and following pages. Practices of business men change, and courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction. Hence evidence is admitted of custom H and usage, which when juridically ascertained and established become incorporated in the common law. Thus, in the present case, there is an alternative claim based on custom and usage. But the contention that the certification was an acceptance of the cheque is primarily a question of law, to be decided on the terms of the Act and on the authorities upon a correct understanding of the characteristics of a cheque and of the effect of certification.

The main question falls into two parts: one is whether it is legally competent to accept a cheque as if it were a bill within the Negotiable Instruments Act

(India), 1881, s. 7, and the other is whether certification constitutes an acceptance. Now it is to be noted that, so far as their Lordships know, there is no case in the books of the acceptance of a cheque. This is an arresting fact at the outset, especially when the myriad cheques which have been drawn and paid during all these years are considered. The reason why a contrast is drawn between the acceptance of a cheque, which is a bill of exchange of a special type, and the acceptance of an ordinary bill of exchange depends on the distinction in fact between a bill of exchange and a cheque, which are in many respects different and distinct in their character and origin (see *Goodwin* v. *Roberts* (1), at p. 346), though in many respects they are analogous. In *Ramchurn Mullick* v. *Luchmeechund Radakissen* (2), at p. 69, this Board on an appeal from the Supreme Court of Calcutta in a judgment delivered in 1854 by Parke, B., pointed out some of the essential differences ; he said that a cheque is a peculiar sort of instrument, in many ways resembling a bill of exchange, but in some entirely different. He said that in the ordinary course it is never accepted : it is not intended for circulation, it is given for immediate payment, it is not entitled to days of grace. In addition, it is to be noted, a cheque is presented for payment, whereas a bill in the first instance is presented for acceptance unless it is a bill on demand. A bill is dishonoured by non-acceptance ; this is not so in the case of a cheque, because the holder of a cheque, as between himself and the drawer, has no right to require acceptance. These essential differences (besides others) are sufficient to explain why in practice cheques are not accepted. Acceptance is not necessary to create a liability to pay as between the drawer and the drawee bank. The liability depends on the contractual relationship between the bank and the drawer, its customer. Other things being equal, in particular, if the customer has sufficient funds or credit available with the bank, the bank is bound either to pay the cheque or dishonour it at once. There is no point in its saying in effect to the drawer or, indeed, to the holder if it has been transferred, " I will pay if you present it again." It is different in the case of an ordinary bill ; the drawee is under no liability on the instrument until he accepts ; his liability on the bill depends on his acceptance of it. As between the drawer and his bank, acceptance of a cheque is superfluous. It would be merely a confirmation of the contractual liability of the bank to honour the customer's orders to pay. The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require the bank to honour his mandate to pay the cheque. But, if the bank (at least at the drawer's request), accepts the cheque, he should be entitled to protect himself as against his customer by setting aside the appropriate funds standing to the customer's credit. The change in the position of all parties which would follow on the acceptance of a cheque if regarded as an acceptance under the Act has led the highest English authorities to lay it down that cheques are not the proper subject of acceptance, or at least to say, as Chalmers on Bills of Exchange, 10th Edn., stated, on p. 292, that " a cheque is not intended to be accepted," though he adds " at common law there is no objection to the acceptance of a cheque if the holder likes to take it in lieu of payment." These latter words emphasise the difference for this purpose between a bill and a cheque, and also explain why cheques are not in practice accepted. In *Macbeth* v. *N. & S. Wales Bank* (3), at p. 18, Lord Alverstone, L.C.J., said : " In ordinary parlance there is no acceptor to a cheque." It seems that on special occasions bankers do accept cheques drawn on themselves so as to make them payable at one of their clearing bankers, they themselves not being members of the Bankers' Clearing House, but this is rare and exceptional. Both Chalmers on Bills of Exchange and Paget, Law of Banking, 4th Edn., p. 164, are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but, if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the court in 1810 in *Robson* v. *Bennett* (4). That is a practice between bankers for the purpose of clearing. It was judicially recognised by Cockburn, C.J., in *Goodwin* v. *Roberts* (1), at pp. 351, 352, in these words :

> . . . a custom has grown up among bankers themselves of marking cheques good for the purposes of clearance, by which they become bound to one another.

This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of the new Regulations and Rules of the Calcutta Clearing Banks Association, r. 12, which are exhibited in the documents of this case. R. 12 says :

> It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the " acceptance " of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of " acceptance " of the document.

It is to be noted that though it uses the term " acceptance " it puts it in inverted commas, so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking bank is by the judicially established custom bound to pay it to the other bank. This certification or marking cannot, however, be identified with an acceptance.

In the United States, the practice of marking or certifying cheques has been established and defined by the different state legislatures in the Uniform Negotiable Instruments Acts. It is presumably this law, as enacted in New York State in 1897, to which the Chief Justice refers in his judgment. The same measure, with trifling variations, has since been made law in the other states of the Union. Their Lordships must, therefore, briefly advert to this law, which gives a statutory recognition to the certification of cheques. The Uniform Act, s. 187, provides that :

> Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

It does not say that the certification is an acceptance, which is dealt with in a different part of the Act. The whole position is, indeed, materially different, as is clear from sect. 188, which goes on to define the effect of certification in the following terms :

> Where the holder of a check procures it to be accepted or certified the drawer and all endorsers are discharged from liability thereon.

These sections have led to a great deal of judicial discussion in the courts of the United States, the effect of which is summarised in the standard work of Brannan on Negotiable Instruments Law, 6th Edn., p. 1146 *et seq*. These discussions also show that certification and acceptance are different things under the Act. Certification makes the banker the debtor of the holder, and discharges the drawer altogether if the certification is not made by his procurement. Certification adds a new party, the bank, as primary debtor, and necessarily involves readjusting the legal position of the original parties, drawer and payee. A similar rule has been adopted, it seems, by the courts of Canada on the basis of the custom in Canada judicially recognised by this Board in *Gaden* v. *Newfoundland Savings Bank* (5). The custom was stated at pp. 285, 286 to be that :

> The only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn.

These last words are not very precise and their exact effect has not been argued in this appeal. It is not here necessary or proper for their Lordships to attempt to follow in detail the Canadian authorities on this topic.

Their Lordships have referred to these matters as tending to support the view that certification is different both in its history and its effects from acceptance, even in jurisdictions in which either by statute or by custom it is declared to be " equivalent " to an acceptance. But it is different in England and India, where the marking of a cheque has so far been only judicially recognised to import a promise or undertaking to pay as between banker and banker for the purpose of clearance. In the absence of relevant enactment or custom, the issue in England and India as to the effect of the certification of a cheque must be determined by the common law.

Their Lordships are of opinion that the certification which is relied on as constituting acceptance of the cheque is not an acceptance within the meaning of the English or Indian Act or the common law. It is not necessary categorically to hold that a cheque can never be accepted ; it is enough to say that it is only done in very unusual and special circumstances. The authority which has been strongly founded upon by the respondent is a case in 1810, *Robson* v. *Bennett* (4), where the practice already mentioned of London bankers to mark cheques presented after banking hours by one banker drawn on another in order to show that the drawer had assets and to show that they would be paid next day at the clearing house, came incidentally into question. The real issue was whether the holder had become bound, as between himself and the drawer, to treat the cheque as good payment of the debt for which it had been given; the facts were that the drawee bank had stopped payment the next morning, so that the cheque was not actually paid. The drawer claimed that the holder was bound to treat the cheque as payment because he had been guilty of laches in not presenting the cheque within banking hours on the day on which it was given. In that event, the drawee bank, which had not then stopped payment, would have met the cheque because the drawer's account was sufficiently in credit. The Court of Common Pleas rejected this contention, and held that there had been no laches on the part of the holder and that by reason of the practice of bankers the actual presentment which had been made was in good time. MANSFIELD, C.J., in giving judgment, used the phrase that "the effect of that marking is similar to the accepting of a bill." That was a mere *dictum* not necessary, or, indeed, relevant, to the decision of the case; the banker was not even a party to the action. Having regard to the custom stated by COCKBURN, C.J., in *Goodwin* v. *Robarts* (1), quoted above and the whole tenor of English authority, their Lordships are of opinion that the *dictum* cannot be justified in English or Indian law. In *Keene* v. *Beard* (6), the question was whether the holder of a cheque could sue the endorser on his endorsement. It was held that he could. No question arose as to the acceptance of a cheque, but ERLE, C.J., in the course of his judgment, observed, at p. 380:

> A cheque is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for aught I know do so.

Further instances of incidental observations to the same effect or similar observations in well-known text writers need not be quoted. Their Lordships repeat that so far as they are aware no case is reported in England or India of a banker being held liable or even sued as acceptor of a cheque drawn upon him. It would certainly require strong and unmistakeable words to amount to the acceptance of a cheque. That cannot be predicated of the certification here in question, which cannot therefore be regarded as an acceptance unless a custom could be established to treat certifications as acceptances.

If the respondent were entitled to claim against the appellant as on an acceptance of the cheque, there would be no defence, unless on the point that the cheque was post-dated. This problem their Lordships will consider later. If that point is for the moment disregarded the respondent's claim may, however, be put forward in default of it being held that there was an acceptance of the cheque on the ground that there is a custom which makes the appellant liable, or, alternatively, on the ground that by common law, apart from special custom, the respondent can claim either in contract or on an estoppel upon the actual words used in the certification.

The Chief Justice, having held that the certification constituted an acceptance, went on to say that the question of usage accordingly did not arise. He added that:

> . . . before agreeing with the learned judge that a usage such as he mentions had been established, I should require further evidence . . . I prefer to regard the evidence as showing that banks in Calcutta, which certify and mark cheques, regard the certification or marking as being an acceptance which makes them legally liable to pay the amount thereof and that they honour their obligations.

Their Lordships do not regard these two sentences as necessarily inconsistent. The latter seems to them merely to state that the general habit of business men supports the Chief Justice's decision that in law there was an acceptance. It cannot be intended to substitute a sentiment that banks ought to honour their signature whether in law binding or not, for the correct legal position when a bank feels entitled or bound to rely on the strict letter of the law and the court is required to decide strictly the legal rights. Their Lordships agreeing with his decision that the evidence of custom is insufficient, as they think it is both in the number and quality of the witnesses and in the certainty and precision of the evidence given, cannot in view of the decision which he had previously expressed on the issue of custom, treat the sentence as intended to find a legally binding custom. There is, indeed, in the evidence no instance spoken to of a dispute being settled in favour of the alleged custom ; the instances given are comparatively few and from a few banks, and are mainly instances of the limited custom of bankers in the clearance, which is not questioned. In some cases given in evidence the periods between certification and clearance extend over the week-end, and in one instance at least even a few days longer. They can, it seems, be most properly regarded as instances of occasional laxity. But there is nothing to justify the finding of a custom to identify certification with acceptance.

In one essential matter, however, the evidence is not merely too weak to support a custom, but is directly opposed to it. The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable. The general tenor of the evidence as to them in this case is that it is at the lowest unusual to certify post-dated cheques, indeed, that it is almost unknown. Bhagwan Das said that he had never certified a post-dated cheque. As to the actual certification on the particular cheque in question, he said that he took it as a representation that the appellant bank would meet the cheque on a future date, and he said he would feel no difficulty in marking a post-dated cheque, though he did not directly answer the question whether it was usual to do so, but merely said, " There is no harm," and later that it was done in rare cases. He also said that this was the only instance in which while at Calcutta he had advanced money on a post-dated cheque. His view of the law was that by marking or certifying the cheque, they became in a way the drawers of it. Another of the respondent's witnesses said that he did not think he had certified a post-dated cheque or accepted (that is, taken) a post-dated cheque certified by another bank. But he expressed his view that, if he certified the cheque, his bank would be liable. Another witness called by the respondent said that it was not unusual to certify a post-dated cheque, though in answer to a leading question on re-examination, he agreed that a bank was bound to pay a certified post-dated cheque. Another of the respondent's witnesses said that he would not discount a certified post-dated cheque ; he would feel there was something suspicious in the transaction and would make inquiry. The appellant was content in the main to point out the inadequacy of the respondent's evidence.

In their Lordships' judgment, the evidence of custom fails as the Chief Justice held. As to the alternative claim in contract or on an estoppel, that claim, in their judgment, also fails. The certification must for this purpose be construed according to the proper meaning of the words used in their setting and independently of the doctrine of negotiability, which is the creation of legislation or established usage. If legislation or usage is ruled out, as in this case it must be, the question is whether the words read in their context, that is, as appearing on a cheque, import a promise by the certifying bank to pay the amount of the cheque whether or not there are funds to meet it, and, if they do, whether there is any privity of contract between the respondent and the appellant, and, if there is, whether there is consideration for the promise as between these parties. If the certification on the cheque had been negotiable, as an acceptance in the proper sense would have been, the respondent bank would *prima facie* have been entitled to claim as a holder in due course, having given value to its immediate transferor, and would not be concerned with the state of accounts or the equities between the appellant bank and Ghose or Mitter, to one or both of whom the certification was issued. But this is not the case unless the certification amounted not merely to a promise but a negotiable promise by the appellant. The respondent bank must show privity of contract between itself and the appellant bank whereas there was privity of contract only as between the appellant bank and either Ghose or Mitter or perhaps both. The respondent bank claims as a holder in due course, and must so claim. If it claimed as assignee or agent for collection, it would have no better title than its assignor or principal. But in addition there clearly was no consideration passing to the appellant from the respondent. There was thus no enforceable contract, even if the certification could be construed according to its terms as a contract to pay.

Their Lordships doubt whether, on this ground, no custom being established, the words of the certification could be so construed. They might be construed as words of representation, as to the genuineness of the cheque and of the signature. If the cheque had not been post-dated, the certification might also be held to include a representation as to the then sufficiency of the drawer's account. But as the cheque was not due for payment until seven days later, a representation as to the then position would not go very far. If it was to be construed as a representation that on the due date there would be funds available, it necessarily amounted to a promise and the want of consideration would be fatal to its enforceability. The promise, if any, was a non-negotiable gratuitous promise given either to Ghose or Mitter or to both to lend the money when the 20th came. Their Lordships adopt the language of BUCKLEY, J., used in a different context in *Re Beaumont* (7), at p. 896 :

> No right had been acquired by the drawee, but an expectation only. Even if the manager did not change his mind, still an agreement to lend is not enforceable, and no right of property had passed to the drawee.

What was in question there was a *donatio mortis causa* of a cheque which the manager of the bank had said would be met. But the principle stated has an application to the certification here. What was said could have been revoked or disowned. It was not binding ; there was no appropriation of funds or declaration of trust involved in the certification, because there were in fact no funds available on the 13th or, indeed, the 20th. Nor could the certification be construed as an estoppel on which the respondent could claim on the doctrine of *Pickard* v. *Sears* (8) and *Jorden* v. *Money* (9), because that doctrine is limited to a representation as to an existing fact, whereas not only were no funds available, but what is called the representation related to the future. Even if funds had been available and had been " frozen," the bank would be entitled to release them before June 20 in the absence of a binding promise to maintain them. It was only to the position in the future when the time for payment arrived that the certification had reference, and whatever language was used, it necessarily amounted, if it was to be effective, to a promise or nothing. From the point of view of a court of law, a gentlemen's agreement or honourable obligation, however important in business, has no validity.

But behind all these considerations lies the circumstance that the cheque was post-dated. The question of certifying a post-dated cheque has been adjudicated upon in the United States. It has there been held there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable and that anyone taking a post-dated cheque before the day of its date is put upon inquiry. As to this reference may be made to BRANNAN ON NEGOTIABLE INSTRUMENTS LAW, p. 1152. There do not seem to be any English cases on the point, presumably because the practice of certifying cheques is not judicially or legislatively established in England and the same is true of India. It was, however, held in *Forster* v. *Mackreth* (10) that a partner had no authority to bind his firm who were solicitors by a post-dated cheque any more than he had authority to bind the firm by a bill of exchange. No doubt the reason for denying ostensible authority is in some aspects different in the one case from that in the other. But in each case it depends on the nature and normal exigencies of the business, and a banker's business does not normally involve that a manager's authority should extend to certifying and still less making a loan against a post-dated cheque. The Chief Justice deals shortly with the difficulty by holding that the post-dated cheque was in law a bill of exchange at seven days' date, which on June 20 became a bill of exchange payable on demand and, therefore, a cheque. But the material date in this context is that of the certification, issued when the bill or cheque was not due. A post-dated bill is under the English Act, sect. 13 (2), not invalid by reason only that it is post-dated. There is no similar provision in the Indian Act, but the same result would, it seems, follow from the common law and the position of a post-dated cheque is recognised in the Indian Stamp Act. But the material invalidity is that of the certification, taken in connection with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due *in praesenti*, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due. The position might be different in jurisdictions where by law or custom certification is equivalent to acceptance, but nothing of the sort is applicable here. Even in such cases the difficulty of saying that there was constructive payment would remain. It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques and that, in the present case, the manager had no actual authority to do so. The bank accordingly was not bound. This in itself would be a sufficient ground for rejecting the respondent's claim.

Their Lordships are not unconscious that bankers regard their word as their bond, and honour their signature even though they might have an answer in law. This is especially true as between banker and banker. Bankers would say that the bank making the mistake or whatever it was should stand by its act. But in circumstances such as those of the present case, the mistake in certifying the cheque would have done no harm, if it had not been for the act of the other banker in discounting it, though the defect was apparent on its face. A lawyer would be disposed to hold that the responsibility lay with the latter bank. In any case, the court is here called upon to decide how the law at present stands. It is not the arbiter on questions of banking ethics or etiquette or good banking policy as a matter of business. The high standards of bankers are too firmly established to be shaken.

On the whole case their Lordships are of opinion that the action of the respondent should fail. They think that the appeal should succeed and the judgment for the respondent should be set aside, and the action dismissed with the costs in the courts below and of the appeal.

Appeal allowed with costs.

Solicitors: *Sanderson, Lee & Co.* (for the appellants); *Douglas Grant & Dold* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

G. A. CRAMP & SONS, LTD. *v.* FRANK SMYTHSON, LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Macmillan, Lord Roche, Lord Porter and Lord Simonds), **May 8, 10, 11, 15, June 21, 1944.**]

Copyright—Infringement—Diary—Copyright in tables contained in diary—Knowledge, labour and judgment involved—Copyright Act, 1911 (c. 46), *s.* 1 (1).

The respondents, who had published the Liteblue diary annually since 1933, alleged infringement of their copyright by the appellants in their Lightweight Diary, 1942. The publication on which the respondents relied as being the subject of copyright was the Liteblue diary for the year 1933. The alleged infringing diary was based on an admitted copy of the respondents' publication made in 1938 by an employee of the appellants who had formerly been employed by the respondents. The respondents contended that they were entitled to copyright in respect of the words, type and lay-out in the body of the diary as well as in the tables of information at the beginning. These tables had been compiled for the first issue of the diary by Smythson, who had since died, and no evidence was available as to the sources from which he had compiled them. The appellants contended that they were not aware and had no reasonable ground for suspecting that copyright subsisted in the respondents' diary and were, therefore, protected by the Copyright Act, 1911, s. 8:—

HELD: the selection of the information reprinted in the diary did not constitute an original literary work sufficient to entitle the respondents to copyright under the Copyright Act, 1911, s. 1 (1).

Decision of the Court of Appeal ([1943] 1 All E.R. 322) *reversed and judgment of* UTHWATT, J., *restored.*

[**EDITORIAL NOTE.** Questions of copyright of the nature here discussed are often matters of degree, but here the House has decided that there was nothing in the tables which could be original literary work. It was contended that the selection gave opportunity for originality, but, in the present case, this is rejected.

AS TO SUBJECT-MATTER OF COPYRIGHT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 520-522, paras. 822-824 ; and FOR CASES, see DIGEST, Vol. 13, p. 172, Nos. 84-86.]

Cases referred to :

*(1) *Macmillan & Co.* v. *Cooper* (1923), L.R. 51 Ind. App. 109 ; 93 L.J.P.C. 113 ; Digest Supp. ; 130 L.T. 675.

(2) *Leslie* v. *Young & Sons*, [1894] A.C. 335 ; 13 Digest 172, *85*.

(3) *Macmillan* v. *Suresh Chunder Deb* (1890), I.L.R. 17 Calc. 951 ; 13 Digest 168, *q*.

APPEAL by the respondents on the question of copyright from a decision of the Court of Appeal (LORD GREENE, M.R., and MACKINNON, L.J., LUXMOORE, L.J., dissenting), dated Feb. 15, 1943, reported [1943] 1 All E.R. 322, where the facts are fully set out.

D. N. Pritt, K.C., and *F. Gahan* (for *H. C. Leon* on war service), for the appellants.

K. E. Shelley, K.C., and *Alan Stevenson* for the respondents.

VISCOUNT SIMON, L.C. : My Lords, both these parties were publishers of pocket diaries. A number of disputes between them have been settled in the litigation which has already taken place, and the question that remains is whether the appellants, in inserting certain tables in their Surrey Lightweight Diary 1942, have infringed any copyright that the respondents had in a collection of tables included in their pocket diary known as Liteblue Diary 1933. It is not disputed that seven of these tables had been copied from the respondents' diary by one Eckford, who entered the appellants' service (after previously serving the respondents) as diary manager and salesman in 1937, though it is right to add that his employers knew nothing of this copying. If, therefore, the respondents owned any copyright in the compilation of material which was copied by Eckford from their diary, infringement of this copyright by the appellants in their Surrey Lightweight Diary 1942 is not, and cannot be, disputed. The question, however, is whether, having regard to its nature and subject-matter, the compilation to be found in the respondents' "Liteblue Diary," which has thus been copied and made use of by the appellants, should be regarded as matter for copyright.

There has been a noteworthy difference of judicial opinion on this issue. UTHWATT, J., who heard the action came to the conclusion that :

> . . . the selection of lists and tables and the arrangement of the respondents' diary . . . [were nothing more than] a commonplace selection of gobbets of information and a commonplace arrangement, neither of which involved any real exercise of knowledge, labour, judgment or skill.

He held, therefore, that the respondents' work was not entitled to copyright. In the Court of Appeal LUXMOORE, L.J., took the same view, stating at p. 330 that :

> . . . the compilation for which copyright is claimed is nothing more than a commonplace selection of scraps of information, or a commonplace arrangement, neither of which has involved any real exercise of labour, judgment or skill.

He, therefore, held (like UTHWATT, J.), that the claim for copyright by the present respondents failed. LORD GREENE, M.R., and MACKINNON, L.J., took a different view. LORD GREENE, M.R., held that the collection of tables prefixed to the present respondents' diary was a compilation which was entitled to copyright and at p. 325 considered it to be established that :

> . . . there is a sufficient amount of skill, labour, judgment and so forth put into the selection of that group of tables to attract copyright.

It was observed by MACKINNON, L.J. :

> That the defendants slavishly copied the printed matter in the plaintiffs' book is manifest and beyond dispute. The only question, therefore, is whether the matter so copied is susceptible of being the plaintiffs' copyright. The matter copied is information as to various topics such as the compiler of such a diary invariably prefixes to the pages of the diary proper. Such information is, of course, open to all the world as part of the stock of common knowledge. The compiler of this part of a diary, if he is really a compiler, has to do two tasks of selection, first the selection of the particular topics, and secondly the expression or selection of the written matter upon each topic.

After analysing the nature of the written matter, he observed at p. 327 :

> What degree of labour and skill will suffice to create copyright in an original work must in every case be a question of fact. In the present case it is near the line . . . But, in my opinion, the plaintiffs are entitled to say that they have copyright in the eight pages of printed matter which the defendants appropriated, . . .

In the Court of Appeal, therefore, the decision of UTHWATT, J., was reversed by a majority.

A The principles of law to be applied to this issue are not in any doubt. By the Copyright Act, 1911, s. 1, copyright subsists under the conditions mentioned in the section in every "original literary . . . work" and this expression includes "compilations." Nobody disputes that the existence of sufficient "originality" is a question of fact and degree. LORD ATKINSON's observation in delivering the judgment of the Judicial Committee in *Macmillan & Co.* v. *Cooper* (1) lays down the law on the subject in terms which are universally B accepted. He said, at p. 125 :

> What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act, 1911, cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.

C Applying this rule to the evidence in the present case, and after hearing full arguments at the bar of the House, I have reached the conclusion that the respondents' copyright is not established and that the appellants have, therefore, not infringed.

The preliminary pages of the respondents' 1933 diary contained, amongst other matter (i) a calendar for the year ; (ii) a selection of "Days and Dates" for the year ; (iii) Inland Postal Rates ; (iv) Empire and Foreign Postage ; D (v) Equivalents of Metric and Imperial Weights and Measures ; (vi) Lighting-Up Times ; (vii) Empire and Foreign Time Table (*i.e.*, the equivalent time to noon at Greenwich for some 30 places) ; and (viii) a Percentage Table beginning with the information that 10*s.* in the £ is equal to 50 per cent., and ending with the statement that 3*d.* in the £ is equal to 1¼ per cent.

The respondents base their claim to copyright upon the selection of these E tables to form a combination of information, and the declaration made by the Court of Appeal is that the "collection of tables comprised in the plaintiffs' Liteblue Diary for 1933" as above set out (other than the calendar) "is a copyright work," and that the infringement by the defendants consists in printing and publishing in "the Surrey Lightweight Diary 1942" this collection of tables. At the same time, if I understood counsel for the respondents aright, he reserved the right to contend, if necessary, on another occasion that there F was copyright in an individual table.

The following observations appear to be justified by the evidence and by inspection of the tables themselves. First, the respondents were really unable to give any oral evidence directly bearing on the authorship or the work incident to preparation of this part of their diary. Frank Smythson, who was responsible for putting out earlier editions of the diaries, was dead, and there is no ground for inferring that the preparation of any one of these tables was in fact the G original work of Smythson or of anyone representing the respondents. The table of Lighting-Up Times states that it is "compiled by courtesy of the Automobile Association." The table of Equivalents of Metric and Imperial Weights and Measures appears to be lifted bodily from a "Harper's Diary of 1930," or else from some source used both by Harper and the respondents. The Postal Rates presumably come from the Postal Guide, and there was no evidence as to who extracted them or summarised them. Granted that the appellants H copied the respondents' tables (and this is not only admitted but is indicated by the almost precise similarity of language), there seems to be nothing that can properly be described as an "original literary work" in grouping together this information. A summarised statement of the most important of the postal charges, inland, imperial and foreign, is part of the ordinary contents of any pocket diary. There would, indeed, as it seems to me, be considerable difficulty in successfully contending that ordinary tables which can be got from, or checked by, the Postal Guide or the Nautical Almanac are a subject of copyright as being original literary work. One of the essential qualities of such tables is that they should be accurate, so that there is no question of variation in what is stated. The sun does in fact rise, and the moon sets, at times which have been calculated, and the utmost that a table can do on such a subject is to state the result accurately. There is so far no room for taste or judgment.

There remains, I agree, the element of choice as to what information should be given, and the respondents contend that the test of originality is satisfied by the choice of the tables inserted. But the bundle of information furnished in the respondents' diary is commonplace information which is ordinarily useful and is, at any rate to a large extent, commonly found prefixed to diaries, and, looking through the respondents' collection of tables, I have difficulty in seeing how such tables, in the combination in which they appear in the respondents' 1933 diary, can reasonably claim to be "original work." There was no evidence that any of these tables was composed specially for the respondents' diary; there was no feature of them which could be pointed out as novel or specially meritorious or ingenious from the point of view of the judgment or skill of the compiler; it was not suggested that there was any element of originality or skill in the order in which the tables were arranged. My own conclusion is that the selection did not constitute an original literary work.

Counsel for the respondents advanced with great pertinacity and ingenuity a subsidiary argument to which I must briefly refer. He contended that under the Copyright Act, 1911, s. 6 (3) (*b*), as the appellants had put in issue the existence of the respondents' copyright, and as the respondents' diary contained the name of the respondents as publishers, it followed that, unless the contrary is proved, the respondents were to be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein, in the sense that not only would the title of the respondents be presumed but that the existence of the copyright should be presumed also. I do not myself so read the section, for I cannot see that the conditions mentioned in the opening words of para. (*b*) have anything to do with establishing a presumption that a work is copyright, though they obviously have to do with the issue of title. My conclusion agrees with what was said by UTHWATT, J., and LUXMOORE, L.J., and I do not find that either LORD GREENE, M.R., or MACKINNON, L.J., indicates an opinion on this point to the contrary. But be that as it may, the argument of counsel for the respondents on sect. 6 would at best only shift the burden of proof, and even if I took a different view of the interpretation of sect. 6, I should still hold that it was in this case established that no copyright existed.

I move that the appeal be allowed with costs.

LORD MACMILLAN: My Lords, of the issues originally raised between the parties to this appeal there remains for determination by your Lordships only one main question. The facts which have given rise to it may be briefly stated.

The plaintiffs in the action, now the respondents in this House, are the publishers of a series of well-known and attractive pocket diaries. Among these is one designated the Liteblue Diary. Included in this diary are various printed tables of useful information prefixed to the blank pages containing spaces for each day's entries. The defendants, now the appellants, publish diaries of a similar character, among them the Surrey Lightweight Diary, which also contains a number of printed tables. In the appellants' Surrey Lightweight Diary for 1942 there are to be found, among others, seven printed tables which are almost textually identical with seven corresponding tables printed with others in the respondents' Liteblue Diary for 1933. It is admitted that, with the necessary calendar alterations and a few minor variations, the appellants copied the seven tables in question which appear in their diary from those contained in the respondents' diary. It is further admitted that if the respondents have any copyright in their seven tables the appellants have infringed it. The question is whether they have any such copyright.

On this issue of copyright or no copyright, the Court of Appeal, reversing UTHWATT, J., have held in favour of the respondents by a majority consisting of LORD GREENE, M.R., and MACKINNON, L.J., LUXMOORE, L.J., dissenting. Their judgment is expressed in a carefully framed order which declares as follows:

> That the collection of tables comprised in the plaintiffs' Liteblue Diary for 1933 and headed respectively "Days and Dates," "Inland Postal Rates," "Empire and Foreign Postage," "Equivalents of Metric and Imperial Weights and Measures," "Empire and Foreign Time Table," "Sunset Table" and "Percentage Table" is a copyright work and that the copyright therein is vested in the plaintiffs.

The order further declares that the defendants have infringed the plaintiffs' copyright by printing and publishing in the Surrey Lightweight Diary, 1942, a collection of seven tables with corresponding headings. A

The ground has been cleared by two important admissions on the part of counsel for the respondents, namely (i) that for the purposes of this case the respondents make no claim to copyright in any one of the seven tables taken individually; and (ii) that they make no claim in respect of the order in which the seven tables are arranged in their diary. The sole merit which the respondents claim as entitling them to copyright is represented as residing in the selection by them of the seven tables in question for publication in their diary. B They maintain that in choosing these particular seven tables they showed knowledge and skill and expended labour sufficient to entitle the collection to qualify, in the words of the Copyright Act, 1911, s. 1 (1), as an original literary work, which by sect. 35 (1) is defined to include "compilations."

I do not doubt that, as the annals of literature show, a high degree of skill and knowledge may be displayed and much labour and judgment expended C in gathering from the wide fields of non-copyright material at the disposal of the public specialised collections of extracts designed to meet particular needs or particular tastes. But it must always be a question of degree. Not every compilation can claim to be original literary work even in the pedestrian sense attributed to these words by the law. Thus, to take a familiar example, it has been held by this House that to compile from the official time-tables of the railway companies a local time-table showing a selection of trains to and D from a particular town is not to compose a work entitled to copyright. Such a compilation may be convenient and useful for the inhabitants of that town but does not require either such labour or such ingenuity in its preparation as to render it fit subject-matter for copyright: *Leslie* v. *Young & Sons* (2).

In my opinion, the respondents, in selecting the seven tables in question for inclusion in their diary did not bring into existence a copyright work. There is no evidence available to show how or why the particular selection was made, E for the original compiler of the series is dead. To my mind, the collection is of an obvious and commonplace character, and I fail to detect any meritorious distinctiveness in it. Everyone expects to find in his pocket diary some useful general information about rates of postage, weights and measures, significant dates and the like. Probably no two series of diaries contain precisely the same collections of tables, for they will vary according to the compiler's ideas as to F what is likely to be useful to the purchasers whom he seeks to attract. But there must be a number of items, such as rates of postage, common to them all. The inclusion or exclusion of one or more of the tables constituting the ordinary stock material of the diary-compiler seems to me to involve the very minimum of labour and judgment. As I have said, and as the authorities remind us, the question must always be one of degree and on questions of degree different minds may naturally reach different conclusions. For myself, I should say G that, if any compilation could be held to fall short of displaying the qualities requisite to attract copyright, the respondents' collection of seven tables is such a one.

The view which I have just expressed absolves me from pronouncing upon the interpretation to be placed on sect. 6 (3) of the Act under which the respondents claimed that there was a presumption in their favour of the existence of copyright. If there were any such presumption I should hold it to have been H displaced on the facts. But as the matter was fully argued I may say that I should be disposed to agree with the construction placed upon the subsection by UTHWATT, J., and LUXMOORE, L.J. As regards the question of innocent infringement under sect. 8, which was also argued, I desire expressly to reserve my opinion as to whether LORD GREENE, M.R., and MACKINNON, L.J., were right in holding that the appellants whom they found to be infringers were not entitled to claim mitigation of the consequences by reason of their not having been aware and having no reasonable ground for suspecting that copyright existed.

Lord Roche: My Lords, I also am of opinion that this appeal should be allowed. The division of opinion in the courts below shows that the question of fact is not an easy one; but the reasons for holding that no copyright existed in the works in question which have been assigned by the trial judge, by Luxmoore, L.J., in the Court of Appeal, and by Viscount Simon, L.C., and my noble friend Lord Macmillan meet with my full concurrence. I only desire to add that I do not rest my conclusion upon any consideration of onus of proof. In my judgment, the facts as a whole disprove the respondents' claim to copyright. At the same time I wish to make it plain that on the facts and pleadings in this case I have no doubt that the onus rested on the respondents, the plaintiffs in the action. I agree with the view of Uthwatt, J., and Luxmoore, L.J., as to the effect of the Copyright Act, 1911, s. 6, and I reject the argument advanced on behalf of the respondents as to the construction and meaning of that section.

Lord Porter: My Lords, this is a claim to establish copyright in an almanac consisting of seven tables and forming part of a diary. The respondents, who were plaintiffs in the action, relied upon the selection of topics included in the diary and did not seek to prove copyright in any individual table, though they said they might have done so and were entitled to support their claim to originality in the whole by any originality which might be found in the parts.

Two points were taken on behalf of the appellants, the defendants in the action. In the first place they said that the almanac was not an original work within the meaning ascribed to that phrase in the Copyright Act, 1911. If, however, contrary to their contention, the court should hold that the seven tables were susceptible of copyright, they said that they were innocent infringers, and, therefore, under sect. 8 of the Act, subject only to an injunction and not liable for damages.

The respondents, on their part, not only maintained that the almanac was susceptible of copyright, but said that, by reason of the provisions of sect. 6 (3) of the Act, copyright must be presumed to exist in their publication until the contrary was proved. This result, they asserted, followed from the wording of para. (*b*) of that subsection, where it enacts that, if a name purporting to be that of the proprietor is printed on the work, the person whose name is so printed shall, unless the contrary is proved, be presumed to be the owner of the copyright. They also denied that the appellants were innocent infringers.

My Lords, having regard to the opinion which I have formed upon the main question as to the susceptibility of the almanac to copyright, I refrain from expressing any opinion upon the other two arguments. For the purpose of this opinion, I am prepared to assume (i) that the respondents are owners of a work which is presumed to be the subject of copyright until that presumption is rebutted and (ii) that the appellants are not innocent infringers. Are, then, these seven tables, selected and combined together as they have been, capable of copyright? Uthwatt, J., thought not, the Lords Justices by a majority of two to one thought that they were.

It is not denied that compilations are susceptible of copyright even though the matter compiled of itself contains nothing new. *Macmillan* v. *Suresh Chunder Deb* (3), which was approved in the Privy Council in *Macmillan & Co.* v. *Cooper* (1), is sufficient authority for this proposition. Nor does it matter, if a substantial portion of the compilation be taken, that the copier added fresh matter of his own or took only a part of the original compilation. On the other hand, as was conceded, no copyright exists merely by reason of the order in which the various items are placed. It is their selection, not their position *inter se*, which is alleged to constitute copyright.

Bearing these considerations in mind, the question to be answered is: Have the appellants succeeded in showing that the almanac in question is not susceptible of copyright? I think they have. It is conceded that, if the work, labour and skill required to make the selection and to compile the tables which form its items are negligible, then no copyright can subsist in it. Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree. Different minds will differ, as may be seen in the present case from the divergence of opinion in the courts below.

Speaking for myself, it appears to me that it is of the smallest. Like Uthwatt, J., and Luxmoore, L.J., I think that:

> . . . apart from any evidence the compilation for which copyright is claimed is

nothing more than a commonplace selection of scraps of information, or a commonplace arrangement, neither of which has involved any real exercise of labour, judgment or skill.

And this is so whether one considers any individual table or the whole of them in combination.

Even, therefore, if the respondents receive the benefit of a presumption that they are owners of copyright until that presumption is rebutted, it is, I think, rebutted by a consideration of the contents of the almanac itself and of the tables which are used as its items. The line may be a narrow one. *Leslie* v. *Young* (2) is one example of matters which have been held to fall on either side of it, though it is an illustration only of the principles involved and not an authority to guide a decision in other cases. Like MacKinnon, L.J., I find the present case "near the line," but, speaking for myself, I would, contrary to his view, put it on that side on which copyright does not subsist. If a further example be of assistance, it is to be found in *Macmillan & Co.* v. *Cooper* (1), where a selection of passages from Plutarch's life was held not to be susceptible of copyright, whereas certain notes appended to it were protected, though of a commonplace nature and, at least in part, themselves selected from older sources. Like Luxmoore, L.J., where he adopts Lord Atkinson's words from that case, it seems to me impossible for the plaintiffs to establish that the amount of knowledge, labour, judgment or literary skill or taste applied to the compilation of the tables and lists at the beginning of the respondents' Liteblue diary for 1933 entitles that compilation to copyright.

I would allow the appeal.

Lord Simonds: My Lords, I concur.

Appeal allowed with costs.

Solicitors: *Rubinstein, Nash & Co.* (for the appellants); *Henry Pumfrey & Son* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

NORAH READ *v.* J. LYONS & CO., LTD.

[King's Bench Division (Cassels, J.), **April 28, 1944.**]

Negligence—Volenti non fit injuria—Employee directed to employment by Minister of Labour and National Service.

Negligence—Dangerous article—High explosive—No escape from premises—Bursting of high explosive shell injuring employee—Non-natural user of premises.

Defendants were the manufacturers of high explosive shells and the plaintiff was directed by the Minister of Labour and National Service to work in the defendants' factory against her will. In the course of her employment a shell exploded from some unascertained cause and the plaintiff was injured:—

Held: (i) the doctrine of *volenti non fit injuria* did not apply as the plaintiff was employed against her will.

(ii) the defendants were under a strict liability to the plaintiff since high explosives are things dangerous in themselves and the rule in *Rylands* v. *Fletcher* (5) applied although the injury to the plaintiff occurred on the defendants' premises and not through any escape therefrom of the dangerous thing.

(iii) the manufacture of high explosives is not a natural user of premises.

[**EDITORIAL NOTE.** Upon the main point this decision carries the matter perhaps one step farther than the *Rainham* case (6). There the damage was to adjoining property, but here the injured person was on the premises where the explosives were kept and used. It was argued that in the case of dangerous things there must be an escape from the premises, but this matter is completely covered by a *dictum* in the *Rainham* case (6) and it is hardly open to a judge of first instance to decide otherwise than in accordance with that *dictum.* The analogy of the animal cases, which it has long been conceded are only an application of the *Rylands* v. *Fletcher* (5) rule, also shows that there is no necessity for an escape. On the point of *volenti non fit injuria*, the case for the first time decides that a person directed to work in a war factory does not voluntarily take on the risks of that employment. The decision should be compared with that in *Alexander* v. *Tredegar Iron & Coal Co.*, [1944] 1 All E.R. 451, where it was decided that this directing into employment did not affect the doctrine of common employment.

As to Rule in Rylands *v.* Fletcher, see HALSBURY, Hailsham Edn., Vol. 24, pp. 46, 47, para. 83; and for Cases, see DIGEST, Vol. 36, pp. 194-199, Nos. 345-388.

As to Defence of Volenti non fit Injuria, see HALSBURY, Hailsham Edn., Vol. 23, pp. 715-719, paras. 1006-1009; and for Cases, see DIGEST, Vol. 36, pp. 92-98, Nos. 608-653.]

Cases referred to:

(1) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 36 Digest 95, *633*; 60 L.J.Q.B. 683; 65 L.T. 467.

(2) *Williams* v. *Birmingham Battery & Metal Co.*, [1899] 2 Q.B. 338; 36 Digest 135, *899*; 68 L.J.Q.B. 918; 81 L.T. 62.

(3) *Baker* v. *James*, [1921] 2 K.B. 674; 36 Digest 97, *647*; 90 L.J.K.B. 1190; 125 L.T. 414.

*(4) *Bowater* v. *Rowley Regis Corpn.*, [1944] 1 All E.R. 465.

(5) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, *311*; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* S.C. *sub nom. Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265.

*(6) *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co., Ltd.*, [1921] 2 A.C. 465; 36 Digest 192, *332*; 90 L.J.K.B. 1252; 126 L.T. 70.

(7) *West* v. *Bristol Tramways Co.*, [1908] 2 K.B. 14; 36 Digest 194, *356*; 77 L.J.K.B. 684; 99 L.T. 264.

(8) *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772; 36 Digest 315, *189*; 83 L.J.K.B. 1352; 111 L.T. 198.

(9) *Smith* v. *Kenrick* (1849), 7 C.B. 515; 36 Digest 157, *8*; 18 L.J.C.P. 172; 12 L.T.O.S. 556.

(10) *May* v. *Burdett* (1846), 9 Q.B. 101; 2 Digest 237, *240*; 16 L.J.Q.B. 64; 7 L.T.O.S. 253.

(11) *Besozzi* v. *Harris* (1858), 1 F. & F. 92; 2 Digest 238, *241*;

(12) *Filburn* v. *People's Palace & Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 2 Digest 238, *243*; 59 L.J.Q.B. 471.

(13) *Jackson* v. *Smithson* (1846), 15 M. & W. 563; 2 Digest 243, *273*; 15 L.J.Ex. 311; 7 L.T.O.S. 231.

(14) *Jones* v. *Festiniog Ry. Co.* (1868), L.R. 3 Q.B. 733; 38 Digest 350, *562*; 37 L.J.Q.B. 214; 18 L.T. 902.

(15) *Northwestern Utilities, Ltd.* v. *London Guarantee & Accident Co., Ltd.* [1936] A.C. 108; Digest Supp.; 105 L.J.P.C. 18; 154 L.T. 89.

(16) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.

(17) *Ponting* v. *Noakes*, [1894] 2 Q.B. 281; 2 Digest 65, *415*; 63 L.J.Q.B. 549; 70 L.T. 842.

(18) *Howard* v. *Furness Houlder, Argentine Lines, Ltd., and Brown, Ltd.*, [1936] 2 All E.R. 781; Digest Supp.

*(19) *The Pass of Ballater*, [1942] P. 112; [1942] 2 All E.R. 79; 111 L.J.P. 61; 167 L.T. 290.

(20) *Honeywill & Stein, Ltd.* v. *Larkin Bros.* (*London's Commercial Photographers*), *Ltd.*, [1934] 1 K.B. 191; Digest Supp.; 103 L.J.K.B. 74; 150 L.T. 71.

(21) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 34 Digest 126, *966*; 9 L.J.Ex. 308.

(22) *Smith* v. *Cammell Laird & Co., Ltd.*, [1940] A.C. 242; [1939] 4 All E.R. 381; Digest Supp.; 109 L.J.K.B. 134; 163 L.T. 9.

Action for damages for personal injuries. The facts and pleadings are fully referred to in the judgment.

Gilbert J. Paull, K.C., and *J. H. C. Goldie* for the plaintiff.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *Valentine Holmes* for the defendants.

Cassels, J.: On Aug. 31, 1942, the plaintiff was in the employment of the Ministry of Munitions as an inspector at a factory at Elstow, near Bedford, where high explosive shells for use in the war were filled. Against her will she had been directed to work there by the Minister of Labour and National Service. The defendants were the occupiers of the factory and conducted it under an agreement with the Ministry of Supply. That agreement made the defendants undertake the operation, management and maintenance of the factory and made them generally responsible for the provision of all the materials required. By that agreement they were deemed to be the employers of the employees working at the factory, though the plaintiff, as an inspector, was directly in the employment of the Ministry of Munitions. The agreement further provided that the Ministry of Supply should be the principal and that the defendants should be their agents and that the materials and site were the property of the Ministry of Supply.

On Aug. 31, 1942, by the explosion of a shell in course of filling the plaintiff

was seriously injured. The cause of the explosion was unknown and unexplained.
The plaintiff brings this action to recover damages for her personal injuries and
bases her claim upon the sole ground that the defendants carried on the manufacture
of high explosive shells which to their knowledge were dangerous things,
and that she, while employed there, suffered injury, loss, and damage through
the explosion of a shell. There were two defences raised : (i) That the statement
of claim disclosed no cause of action ; (ii) that the plaintiff voluntarily incurred
the risk of the explosion as a risk incidental to her employment, in other words, A
volenti non fit injuria.

The facts can be very shortly stated upon both branches of the case for there
was little or no conflict upon them, and the defendants by letter dated Apr. 11,
1944, had made admissions which greatly shortened the evidence. The plaintiff,
now 27 years of age and married, but at the material time single, registered under
the National Service Acts in 1941, became a stores accountant with the London
Brick Co., Ltd., in September of that year, and was told by the Employment B
Exchange in April, 1942, that she would have to go to work at the defendants'
munitions factory at Elstow. She protested and asked if she could have any
other work than in a munitions factory and she was told that she could not
without a doctor's certificate that her health would not allow her to do that
work. She considered it useless to apply for such a certificate, for her health
was perfectly good. She was put to work in the inspection department. She
asked for clerical work but was told that there were no vacancies. She had C
some training for this work of inspection. There was no reason other than
the Order to cause her to remain at this work, and I accept her evidence that
she would not have remained at such work unless compelled to do so. She
was regarded as efficient by her foreman who, in July, asked her if she would
like to have some experience in the office, and she said that she would think it
over, but she was never asked again. It was clear from her foreman's evidence D
that this suggestion was made to her with a view to her qualifying for work
of greater importance in the munitions factory. I am satisfied that she did not
voluntarily undertake the work upon which she was engaged and that her
claim does not fail by reason of the maxim *volenti non fit injuria.*

Three cases were cited by counsel on behalf of the plaintiff on this point,
namely, *Smith* v. *Baker* (1), *Williams* v. *Birmingham Battery & Metal Co.* (2), and
Baker v. *James* (3), which decide that the real question is whether the plaintiff E
voluntarily undertook a risky employment with a knowledge of its risks, or in
other words contracted or consented or undertook to accept the risks.

I need only cite the latest pronouncement upon the point in *Bowater* v. *Rowley
Regis Corpn.* (4), where SCOTT, L.J., said at p. 465:

> In regard to the doctrine *volenti non fit injuria,* I would add one reflection of a general
> kind. That general maxim has to be applied with especially careful regard to the
> varying facts of human affairs and human nature in any particular case, just because F
> it is concerned with the intangible factors of mind and will. For the purpose of the
> rule, if it be a rule, a man cannot be said to be truly "willing," unless he is in a position
> to choose freely ; and freedom of choice predicates, not only full knowledge of the circumstances
> upon which the exercise of choice is conditioned, in order that he may
> be able to choose wisely, but the absence from his mind of any feeling of constraint,
> in order that nothing shall interfere with the freedom of his will.

That point, therefore, is decided in favour of the plaintiff. G

The other defence that the defendants put forward of no cause of action
raised an argument of great importance and involved consideration of many
cases. The facts were few. By their defence the defendants admitted the
manufacture of high explosive shells and knowledge of their danger. By the
letter of Apr. 11, 1944, to which I have referred, the defendants admitted that
the explosion which occurred on Aug. 31, 1942, killed a man and injured the
plaintiff and others. It was further admitted by the defendants that at the time H
of the explosion and her injuries the plaintiff was lawfully in the shell filling
shop at the factory in the course of her employment. In para. 1 of the defence
the defendants admitted that they were the managers of the factory and that
high explosive shells were manufactured in the factory ; and it was contended
on behalf of the plaintiff that this admission and the agreement between the
defendants and the Ministry of Supply established that the defendants were
carrying on the manufacture of high explosive shells. I upheld that contention,
and indeed it was not argued to the contrary by the defendants.

The questions of law put forward, therefore, for decision are, what was the duty owing by the defendants to the plaintiff? Does the case fall within the limits of strict liability? The defendants were carrying on an ultra hazardous activity, to borrow phrases from the American Restatement. No one can doubt the magnitude of the danger of manufacturing explosive shells. It is (and I hold that it is) a non-natural user of the land in the sense that it is a special use bringing with it increased danger to those who are on or in the neighbourhood of the premises. It was not denied that if a person outside the premises had been injured in the explosion the defendants would have been liable without proof of negligence. There would then have been an escape within the meaning of *Rylands* v. *Fletcher* (5). The defendants contended that as there was here no escape and that as the plaintiff was injured on the premises she must allege and prove some negligence, however small in degree. For the plaintiff it was argued that an explosive is like an animal of whose mischievous disposition the animal's controller knows, or the law presumes that he knows, and that no escape from the premises is necessary for the purpose of the *scienter* rule, and authorities to which I will refer in a moment were cited in support of that contention.

The defendants were dealing with explosives. They were manufacturing them on their premises. Explosives are within the class of things dangerous in themselves; that is a matter of law which I decide in favour of the plaintiff: see *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.* (6). At p. 471 LORD BUCKMASTER said this:

> Now, the foundation of the action was a claim based upon the familiar doctrine established by the case of *Fletcher* v. *Rylands* (5), which depends upon this—that even apart from negligence the use of land by one person in an exceptional manner that causes damage to another, and not necessarily an adjacent owner, is actionable: *West* v. *Bristol Tramways Co.* (7); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (8). In the present case the use complained of was that for the purpose of making munitions, which was certainly not the common and ordinary use of the land, two substances, namely, nitrate of soda and dinitrophenol, were stored in close proximity, with the result that on a fire breaking out they exploded with terrific violence.

In my view the defendants were under a strict liability to the plaintiff in this case, and it was unnecessary to aver negligence because they were dealing with dangerous things which got out of control and did damage to the plaintiff. My view further is that the plaintiff's position inside the factory, when she suffered the damage, made no difference to her rights which were the same as if she had been outside the factory and had there been injured by the same explosion. Under the rule in *Rylands* v. *Fletcher* (5) the liability for damage arising from mischievous and dangerous animals or from explosives on a man's land are merely instances of strict liability. I take the *Rylands* v. *Fletcher* (5) rule first, though it is by no means first historically, cases concerning damage by animals being much earlier. That classical rule is stated by BLACKBURN, J., at pp. 279, 280:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.

Earlier, at p. 279, Blackburn, J., said this :

> The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land ? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours, but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions, in order to keep it in, but no more. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill could not detect.

When that famous case reached the House of Lords, Lord Cairns, L.C., said, at pp. 338, 339 :

> My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used ; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

The Lord Chancellor went on to refer to *Smith* v. *Kenrick* (9), and he added, at p. 339 :

> My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

In the same case Lord Cranworth said, at p. 340 :

> I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Blackburn, J., in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

The strict liability which *Rylands* v. *Fletcher* (5) attached to the circumstances of that case caused that decision to become identified with animal cases which are really further instances of the application of strict liability. The principal case upon animals is *May* v. *Burdett* (10), where the plaintiff's wife was bitten by the defendant's monkey. There was no averment of negligence and Lord Denman, C.J., in delivering the judgment of the court said, at pp. 110, 111 :

> This was a motion to arrest the judgment in an action on the case for keeping a monkey which the defendant knew to be accustomed to bite people, and which bit the female plaintiff. The declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large ; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby etc. It was objected, on the part of the defendant, that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal ; and it was said that, consistently with this declaration, the monkey might have been kept with due and proper caution, and that the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself. A great many cases and precedents were cited upon the argument : and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it ; and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after *knowledge* of its mischievous propensities. The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care.

On p. 112, Denman, C.J., says :

> In Comyns's Digest, tit. *Action upon the case for negligence* (A5.), it is said that

> " an action upon the case lies for a *neglect* in taking care of his cattle, dog, etc. ; " and passages were cited from the older authorities, and also from some cases at *nisi prius*, in which expressions were used showing that, if persons suffered animals to go at large, knowing them to be disposed to do mischief, they were liable in case any mischief actually was done ; and it was attempted to be inferred from this that the liability only attached in case they were suffered to go at large or to be otherwise ill secured. But the conclusion to be drawn from an examination of all the authorities appears to us to be this : that a person keeping a mischievous animal with knowledge of its A propensities is bound to keep it secure *at his peril*, and that, if it does mischief, negligence is presumed, without express averment.

The injury in that case arose while the defendant kept the monkey, and there was no averment that the animal had escaped from the premises. A similar case was the bear case, *Besozzi* v. *Harris* (11), where the bear was on a chain on the defendant's premises when it did the damage. Another animal case was that of the elephant in *Filburn* v. *People's Palace* (12). The headnote in that B case reads :

> In an action to recover damages for personal injuries sustained by the plaintiff from an elephant which was exhibited by the defendants, the jury found that the defendants did not know the elephant to be dangerous : —Held, that the defendants were liable, as the animal did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance C of its dangerous character.

The plaintiff in the elephant case had been injured by the defendants' elephant whilst it was being exhibited by them. BOWEN, L.J., at p. 261, delivered judgment as follows :

> The broad principle that governs this case is that laid down in *Fletcher* v. *Rylands* (5), that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. D The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of LORD HOLT and of HALE until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is E dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection ; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

F There was no averment of negligence in that case, and in *Jackson* v. *Smithson* (13), which is known as the ram case, it was held that an averment of negligence was not necessary. PLATT, B., said, at p. 565 :

> No doubt a man has a right to keep an animal which is *ferae naturae*, and nobody has a right to interfere with him in doing so, until some mischief happens ; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.

G In *Jones* v. *Festiniog Ry. Co.* (14), the case of sparks from a railway engine, BLACKBURN, J., said at p. 736 :

> Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part.

H The keeping or manufacturing of explosives comes under the same doctrine of strict liability when they cause damage. The liability under such a heading is not limited to those who suffer injury on adjacent land or outside the premises. In *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.* (6), to which I have already referred and which actually was a case of damage of neighbouring property through an explosion, LORD BUCKMASTER, at p. 471, uses the phrase which I have already cited which clearly indicated that it was not necessary to be an adjacent owner who was injured.

In Charing Cross Electricity Supply Co. v. *Hydraulic Power Co.* (8) there were two neighbouring owners of chattels, co-users of a highway, where the plaintiffs' electric cables were damaged by the burst of the defendants' hydraulic mains laid under the same street. At p. 779 Lord Sumner said this :

> I think that this present case is also indistinguishable from *Rylands* v. *Fletcher* (5). Two grounds of distinction have been suggested. It is said that the doctrine of *Rylands* v. *Fletcher* (5) is applicable between the owners of adjacent closes, which are adjacent whether there be any intermediate property or not ; and that it is a doctrine depending upon the ownership of land and the rights attaching to the ownership of land, under which violations of that species of right can be prevented or punished. In the present case, instead of having two adjacent owners of real property, you have only two neighbouring owners, not strictly adjacent, of chattels, whose chattels are there under a permission which might have been obtained by the private licence of the owners of the soil, though in fact obtained under parliamentary powers ; hence the two companies are in the position of co-users of a highway, or at any rate of co-users of different rooms in one house, and *Rylands* v. *Fletcher* (5) does not apply. The case depends on doctrines applicable to the highways, or to houses let out in tenements. I am unable to agree with any of these distinctions, though they have been pressed upon us by both learned counsel with great resource and command of the authorities.

A little further on, on p. 780, Lord Sumner added this :

> Again, Lord Cranworth in the House of Lords speaks of the principle not as confined to the case of landlords, but in very broad terms : " For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." That is not a precise proposition of law, but it is inconsistent with there being any idea in his Lordship's mind that *Rylands* v. *Fletcher* (5) was confined to the invasion of a right of property in soil.

At p. 785 Bray, J., who was a member of the court dealing with the *Charing Cross Electricity* case (8), in quoting the words " for any mischief thereby occasioned " added, " that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any mischief thereby occasioned."

Then there is *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.* (15), where the respondents' hotel was destroyed by fire caused by the escape of natural gas which the appellants had in a main under the street and which had percolated through the soil into the hotel through a break caused by the operations of the local authority. Lord Wright in that case, at p. 118, said this :

> Before discussing the facts in the case, it is desirable to explain the principles of law which, in their Lordships' judgment, are applicable. That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are *prima facie* within the principle of *Rylands* v. *Fletcher* (5) affirming *Fletcher* v. *Rylands* (5) : that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come *prima facie* within the rule of strict liability if the gas escapes : the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Rylands* v. *Fletcher* (5) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land : it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the city (that is in the sub-soil) in exercise of a franchise to do so.

It was contended by the Solicitor-General in this case on behalf of the defendants that, when you come to consider damage which has occurred on the land where the danger, that is the explosive, is kept, the duty is to take care, and it is not a case of strict liability ; that the foundation of *Rylands* v. *Fletcher* (5) is trespass to the adjoining land, but there was no count for trespass in that case. Of course there may be trespass to the person and that may depend upon whether the person is lawfully where he is injured.

If that is so the plaintiff here was certainly lawfully on the premises when she was injured by the explosion. It was argued by the Solicitor-General that, if a person is injured on some one else's property, the questions to be asked are in what capacity is he there, and what is the extent of the duty owed to him by the occupier by reason of that capacity. He cited *Donoghue* v. *Stevenson* (16), where Lord Macmillan, at p. 611, said this :

> The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to

describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

It is to be observed that that case concerned the liability of a manufacturer to an ultimate customer who drank a bottle of ginger-beer which contained the decomposed remains of a snail. LORD MACMILLAN does refer, however, to the "exceptional case of things dangerous in themselves" and the "stringent" "degree of diligence" exacted by the law.

The Solicitor-General contended that negligence is presumed in the wild animal cases and the action is for trespass in the cattle trespass cases, and further observed that in the case of dangerous things like explosives, when they escape from the premises, negligence is presumed, but not when the injury is done on the premises through their getting out of control and escaping there.

I cannot agree with these contentions. I think they lead, in the case of explosives, to strange results if they are correct. If in this case the plaintiff had had a friend waiting for her outside the premises when the explosion occurred and that friend had been injured, that friend would have had a case upon strict liability, but the plaintiff, being inside, would have to prove negligence. I cannot see on principle why the plaintiff inside should be faced with the difficulty of proving negligence as the specific cause of the danger having ripened into actual harm to her, whilst her friend outside need only say that the defendants were putting their land to a non-natural use by manufacturing explosives: see POLLOCK ON TORTS, 14th Edn., p. 386. Equally does the strange result follow, if in this case the plaintiff, instead of being on the premises at the time of the explosion, had been approaching the factory, but had not reached it and was injured when only a few yards away.

Two cases were referred to in which stress was laid upon the word "escape." Both I think are distinguishable. In *Ponting* v. *Noakes* (17) the plaintiff and the defendant were adjoining occupiers of land. The plaintiff's horse reached across the boundary and was poisoned by the defendant's yew tree leaves. CHARLES, J., held that *Rylands* v. *Fletcher* (5) had no application because there was no escape of the poisonous leaves from the defendant's land to the plaintiff's, but the decision really turned on the plaintiff's horse being a trespasser upon the defendant's land. In *Howard* v. *Furness Houlder* (18) LEWIS, J., said that the principle of *Rylands* v. *Fletcher* (5) did not apply to the case of steam on board a steamship injuring the plaintiff. I need not go into the other grounds, including several of negligence, which were raised in the case which failed against the shipowners and succeeded against the second defendants, the contractors; but there the judge held that the steamship owners were not making an unnatural use of their steamship in generating steam. I was urged to follow LEWIS, J., in his decision upon this point, but I think the facts in that case were different and the point arose only incidentally.

In *The Pass of Ballater* (19), LANGTON, J., held that, where an explosion occurred on board ship through the use of an oxy-acetylene burner in the poop space, and sparks descended a manhole leading to the cofferdam and ignited a mixture of air and petrol and caused damage to the ship, the owners were entitled to recover in respect of the damage. The case concerned the negligence of a sub-contractor, namely, an analyst engaged by the defendants to test for the presence of inflammable gas or vapour, but liability attached to the defendants who were carrying out the repairs.

Preferring the phrase "strict liability" to that of "absolute liability" used by SLESSER, L.J., in giving the judgment of the Court of Appeal in *Honeywill and Stein, Ltd.* v. *Larkin Bros., Ltd.* (20), LANGTON, J., in *The Pass of Ballater* (19), said at pp. 116, 117 ([1942] 2 All E.R. at pp. 83, 84):

> If one adopts this meaning of the word it would appear that the law stands in this way. In normal cases, which do not necessitate or involve the use of materials or instruments which are in themselves dangerous, a man is liable for the acts of his servants, but not for the acts of a contractor. *Quarman* v. *Burnett* (21). This general rule is subject to well established qualifications. For example, where a special duty is laid by statute on an individual or class of individuals, either to take care or even to ensure safety (an absolute duty: in the true sense), that person or class cannot delegate the duty so imposed on them, that is to say, they cannot by delegation diminish the duty or in any way escape from or evade the full implication of and responsibility for that duty:

> *Smith* v. *Cammell, Laird & Co., Ltd.* (22). Again, where the introduction of implements or substances dangerous in themselves, such as flame-bearing instruments or explosives, are necessarily incidental to the work to be performed, a contractor is equally bound by an unescapable duty. The point may perhaps be crystallized by saying that he has not merely a duty to take care but a duty to provide that care is taken.

I only refer to that case because it deals with strict liability attaching to dangerous processes causing an explosion even on board ship.

The Solicitor-General raised another point, namely, that in the present circumstances the defendants were not making a non-natural user of their premises in that we are in a state of war; the country is organised for war. The Emergency Powers Defence Act, 1940, s. 1, confers upon His Majesty power to make provision requiring persons to place their services and their property at his disposal for the efficient prosecution of any war: that the defendants were making explosives which were essential, and that, therefore, what in time of peace would be a non-natural user becomes a natural user for the general benefit of the community in a time of grave national danger.

In the *Rainham* case (6) the same argument was put forward but the House of Lords ignored it. To allow it to prevail in the circumstances of this case would require more than a judicial decision. I hold, therefore, that the plaintiff is entitled to recover £350 and £225 2*s.* 8*d.* special damage.

Judgment for the plaintiff for £575 2*s.* 8*d. and costs.*

Solicitors: *L. Bingham & Co.* (for the plaintiff); *Treasury Solicitor* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

Applied. SEAFORD COURT ESTATES, LTD. *v.* ASHER. [1949] 2 All E.R. 155.

Approved. ASHER *v.* SEAFORD C ESTATES, LTD. [1950] 1 All E.R.

Applied. BECK *v.* NEWBOLD. [1952] 2 All E.R. 412.

WINCHESTER COURT, LTD. *v.* MILLER.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **June 27, 1944.**]

Landlord and Tenant—Rent restriction—Permitted increase—Transfer to landlord of liability to repair previously borne by the tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 2 (3).

The appellants let certain premises in 1936 at a rent of £195 per annum. The lease contained a covenant to repair with no exception as to fair wear and tear. This letting fixed the standard rent of the premises. On May 12, 1941, the premises were let to the respondent at a rental of £160 per annum, the respondent covenanting to keep the premises in repair fair wear and tear excepted. On May 25, 1942, a new lease was entered into by the appellants and the respondent providing for a rent of £165 per annum and a covenant by the respondent to repair, fair wear and tear excepted. On Nov. 9, 1942, the appellants served on the respondent, under the Rent Restriction (Notices) Act, 1923, a statutory notice raising the rent from £165 to £195. On Aug. 23, 1943, the appellants sent a notice in the statutory form informing the respondent that as from the expiry of the notice they would require the payment of an additional sum of £20 per annum. The question to be determined by the court was whether the appellants were permitted, by sect. 2 (3) of the 1920 Act, to increase the rent by £20 because part of the burden of repair borne by the tenant of the lease of 1936 had, under the tenancies between the appellants and the respondent, been transferred to the appellants. It was agreed that the difference in value between the repairing covenants was £20 per annum:—

HELD [LUXMOORE, L.J., *dissenting*]: upon the true construction of sect. 2 (3) the fair wear and tear part of the covenant to repair was a burden previously borne by the tenant which had been transferred to the appellants, and the value thereof was a permitted increase within the meaning of the section.

[**EDITORIAL NOTE.** The wording of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), is different from that of sect. 2 (1), for while the latter speaks of additions to the standard rent, subsect. (3) speaks of the rent being deemed to be increased. Any transfer of burden of repairs can take place only by the agreement of the parties, and it is argued that in a letting at less than the standard rent with a less onerous repair covenant on the part of the tenant the amount of the rent must have been arrived at by an agreement taking into consideration the shifting of the burden of repair. The majority of the court, however, take the view that the standard rent may be increased by the amount in money representing the average cost of the repairs taken over by the landlord.

As TO PERMITTED INCREASE OF RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 326, para. 387; and FOR CASES, see DIGEST, Vol. 31, pp. 567, 568, Nos. 7139-7150.]

Case referred to:

A (1) *Strickland* v. *Palmer*, [1924] 2 K.B. 572; 31 Digest 568, *7150*; 93 L.J.K.B. 1033; 131 L.T. 648.

APPEAL by the landlord from a decision of His Honour JUDGE HARGREAVES. The facts are fully set out in the judgment of SCOTT, L.J.

Comyns Carr, K.C., and *Archibald Safford* for the appellants.

W. E. P. Done and *M. O'Connell Stranders* for the respondent.

B SCOTT, L.J.: This is a case of first impression under the Rent Restriction Act, 1920, s. 2 (3). It relates to a flat in the Metropolitan Police District, brought within rent restriction for the first time by the Act of 1939 by reason of its rateable value being under £100. Its standard rent is based on the last letting before Sept. 1, 1939, which was in 1936 when the house was let on lease for 7 years at £195 per annum plus a payment of £10 per annum for electricity and the use of a telephone. The £195 therefore became on Sept. 1, 1939, its C standard rent. In that lease the tenant undertook internal repairs on a fairly full repairing covenant. That lease came to an end prematurely in April, 1941, and on May 12, 1941, the appellant company as landlord let the flat on a quarterly tenancy to the respondent at £160 per annum (plus the £10 as before), but on a less onerous repairing covenant; for "fair wear and tear" was excepted. On May 25, 1942, a fresh agreement of tenancy was substituted, again for a D quarterly tenancy, from that date, terminable by not less than three months' written notice on that or other quarter days, at £165 (plus the £10) rent payable monthly in advance. In Nov., 1942, the company gave a statutory notice (which operated as a notice to quit under the Rent Restriction (Notices) Act, 1923, s. 1), raising the rent to the standard figure of £195 as from Feb. 25, 1943, plus the £10. Owing to an increase of rates the appellant company became, in June, 1943, entitled to demand a permitted increase of £1 10*s*. 8*d*. over the E standard rent and on June 30, gave a statutory notice accordingly.

On further consideration of their position the company came to the conclusion in August, 1943, that they were entitled, under sect. 2 (3) of the 1920 Act to demand in respect of the "dwellinghouse" an additional payment because of the "transfer" to their shoulders of that part of "the burden" of repairs which had been carried by the tenant under the lease of 1936, but had since been transferred to the landlord as a result of the exemption of fair wear and tear F in the two tenancy agreements with the respondent. That burden had rested on the tenant at the date which fixed the standard rent, namely, the last letting before Sept. 1, 1939, but had passed from the tenant to the landlord in May, 1941, and since then had remained on his shoulders. Acting on this view the company on Aug. 23, 1943, sent a notice in the statutory form informing her that as from the expiry of the notice on Nov. 25, 1943, they would require G payment not only of the standard rent of £195 plus the permitted increase of £1 10*s*. 8*d*. plus the £10 "including telephone and kilowatt rentals," but also of a further sum of £20 per annum. They gave it no name but stated in the notice that it was for "costs of repairs for which former tenants were liable." The question we have to decide is whether that demand was authorised by sect. 2 (3) of the 1920 Act. The county court judge held that it was not within the subsection, and accordingly had to be treated as an increase over the H standard rent which was prohibited. The subsection is as follows:

> Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwellinghouse is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwellinghouse is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act.

If the additional payment is within the section it is not to be deemed an " increase of rent " and, therefore, there is no law forbidding it. Counsel for the appellants put his argument very shortly, basing it on the language of the subsection. We had an interesting and forceful argument from counsel for the tenant, but on the whole, though with full recognition of the uncertainties left open by the language of the subsection, I have come to the conclusion that we ought to allow the appeal.

The question of interpretation is one of general importance ; but, in my opinion, (i) the words of the subsection are sufficient to cover the interpretation ; (ii) there is nothing in the subsection or its context inconsistent with that interpretation ; (iii) it is consonant with the broad policy of the legislation ; and finally, (iv) it is only if that is the right interpretation of that particular subsection, that we can find any provision whatever in the whole body of rent restriction legislation to give effect to what seems to me to be the primary principle which from the outset of the legislation in 1915 must really have underlain the decision of Parliament to use the rental figure arrived at by the parties themselves, when at arm's length ; namely, that the letting of the house in a free market, that is to say, one unrestricted by statutory limitation, can be used as the basic and permanent criterion of what can in fairness to the parties be treated as the " standard rent " of the house. From this point of view the important considerations to bear in mind are, first, that the standard rent becomes under the legislation a permanent attribute of the house, one which (apart from " permitted increases ") cannot be changed by the free contract of its present or future landlords or tenants ; secondly, that to that extent the house acquires a defined status, so that a decision of the courts fixing its standard rent is a judgment *in rem* binding on all the world within the jurisdiction of our courts. The legal result is that within those limits the relationship of landlord and tenant of the house is taken out of the realm of contract and passes into status. If there be ambiguity in the subsection—and no one can say that its language is as clear as it might be—it must be construed in the light of the governing principles embodied in the legislation. When Parliament adopted the protective policy of taking rents out of the consensual control of the parties, because external causes had made the supply of " dwellinghouses " fall short of the demand and thus caused undue economic hardships to fall on the tenant classes of the community, it must be presumed to have intended to do so without unavoidable unfairness to landlords. That is no doubt why it chose as the criterion of its standard rent, a rent fixed by the free bargaining of the parties—the proverbial economic " higgling of the market "—as it did by its definition of the standard rent in sect. 2 (1) of the Act of 1915, the first Rent Restriction Act. Whether it was the current rent at the time of the passing of the Act or the rent when the house was last let previously, it was equally one of which the attribute of probable fairness could be predicated. That Parliament did think that such a basis would probably be fair may be presumed ; and the presumption is borne out by the fact that Parliament maintained the same basis in identical language in the 1920 Act ; and did it again in the 1939 Act, to houses which theretofore had remained outside the Rent Restriction Acts. When adopting that basis for the standard rent as fair to both parties, Parliament cannot have been blind to the other main incidents of the relationship of landlord and tenant. Every consensual rent is, in economic theory, the outcome of bargaining between the parties in the light of the respective advantages and burdens, which the other intended terms of the contract will confer or impose respectively on each of them. When agreement is reached the agreed rent may thus fairly be regarded as the money measure of the balance of those advantages and burdens for which the tenant is content to pay the agreed rent ; and it is obvious that Parliament so regarded the problem. But if that be true—and I think it is true—it is equally obvious that the equilibrium represented by that bargaining is susceptible of disturbance as time goes on, not only by a change in the amount of rent, but also by a " transfer of ", or a change in any one of the economic advantages and burdens upon which, in the nicely adjusted and bargained balance, the fairness of the rent depended. It must be assumed that Parliament was, in 1920, alive to the obvious fact that alterations in those basic advantages and burdens of the tenancy might easily make the fixed standard rent irremediably unfair, unless the resultant change of balance could be redressed by a compensating money change. That to my mind must have been both the genesis and the object of sect. 2 (3) of the 1920 Act; and that characteristic need of some way of maintaining the fairness of the original balance, which seems to me inherent in the legislation, is, I think, a sufficient reason for so resolving any ambiguity there may be in the wording of sect. 2 (3) of the 1920 Act as to give it the meaning for which the appellant company contends. And it is to be observed further that such a change in the A balance of economic considerations underlying the rent may in the life history of the house occur at any time, not only as between the original tenant and the original landlord, but after either or both of them has or have ceased to be in any way concerned in the house. The house, on the other hand, has its permanent status with its permanent statutory rent (subject only to permitted increases) and so far as the theory of the Act is concerned goes on for ever, though landlords and tenants come and go. Unless this interpretation of the B subsection is well founded, the legislation must not infrequently lead to results which are permanently unfair; for it will contain no provision for ensuring that the standard rent shall retain its quality of fairness in relation to the agreed distribution of the other burdens of the tenancy agreement, a relationship upon which the standard rent was obviously based by Parliament in 1915; and however the subsection ought to be construed, it is indubitable that the Acts were not intended to petrify the terms of the tenancy other than rent.

C At first sight there was plausibility in the argument of counsel for the tenant that a change of tenant, or a change in the terms of the original tenancy agreement, occurring between the date of the original letting on which the statutory rent was based, and the time when a claim is made under sect. 2 (3) in respect of a transfer of burden or liability must be treated as a contractual waiver of any pre-existing right conferred by the subsection. But that reasoning involves D as I think, a fallacy; it ignores the fundamental element of the statutory disregard of freedom of contract, and assumes a restoration of it for the purpose of overriding the declaratory provisions of the subsection. Those provisions fix the parties' rights just as much as the provisions permitting defined increases of the standard rent. I think the subsection creates certain rights for redressing an unfair alteration of the equilibrum which underlies the legislative perpetuation of the standard rent. The language of the subsection is pointedly free E from limiting restrictions. "Any transfer to a tenant of any burden or liability . . . shall be treated as an alteration of rent" and the increase of burden is treated as a forbidden increase of the standard rent, and made recoverable from the landlord. So, on the other hand, an increase of rent to counterbalance a transfer of burden from the tenant to the landlord is made recoverable from the tenant. The language of the subsection which contains this statutory recognition of the fundamental principle of equilibrum ought, in my opinion, F to be liberally construed so as to give effect to that principle, if its words permit that construction, and I think they do.

For these reasons I would construe the word "transfer" as a synonym for "shifting," because the emphasis of the section is on the fact of a change in the equilibrum; it is the shifting of the burden that matters, not how or by whom it is brought about.

G I have read the draft judgment of LUXMOORE, L.J., with care, but in spite of his forceful argument am unable to construe subsect. (3) as restricted to "consensual transfers," as he thinks. As he has himself pointed out, the quarterly notice given to the respondent in August, 1943, brought that tenancy to an end upon the expiration of the notice; that effect resulting from the operation of the Rent Restrictions (Notices of Increase) Act, 1923. Had there been no tenant between the termination of the Platini tenancy in April, 1941, H and the appellant's decision to re-let in November, 1942, the appellant could then have said to any applicant "the standard rent is £196 10*s.* 8*d.*; but in regard to the repairing covenant, upon the basis of which the rent, which became in 1939 the standard rent, was originally fixed, I am going to take over the fair wear and tear obligation, worth £20 per annum myself and you will have to pay the equivalent of that in addition to the standard rent, as it is a 'transfer' within sect. 2 (3)." LUXMOORE, L.J., says that, if the proposing tenant agrees, and takes a tenancy on that footing, subsect. (3) will prevent his coming to the court to complain of the £20 extra rent; but that, if the landlord cannot find anyone willing to agree to pay the extra money, the subsection has no operation. On the other hand, the consensual view of the subsection in a case like the present renders the statutory notice to quit nugatory ; for the existing tenant can ignore it, on the ground that the condition it seeks to impose of an added £20 in order to restore the original equilibrium is forbidden. Equally if he submits to the notice to quit and leaves a new tenant coming in has an equal right to ignore the condition ; and in the result the original balance can never be restored. I confess the problem is difficult ; but on the whole I think the appeal should be allowed.

I would only add that I do not think this action to recover the arrears of rent which *ex hypothesi* are "deemed not to be an increase of the standard rent" falls within the bar against appeals contained in subsect. (6) of the same section. I am supported in that opinion by certain *dicta* of this court in *Strickland* v. *Palmer* (1), per Scrutton, L.J., on p. 584, and per Atkin, L.J., on p. 686. I mention it as had it been otherwise it would have been the duty of this court of its own initiative to decline jurisdiction.

The appeal should I think be allowed with costs here and below, the latter on the same scale as were given to the respondent on the trial.

MacKinnon, L.J. : The standard rent of this flat was fixed for Mrs. Miller, or any other tenant, in March, 1942, by the earlier letting to Platini. Admittedly they let the flat to her at that date at less than the standard rent. The term of that demise having come to an end, the appellants seek to raise her rent to the standard rent fixed by the letting to Platini. The rent of the letting to Platini was, in effect, £206 10*s.* 8*d.*, with a covenant by him to do considerable repairs, the burden of which covenant was equivalent to £20 a year. Under the terms of the demise to the defendant she does not bear that burden. The appellants therefore seek to charge her £226 10*s.* 8*d.* a year, namely, £206 10*s.* 8*d.* as the standard rent, and £20 as an addition permitted by sect. 2 (3) of the Act of 1920. It is said that, in the terms of that subsection, this is an "increase of rent in respect of the transfer to a landlord of a burden or liability previously borne by the tenant," and, therefore, this increase "shall be deemed not to be an increase of rent for the purposes of this Act." It is, therefore, not an increase of rent which by sect. 1 of the Act of 1920 and Sched. I of the Act of 1939 is declared to be irrecoverable from the tenant.

The county court judge has rejected this contention because of his view of the meaning of the words "a landlord" and "the tenant" in the relevant part of sect. 2 (3) of the Act of 1920. He thinks these must refer to the parties to a particular demise, and the variation of the terms of that demise whereby a burden is transferred, presumably by agreement, from tenant to landlord. I say "presumably by agreement," for, if the term of the demise is unexpired, there could be no such transfer except by the agreement of the tenant. If the demise has expired and the tenant is holding over as a statutory tenant, then by sect. 15 of the Act of 1920 the statutory tenant is

> . . . entitled to the benefit of all the terms and conditions of the original contract of tenancy . . .

So that in that case also any such transfer of burden to the landlord could only be by agreement of the tenant. In the result, on the judge's view, this part of sect. 2 (3) would have a very limited effect, namely, to prevent a tenant seeking to take advantage of the Act so as to relieve himself of the plain terms of an agreement he had voluntarily made. Similar considerations apply to the first half of sect. 2 (3) as to the transfer to a tenant of a burden or liability previously borne by the landlord. I cannot think that sect. 2 (3) was meant to have only this very limited effect. I think the increase of rent therein contemplated is not merely an increase of rent reserved by a particular demise, but also increase of rent above the standard rent. Therefore "the tenant" who previously bore the burden must be, or include, the tenant a demise to whom fixed the standard rent, and the "previous terms" must mean, or include, the terms of the previous tenancy which fixed the standard rent.

I think this view may be material in relation to another aspect of this legislation. By sect. 12 (1) (*a*) of the 1920 Act, as amended by the 1939 Act, the standard rent of what is called a 1939 house is to be the rent at which it was last let before Sept. 1, 1939. The judge is given no discretion to take into account the date, terms, or circumstances of that last letting. I have before now had occasion to point out that this unqualified provision may very possibly result in the gravest injustice; for example, if the last letting before September, 1939, was a century ago, when monetary values were utterly different; or if such last letting was by the then owner at a nominal rent to some aged relation; or if the last letting was at a very low rent in consideration of a covenant by the tenant to spend a large capital sum in repairing, modernizing, or even enlarging the dwelling. The judge would have no power to take any of these factors into account. If the argument for the respondents in this case is correct there is yet another possible source of injustice and hardship. Suppose in October, 1939, A. lets a house to B., at £120 per annum, which in fact is a very moderate rent. B. pays what he has agreed to pay for seven quarters. Before the eighth quarter (bearing in mind the provision of sect. 8 (2) of the Act of 1923 as amended by Sched. I of the 1939 Act) B. applies to the county court judge, under sect. 11 (1) of the Act of 1923 for a declaration that the standard rent of the house is £100, and claims under sect. 14 (1) of the Act of 1920, as amended by Sched. I of the 1939 Act, to recover back £35 of the total of the seven quarterly payments he had made pursuant to his contract. He supports both claims by alleging that he has discovered and can prove that before he signed the lease in October, 1939, the house was last let in 1889 for £100 per annum. A. says that he finds this was so, but he has been able to discover, and proves, that under the lease of 1889 the tenant was subject to a full repairing covenant, whereas by his lease to B. in 1939 he, A., is bound to do all the repairs, and this burden means an expenditure of at least £20 per annum. If the present respondent's argument is correct the judge will be reluctantly compelled to accede to both parts of B.'s iniquitous claim. But, in my view, sect. 2 (3) of the Act of 1920 will save the judge from that painful necessity. I think he can, and ought to, say that the words "the rent at which it was last let" in sect. 12 (1) (*a*) of the 1920 Act, as amended by the 1939 Act involve a demise by a landlord to a tenant, and that such a landlord and tenant are within the contemplation of the provision as to "a landlord" and "the tenant" in the second half of sect. 2 (3) of the Act of 1920. When, therefore, in October 1939 A. let the house to B. at £120 per annum, undertaking to do all the repairs, he was only doing what he was entitled to do, namely, charge him £100, the rent reserved by the 1889 demise with the addition of £20 for the burden transferred to him, a landlord, from the tenant of 1889.

If, however, as I find Luxmoore, L.J., thinks, the respondents in this case are right, sect. 2 (3) of the Act of 1920 will hardly ever have any effect at all, and will never have any effect except to prevent a tenant from seeking to repudiate his own voluntary agreement.

I think the appellants were right and that their appeal should be allowed.

Luxmoore, L.J.: The question raised by this appeal is new. It arises under the Rent Restriction Acts. It is: Can the standard rent of premises to which the Acts apply be increased to a tenant, who elects to remain as statutory tenant after the tenancy has been determined by notice to quit, by an amount equal to the difference between the value of an ordinary repairing covenant and one which contains an exception for fair wear and tear in a case where the standard rent was fixed by a lease containing an ordinary repairing covenant and the tenant electing to remain as statutory tenant was only liable under a covenant containing such an exception?

The question has arisen in these circumstances. A flat, 10, Winchester Court was let by the appellants to the respondent by a lease dated May 12, 1941 (to which I will refer as the first lease) at a yearly rent of £160 plus an annual charge of £10 for electricity and use of telephone. The annual charge of £10 can for the purposes of this case be ignored because it forms no part of the standard rent. By the first lease the respondent covenanted to keep the premises in repair, but the covenant contained an exception from liability in respect of fair wear and tear. At the time the first lease was granted the flat was within the provisions of the 1939 Act, the standard rent being fixed in accordance with the provisions of the Acts at £195. This was the rent reserved under a lease dated Dec. 25, 1936, granted in favour of one Platini which was the last letting of the flat before Sept. 1, 1939. By the last-mentioned lease Platini covenanted to keep the flat in repair, but as there was no exception of fair wear and tear, Platini's covenant was more onerous from the tenant's point of view and more favourable from the landlord's than the repairing covenant in the first lease. The difference in value of the two covenants was agreed at the trial to be £20 per annum. The first lease was subsequently terminated and a new lease (to which I will refer as the second lease) was entered into by the appellants and respondent on May 25, 1942, at an increased annual rent of £165 plus the further sum of £10 a year for use of electricity and telephone as in the case of the first lease. The second lease also contained a repairing covenant with an exception of fair wear and tear. On Nov. 9, 1942, the appellants, as they were entitled to do, served on the respondent a statutory notice under the Rent Restriction Acts purporting to raise the rent of the flat as from Feb. 15, 1943, from £165 to £195, which was properly described in the notice as the standard rent of the premises. This notice operated under the Rent Restriction (Notices) Act, 1923, s. 1, as a notice to quit. Subsequently the rates of the flat were increased and in June, 1943, the appellants became entitled to demand an increase of £1 10*s.* 8*d.* under the provisions of sect. 2 (1) (*b*) of the 1920 Act and they accordingly on June 30, 1943, served on the respondent a further statutory notice claiming that the rent of the flat would as from Aug. 1, 1943, be £206 10*s.* 8*d.* The notice states that the standard rent was £205 including telephone and kilowatt rentals. This is admittedly a mistake for £195 as the £10 for electricity and telephone forms no part of the standard rent. On Aug. 11, 1943, the appellants gave the respondent notice to quit under the second lease. This notice expired on Nov. 15, 1943, and was effective to put an end to the contractual tenancy constituted by the second lease. At the same time as the last mentioned notice was served the appellants' agents wrote to the respondent purporting to inform her of the terms on which she was entitled to remain in occupation after Nov. 15, 1942, under the provisions of the Rent Restriction Acts. The material parts of the letter are as follows:

> You will appreciate that you are entitled to continue at the standard rent which is £195 per annum plus £5 per annum telephone rental plus £5 per annum kilowatt rental plus any increase in rates which has occurred since the date by reference to which the standard rent is fixed subject to similar conditions of tenancy to those existing under the lease which created the standard rent.

The lease referred to is that granted to Platini. The letter sets out a copy of the repairing covenant contained in Platini's lease and continues:

> We are therefore writing to say that our clients will be prepared on the expiration of your current tenancy to grant you a lease for a period of one year and thereafter three monthly at the standard rent plus increased rates as above such lease to contain the foregoing repairing covenant on the part of the tenant or, alternatively, if you desire to continue on the basis of having no liability for internal repairs and redecorations then the rent will be increased by £20 per annum to £215 per annum plus telephone rental plus kilowatt rental plus increased rates as above being the estimated annual cost of the repairs and redecorations for which the landlord will be liable being an obligation for which the tenant was liable under the lease creating the standard rent.

Some correspondence ensued, to which it is immaterial to refer, and on Aug. 31, 1943, the appellants served a notice under the Rent Restriction Act stating that the rent of the flat would, as from Nov. 15, 1943, be £226 10*s.* 8*d.* per annum. It stated "Details showing how this rent is made up are given below." The details referred to are as follows: (*a*) Standard rent of the premises £205 per annum including telephone and kilowatt rents. Again the £205 is admittedly a mistake for £195, the separate rental of £10 for telephone and kilowatt rent remaining payable for those services but forming no part of the standard rent; (*b*) Cost of repairs for which former tenant was liable £20 per annum. (*c*) Increase of rates payable by the landlord £1 10*s.* 8*d.* The details how this last-mentioned figure had been arrived at were given. The respondent admitted her liability to pay the £196 10*s.* 8*d.*, that is to say, the standard rent of £195 plus the permitted increase of £1 10*s.* 8*d.* in respect of increased rates borne by the landlord and also the £10 but refused to pay any part of the £20 claimed in respect of the repairing covenant.

In due course the appellants sued the respondents in the county court for £47 16*s.* 6*d.* in respect of arrears of rent for the flat and for a declaration that they were entitled to increase the rent of the said dwellinghouse by the sum of £20 per annum or, alternatively, such sum as the court may determine, in respect of the transfer to them of the liability to repair previously borne by Platini and not now borne by the defendants, or, alternatively, that the defendant is liable to observe and perform the terms and conditions of the contract of tenancy dated Nov. 23, 1936, and made between the appellants and Platini. The respondent in her defence admitted that the standard rent of the flat was £195 and that she had paid rent at that rate and also at the rate of the additional rent of £10 from Feb. 15, 1943. She further admitted the addition in respect of the increased rates. She denied that the appellants were entitled to increase the rent in respect of the £20; and pleaded that she retained possession of the flat by reason of the provisions of the Rent Restriction Acts and that she had tendered to the appellants the rent she admitted to be due, namely, £17 4*s.* 3*d.* per month based on the standard rent of £195 plus the increase of £1 10*s.* 8*d.* in respect of rates and the appellants refusal to accept such tender and brought into court the sum of £34 8*s.* 6*d.* in respect of rent she admitted to be due down to Dec. 1, 1943, and a further sum of £17 4*s.* 3*d.* in respect of the rent which became payable on Jan. 1, 1944. The action was heard at the West London County Court by His Honour JUDGE HARGREAVES, who decided in favour of the respondent and ordered that judgment be entered for her with costs which were to be set off when taxed against the money brought into court by the respondent. The appellants appeal from this order. As will be seen from the facts stated the real question in the appeal relates to the appellants claim to include the £20 per annum in the annual rental of the flat. It is admitted that the standard rent of the flat is £195 and that by reason of the compliance by the appellants with the provisions of sect. 2 (1) (*b*) there has been an increase of £1 10*s.* 8*d.* over and above that rent. Now it is common ground that the respondent is entitled under the provisions of sect. 15 of the 1920 Act to remain as statutory tenant of the flat at the standard rent plus such increases as are permitted to the landlord. A perusal of that section makes it clear that as statutory tenant the respondent so long as she retains possession of the premises must observe and is entitled to the benefit of all the terms and conditions of the second lease so far as the same are consistent with the provisions of the Acts. In other words, she is bound to observe the modified repairing covenant contained in it and cannot be compelled to submit to more onerous terms.

The question, therefore, seems to resolve itself into one whether the £20 claimed is a permitted increase of the standard rent or not. Sect. 2 of the 1920 Act has a side note "Permitted increases in rent." The section is divided into a number of subsections. The first subsection is as follows:

> The amount by which the increased rent of a dwellinghouse to which this Act applies may exceed the standard rent shall, subject to the provisions of this Act, be as follows, that is to say . . .

Then follow a number of paragraphs under the headings (*a*) to (*e*) inclusive. Para. (*a*) deals with expenditure made by the landlord on repairs since Aug. 4 1914, and in the case of 1939 houses there is an amendment by the 1939 Act altering the date to Sept. 2, 1939, and providing for other alterations. Para. (*b*) provides for increase of rent in cases where the amount payable by the landlord for rates has been increased. Para. (*c*) allows a comprehensive increase not exceeding 15 per cent. of the net rent subject to a proviso. Para. (*d*) authorises an increase in respect of repairs varying with the landlord's liability for the whole of such repairs or for part only thereof. Para. (*e*) provides increases in respect of dwellinghouses let by a railway company. Paras. (*c*), (*d*) and (*e*) do not apply to 1939 houses but it is necessary to refer to them in order to arrive at a conclusion as to the meaning of the section. Subsect. (2) provides for the suspension of any increase under subsect. (1), (*c*) and (*d*). It is under subsect. (3) that the present question arises. It provides as follows:

> Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwellinghouse is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwellinghouse is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act: Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent.

The increase of rent referred to in the second part of the subsection is in respect of a transfer to a landlord of any burden or liability. There is no machinery for any transfer *in invitum* and it would seem that the only method for bringing about such a transfer as is mentioned is consensual. I agree with the view expressed by SCOTT, L.J., that the terms "landlord" and "tenant" are not used in the subsection to describe particular individuals already in contractual relationship but are used generally. The burden of the repairing covenant undertaken by Platini was by reason of the modified form entered into by the respondent in part transferred to the landlords by the first lease, but the rent payable thereunder by the respondent was fixed contractually at £160 no doubt on the basis of that partial transfer, and there was no increase of rent to the respondent over the £195 which was then the standard rent of the flat. When the respondent took the second lease the rent was increased to £165, but there was no transfer of burden or liability to the landlords because the burden or liability had already been transferred to them by the first lease. Now it is to be observed that in the case of any such transfer as is contemplated by this subsection any addition to a tenant's rent by reason thereof is not described as a permitted increase of rent but is said "not to be deemed to be an increase of rent for the purposes of" the Acts. Sect. 3 of the 1920 Act provides by subsect. (2) for certain notices in writing to be given before any permitted increase of rent can become effective. These notices are to be in the form contained in Sched. I to the Act or in a form substantially to the same effect. This form makes provision for all of the permitted increases referred to in sect. 2 (1) (*a*), (*b*), (*c*) and (*d*), but makes no provision in respect of any claim for additional rent under subsect. (3), and it is difficult to formulate how the notice ought to be framed if it is to provide for an increase in rent which is not for the purposes of the Act to be deemed to be an increase. The form of notice has been altered from time to time under the provisions of sect. 14 of the Act of 1933. The forms now in force are to be found in the Rent Restrictions Regulations, 1939, Sched. I. None of these forms provide for any increase or addition to rent in respect of anything arising under sect. 2 (3). Apart from the absence of any provision for a transfer of burden or liability from tenant to landlord or vice versa there is no machinery in the Acts by which any addition to the standard rent can be made against a statutory tenant in respect of these matters. I am, therefore, of opinion that on the true construction of the subsection any such addition to the rent in respect of the matters referred to in the subsection can only result from agreement between the landlord and tenant and cannot be imposed on the tenant in the absence of such agreement. The subsection is, of course, necessary to protect the landlord where rent is raised by agreement above the standard rent by reason of matters dealt with in it, and this seems to me to explain why in subsect. (3) the additional rent allowed to be charged is not referred to as an increase of rent but is dealt with by providing that it is "not to be deemed to be an increase of rent for the purposes of the Act."

I have, therefore, come to the conclusion that subsect. (3) refers only to cases where there is a consensual transfer of liability and has no reference to and does not authorise any increase of rent to a statutory tenant where there is no consensual transfer. The landlords could properly have agreed with the respondent for payment of an additional rent beyond the £195 when the first lease was granted because that lease provided for a transfer to the landlords of part of the burden or liability in respect of repairs imposed on Platini by his lease, but the transfer to the landlords was then completed and there was no ground for exacting any additional rent beyond the £195 when the second lease was executed.

For these reasons I am of opinion that the county court judge came to the right conclusion and that this appeal should fail. I naturally express my opinion with some diffidence as I find my brethren take a different view of the construction of the Act. I would, for the reasons I have expressed, dismiss the appeal with the usual consequences.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Stikeman & Co.* (for the appellants); *Linklaters & Paines* (for the respondent).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law*].

COLEBROOK *v.* WATSON INVESTMENT CO.

[CHANCERY DIVISION (Vaisey, J.), **May 22, 25, June 9, 1944.**]

Sale of Land—Sale by mortgagee—Statutory restrictions on mortgagee's powers under 1914 *legislation—Sale with consent of mortgagor—Validity—Courts (Emergency Powers) Act*, 1914 (*c.* 78).

On Dec. 5, 1919, a mortgagee conveyed property to a purchaser in the exercise of his power of sale with the consent of the mortgagor and without any leave of court authorising the transaction. It was contended that it was essential to the validity of the conveyance that the leave of the court should have been obtained:—

HELD: under the Courts (Emergency Powers) Act, 1914, leave of the court was not necessary in such a case and the conveyance was valid and a good root of title.

[**EDITORIAL NOTE.** It is settled that under the present emergency legislation the exercise of a mortgagee's power cannot be validated by the consent of the mortgagor. It is essential that the leave of the court be obtained. It was always thought that the position under the emergency legislation passed during the last war was different and in fact transactions were always carried out on that assumption. This decision justifies that assumption and gives the reason for the difference—namely, that the wording of the relevant enactments is quite different in the two cases.

AS TO STATUTORY RESTRICTIONS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 420, 421, para. 621; and FOR CASES, see DIGEST, Vol. 35, p. 512, No. 2425.]

Cases referred to:

*(1) *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805; 35 Digest 512, *2425*; 95 L.J.Ch. 564; 135 L.T. 311.

*(2) *Smart Bros.* v. *Ross*, [1943] A.C. 84; [1942] 2 All E.R. 282.

(3) *Re Sandow, Ltd., Skipworth*, v. *Sandow, Ltd.*, [1916] W.N. 262.

(4) *Knowles* v. *Mellor*, [1917] cited Annual Practice 1920, p. 1336.

*(5) *Bowmaker* v. *Tabor*, [1941] 2 K.B. 1; [1941] 2 All E.R. 72.

*(6) *Soho Square Syndicate* v. *E. Pollard & Co.*, [1940] Ch. 638; [1940] 2 All E.R. 601.

ACTION for specific performance by the vendor. The defence was that a conveyance by a mortgagee was not a good root of title since the sale had been made without the leave of the court under the Courts (Emergency Powers) Act, 1914. The facts are fully stated in the judgment.

Charles Harman, K.C., and *H. Hillaby* for the plaintiff.

R. F. Roxburgh, K.C., and *Raymond Jennings* for the defendants.

VAISEY, J.: The contract, dated June 24, 1943, is for the sale by the plaintiff to the defendants of a house and grounds called Fulmer Hall, in Buckinghamshire, at the price of £13,000. The questions which arise all originate in what the defendants allege to be an imperfection in the deed which is the stipulated root of the plaintiff's title. This deed is dated Dec. 5, 1919, and purports to be a conveyance in exercise of a mortgagee's power of sale. The mortgagor's personal representative acting under the direction of the court in proceedings in which the mortgagor's estate was being administered consented to such exercise of the power, but there was no application to the court in regard thereto under the Courts (Emergency Powers) Act, 1914, which was in operation at the time. The defendants contend that this omission vitiated the deed. Under decisions which bind me there is no doubt that, in cases to which the corresponding statute now in force applied, namely, the Courts (Emergency Powers) Act, 1939, it is not competent to interested parties in any way to contract out of its provisions. Thus, the protection which that Act affords to (amongst others) a mortgagor cannot be waived by him, and an order of the court is the indispensable prerequisite to any exercise of a mortgagee's powers in any case to which that Act applies. If a similar disability was imposed upon the parties by the Act of 1914, the deed of Dec. 5, 1919, did not, it is argued, exercise the power of sale validly or at all, and operated only as a transfer of the mortgage, with the consequence that it is neither such a document as the contract represents it to be, nor such a root of title as the plaintiff can oblige the defendants to accept. The defendants ask me to come to that conclusion (i) by necessary implication from those decisions which bind me under the Act of 1939; (ii) upon the principles which those decisions establish or illustrate; and (iii) having regard to *Anchor Trust Co.* v. *Bell* (1) which dealt with the Act of 1914.

In order to test the validity of the defendants' arguments I must consider, in the first place, the relevant provisions of the two Acts, with particular reference to the points of similarity and of difference which they present. The Act of 1914 was in force from Aug. 31, 1914, to Aug. 31, 1922, a period of eight years. It provides (so far as material for the present purpose) that :

> No person shall realise any security for the purpose of enforcing the payment or recovery of any sum of money except after such application to such court and such notice as may be provided for by rules under this Act If, on any such application, A the court is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable to the war the court may by order defer the operation of any such remedies as aforesaid for such time and subject to such conditions as the court thinks fit.

Compare and contrast the material words of the Act of 1939, which enact that :

> A person shall not be entitled except with the leave of the appropriate court to proceed B to exercise any remedy which is available to him by way of the realisation of any security and if on any application for such leave the court is of opinion that the person liable to pay the debt in question is unable immediately to do so by reason of circumstances attributable to war the court may refuse leave for the exercise of that remedy or give leave therefor subject to such restrictions and conditions as the court thinks proper.

Now it seems to me that there are some noticeable differences of expression C as between the two Acts. In the earlier one, the prescribed condition precedent is the application to the court and the service of a notice ; in the later it is the obtaining of the court's leave. What the court is empowered to do by the earlier Act is to defer the operation of a remedy ; by the later Act it is either to refuse, or to give, leave for the exercise of the remedy. The last-mentioned distinction is particularly important in connection with the following observation of Viscount Simon, L.C., in *Smart Bros.* v. *Ross* (2), at p. 91 ([1942] 2 All D E.R., at p. 285) :

> Where the statute [the Act of 1939] requires the leave of the court before a remedy can be exercised that leave cannot be dispensed with by agreement between the parties.

This principle is much more clearly applicable on the wording of the Act of 1939 than on the different expressions of the Act of 1914. A power to defer the operation of a remedy is not the same thing as the prohibition of its exercise without leave ; and though the result in either case may be much the same, E it does look as though the intentions of the legislature were not absolutely identical on the occasions of the passing into law of these two statutes. If they were, it is surely legitimate to inquire why the legislature did not on the second occasion use the same language as had been used on the first occasion.

During the whole of the time the Act of 1914 was in operation, nobody seems to have seriously supposed that it was not, for example, perfectly legitimate F for a mortgagor, at a time when he was entitled to the protection of the Act, to waive such protection, and in this sense to contract out of its provisions. The only reported decision (if such it may be called) upon the point is that of Sargant, J., in *Re Sandow* (3). The authority itself is far from satisfactory. The application was *ex parte*, and the record of what was said both by counsel and by the judge is extremely meagre ; but the real importance of the case, to my mind, is that it was treated on all sides as accurately stating the law. G The text-books and books of reference were and are, so far as I can discover, unanimous in taking the view that there was no need under the Act for the enforcement of a mortgagee's remedies to be sanctioned by the court, provided that it was consented to by the mortgagor : see, for example, the Annual Practice for 1920, at p. 1336, and all subsequent issues down to (I believe) 1940 ; Halsbury, Laws of England, 2nd Edn., Vol. XXIII, p. 420 ; Williams, Vendor and Purchaser, 4th Edn. (1936), p. 107 ; Palmer's Company Pre- H cedents (Debenture Volume), 1920 Edn., pp. 520 and 812.

There is no doubt at all that receivers of mortgaged properties were as a common practice during those eight years appointed both by the court and out of court, without any application being made under the Act of 1914, the concurrence or consent of the mortgagor being universally regarded as quite sufficient. If the defendants' objection in the present case is well-founded, there must have been some if not hundreds of orders of court, and transactions out of court, which were in fact (although no one appears to have suspected it) absolutely illegal and void. I confess to a feeling that such a decision on my part might savour of presumption, but that, of course, in no way concludes the matter.

It seems that ATKIN, J., in an unreported case of *Knowles* v. *Mellor* (4), came to the same conclusion as SARGANT, J., but with that exception nothing seems to have been mooted on the point until some time after the Act had ceased to be in operation, when *Anchor Trust Co.* v. *Bell* (1) came before LAWRENCE, J., to whose judgment I must now advert. He undoubtedly approved of A *Re Sandow* (3), and obviously thought that "contracting out" of the Act was possible; indeed, he says so, as I shall presently mention, and a large part of his judgment was devoted to the question of whether the parties had in fact contracted out of the Act, a question which he decided in the negative. A passage, however, which has caused me some misgiving is the one at p. 821, where he says:

> B In my opinion the effect of the Act of 1914 is to abrogate the power, unless the requirements of the Act are complied with.

How is the word "abrogated" to be reconciled with the rest of the judgment? If the judge meant that the power had been abrogated in the proper sense of that word—that is to say, abolished or destroyed—why did he take such pains to discover whether or not it had been exercised by consent? It would have been quite enough for him to say that the power did not exist. The suggestion C of counsel for the defendants was that he may have supposed that the power could be, as it were, re-created at the volition of the parties, a view which was ruled out as inadmissible in *Bowmaker* v. *Tabor* (5), at p. 7.

I myself prefer to effect the reconciliation between the two parts of the judgment by supposing that the word abrogated was used in it as equivalent in meaning to suspend or in abeyance, and it is in that sense that I read and understand it. However that may be, at p. 822, LAWRENCE, J., used these D very plain words:

> There can, I think, be no doubt that it was competent for the plaintiffs to waive any application by Mrs. Bell to the court before entering into possession or selling the property.

No other relevant reported case under the Act of 1914 was brought to my attention or is known to me, and I must now consider the decisions under the E Act of 1939. They are three in number. In none of them was *Re Sandow* (3) disapproved of as a decision under the Act of 1914, though the principle which it applied to that Act was held not to be applicable to the Act of 1939. I have already mentioned that the Act of 1939 was expressed in very different language; it was also passed in very different circumstances. This was put very forcibly by FARWELL, J., in the first of the three cases, *Soho Square Syndicate* v. *E. Pollard & Co.* (6), where he pointed out that the policy of the legislature in F protecting such persons as mortgagors and debtors even against themselves, and in regarding them as persons not fit to be trusted to look after their own interests, has advanced considerably since 1914. Counsel for the defendants submitted that this view of the matter was no longer tenable as having been impliedly overruled by the Court of Appeal in *Bowmaker* v. *Tabor* (5), at p. 5, and by the House of Lords in *Smart Bros.* v. *Ross* (2) already mentioned, these G being the other two of the three cases on the Act of 1939.

I am not convinced that I ought to accept that submission, nor can I assent to the broad proposition that neither in phraseology nor in purpose can any distinction be drawn between the two Acts. If the Court of Appeal or the House of Lords had intended to pass a general condemnation on the manner in which the earlier Act had been interpreted and administered during the whole eight years of its applicability, it would surely have been done in unmistakable H language, and not left to be discovered by mere surmise and conjecture. Such a finding would have been well within the competence of the higher courts, but I am far from clear that it is open to me. It is beyond question that the two Acts do differ very widely in phraseology. I do not profess to understand why the legislature thought it right to effect so radical a redrafting of the Act of 1914 to meet the later and still existing emergency. The fact remains that it was done.

I must now deal briefly with each of the three cases. As regards the *Soho Square* case (6) the actual decision of FARWELL, J., was that the provisions of the Act of 1939 preclude a mortgagee from appointing a receiver of the mortgaged property without the leave of the court even though the mortgagor has consented to the appointment. The judge expressed the view that Lawrence, J., in *Anchor Trust Co.* v. *Bell* (1) was following the decision in *Re Sandow* (3), see p. 643.

As to *Bowmaker* v. *Tabor* (5), it was pointed out in the judgment of the Court of Appeal that the case was one of waiver (which was held to be ineffectual) rather than of contracting out. In the present case, though the point is not, in my view, essential to my decision, the consent, given as it was under the direction of the court, might perhaps be regarded as in some sense contractual.

Finally there is *Smart Bros.* v. *Ross* (2). There it was held that no leave under the Act of 1939 was necessary, on the ground that no remedy was being exercised on the determination by mutual agreement of a hire-purchase contract. I have already quoted the words from the speech of Viscount Simon, L.C., upon which special reliance was, very properly, placed by counsel for the defendants. They cannot, in my judgment, conclude the present case.

On the whole I see no sufficient reason for acceding to the suggestion that I should come to a decision which involves the proposition that the contemporary theory and practice in regard to the Act of 1914 were fundamentally mistaken and wrong. The idea of so belated an enlightenment does not at all attract me. I should be very reluctant to arrogate to this generation *ex post facto* a greater measure of wisdom on the subject of the Act of 1914 than was vouchsafed to the generation in whose days it was in actual operation. Other words of the legislature in a similar statute—the Act of 1939—have in these other days been interpreted as excluding the possibility of "contracting out." The decisions to that effect are binding upon me, and, if I may say so with respect, I agree with them.

But I cannot overlook the fact that in none of them is it said that *Re Sandow* (3) was wrongly decided, or that the law as laid down in relation to the Act of 1939 must necessarily have been applicable to the Act of 1914. By what they omit to say I regard these decisions as fully justifying my own. If the practice of contracting out under the Act of 1914 had either violated its terms or been contrary to the public policy of the time, how can that fact have possibly managed for eight whole years not only to elude the vigilance of the court, but also to escape the notice of the whole of the legal profession in those days? I should hesitate a very long time before venturing to assume the existence of so vital a misunderstanding and so wholesale a maladministration of such an important and widely applicable Act of Parliament, all unsuspected by the bar and uncorrected by the bench, and I am relieved to feel that I am not called upon to do anything of the kind. In my judgment the generation which produced the Act of 1914 should be presumed also to have comprehended its meaning in this very material respect.

Such being the view which I have formed on the general question, I hold that the deed of Dec. 5, 1919, effectively conveyed the whole legal and equitable interest in the property to the plaintiff's predecessor in title. The Law of Property Act, 1925, s. 45 (6) makes the recitals in that deed sufficient evidence of the facts, but there is ample contemporaneous proof (if such were needed) of the allegation in the penultimate recital that the personal representative of the mortgagor had, before the date of the deed, consented to the exercise by the vendors (being the personal representatives of the survivor of the mortgagees) of their statutory power of sale without any such application to the court as would otherwise have been required under the Act of 1914. The deed constitutes, in my judgment, an unexceptionable root of title.

The Act of 1939 has now been superseded by a later consolidating statute, but for convenience I have throughout this judgment assumed that the Act of 1939 is still in force.

Declaration accordingly.

Solicitors: *Walters & Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

WOODWARD AND ANOTHER *v.* MAYOR OF HASTINGS AND OTHERS.

[KING'S BENCH DIVISION (Hallett, J.), **May 2, 1944.**]

Public Authorities—Limitation of actions—What bodies protected—Governors of grammar school—Pupil slipping on worn step on snowy day—Infancy of plaintiff—Custody of parent—Endowed Schools Act, 1869 (*c.* 56), *s.* 45—*Public Authorities Protection Act,* 1893 (*c.* 61), *s.* 1—*Limitation Act,* 1939 (*c.* 21), *ss.* 21 (1), 22.

Education—Grammar school—Negligence—Liability—Governors—Public authority—Limitation of time—Infancy—Custody of parent—Endowed Schools Act, 1869 (*c.* 56), *s.* 45—*Public Authorities Protection Act,* 1893 (*c.* 61), *s.* 1—*Limitation Act,* 1939 (*c.* 21), *ss.* 21 (1), 22.

The plaintiff was a pupil of the Hastings Grammar School. In 1940 the school was evacuated to St. Albans and in Jan., 1942, whilst going over the doorstep of premises then used for school purposes the plaintiff slipped and was seriously injured. The step was covered with frozen snow which had been swept, but frozen snow was still left on the step and no ashes or other material had been placed on the step. No warning of this dangerous condition had been given. The step apart from the frozen snow was badly worn and sloped steeply down. The school was an endowed secondary school under the terms of a scheme sealed by the Board of Education in 1910 under the Endowed Schools Acts, 1869 to 1889. The governing body consisted of 14 governors of whom eight were appointed by a public authority, and the Mayor of Hastings and the chairman of the Education Committee of the borough were *ex-officio* governors. The writ was issued more than a year after the date of the accident and the defendants pleaded the Limitation Act, 1939, s. 21. The plaintiff was an infant and advantage was sought to be taken of the Limitation Act, 1939, s. 22. His father at the time was a writer in the Royal Navy, in touch with the home by letter and his mother was at home :—

HELD : (i) the governors were performing a public duty and exercising a public authority and the negligence complained of was a neglect or default in the execution of that public duty or authority. The action was, therefore, barred by limitation of time.

(ii) the infant was in the custody of the father, or, if not of the father, of the mother and the provision as to the disability of infancy was not available to the plaintiff.

[**EDITORIAL NOTE.** The disabilities which were once an important feature in dealing with the defence under the statutes of limitations have to a large extent lost that importance by reason of modern progress. The disability of infancy had been curtailed in cases where the infant is in the custody of the parent, the reason obviously being that the parent can commence proceedings on the infant's behalf. This case discusses what amounts to being in the custody of a parent for the purposes of the Limitation Act, 1939, s. 22. The other features of the case are to a large extent, though not entirely, covered by authority, but the case is of importance on the consideration of the effect of the evacuation of schools and the separation of children from their parents.

AS TO PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-297, paras. 609-616 ; and FOR CASES, see DIGEST, Vol. 38, pp. 101-112, Nos. 725-795.]

Cases referred to :

(1) *Ching* v. *Surrey County Council,* [1910] 1 K.B. 736; 19 Digest 556, *17*; 79 L.J.K.B. 481 ; 102 L.T. 414.

(2) *Morris* v. *Carnarvon County Council,* [1910] 1 K.B. 840 ; 19 Digest 556, *18* ; 79 L.J.K.B. 670 ; 102 L.T. 524.

*(3) *Griffiths* v. *Smith,* [1941] A.C. 170 ; [1941] 1 All E.R. 66 ; 110 L.J.K.B. 156 ; 164 L.T. 386.

(4) *Ayr* v. *St. Andrew's Ambulance Association,* [1918] S.C. 158 ; 38 Digest 125, *p.*

(5) *The Johannesburg,* [1907] P. 65 ; 38 Digest 103, *738* ; 76 L.J.P. 67 ; 96 L.T. 464.

*(6) *Greenwood* v. *Atherton,* [1939] 1 K.B. 388 ; [1938] 4 All E.R. 686 ; Digest Supp. ; 108 L.J.K.B. 165 ; 160 L.T. 37.

ACTION for damages for negligence. The action was brought by the first plaintiff through his mother, his next friend, for damages for negligence resulting in personal injuries, and by the second plaintiff, the mother, only in respect of her special damages. The defendants were sued as representing the governors of Hastings Grammar School.

The first plaintiff, Cecil Douglas Woodward, who was born on Oct. 26, 1924, obtained a scholarship from the London County Council to the Hackney Downs Secondary School. In Sept., 1939, owing to the outbreak of war, he was transferred to the Hastings Grammar School where he attended until July, 1940. The school was then moved from Hastings and in Jan., 1942, at the time of the accident in question, it was being carried on in substituted premises at St. Albans. The premises used for the morning periods were the Abbey Institute and the Congregational Church School. The first term of the year started on Jan. 13, 1942. On that day it snowed and during the night apparently it froze. On the morning of Jan. 14, it was still snowing. Woodward attended prayers at the Congregational School and was then told by one of the mistresses to fetch back one or two boys who had gone to the Abbey Institute for a lesson which had been cancelled. He started out to perform his mission and going out over the doorstep he slipped and was in considerable pain. He waited for some time and then tried to carry on with his mission but slipped again. As a result he was seriously injured.

J. P. Eddy, K.C., and *S. Lincoln* for the plaintiffs.

Gilbert Dare for the defendants.

HALLETT, J.: I have first to consider what is the duty of those who are required or undertake to provide premises for use by the scholars of a school. Certain authorities have been cited to me. I need not review them all, but perhaps I should mention *Ching* v. *Surrey County Council* (1), and *Morris* v. *Carnarvon County Council* (2). I have no doubt that the duty of such persons is to make the premises as safe for use by the scholars in the ordinary way in which scholars may be expected to use them as reasonable care and skill can make them.

The next question is: Were the governors, who are sued in the present action, persons who were required, or had undertaken, to provide premises for the Hastings Grammar School? The burden of showing that was, in my view, upon the plaintiffs. The position of the governors is of importance, both because it must be shown that they were responsible for the provision and state of the premises and also because of a certain defence, to which I shall later have to refer.

The Hastings Grammar School is managed under the terms of a scheme sealed by the Board of Education on Apr. 13, 1910, and there would seem to be no doubt that it is an endowed school within the meaning of the Endowed Schools Acts, 1869 to 1889. By the Endowed Schools Act, 1869, s. 45, a scheme, when and as approved by Her Majesty in Council, is to have full operation and effect in the same manner as if it had been enacted in that Act; and the duties and power of making schemes, which the Charity Commissioners might otherwise enjoy under the Charitable Trusts Acts or otherwise, are transferred to the Board of Education. Under this scheme there are certain management rules and r. 9 provides:

> The governors shall keep in repair all the buildings of the foundation not required to be kept in repair and insured by the lessees or tenants thereof.

That is the only provision in the scheme to which my attention has been called with regard to the responsibility for the provision and repair of premises to be used by the school. I think that the position is certainly very much less clear than it was in *Griffiths* v. *Smith* (3), where it would seem to have been beyond doubt that the duty of providing a school house and keeping the school house in good repair was imposed by express enactment upon the managers of the non-provided public elementary school at Liverpool which was there in question.

However, whilst recognising that the materials are less certain, I am satisfied and I hold that in this case the duty of providing suitable premises (which, as I understand it, means both the original provision and the keeping in repair) for the scholars of Hastings Grammar School fell upon the governors of that school.

The next question is: Was that duty in any way affected by the removal from Hastings to St. Albans? In July, 1940, directions were given by the authorities to certain schools on the south coast to remove elsewhere. Hastings Grammar School was told to go to St. Albans and arrangements were made with the authorities at St. Albans Grammar School. The headmaster saw the authorities of St. Albans Grammar School and found that they were willing to let him have the use of their building in the afternoon only. He had nowhere to teach the boys in the morning. By his own endeavours the headmaster found two buildings in St. Albans of which use might be obtained. One was the Abbey Institute and the other was the Congregational Church School. The actual acquiring of those premises was carried out by the Hertfordshire Education Committee. I do not think that the duty of the governors of the Hastings Grammar School can have been altered in point of law by the transference of the school from Hastings to St. Albans. It was quite natural that the matter should be left to be arranged through the medium of the headmaster, but because the governors quite naturally left this to somebody else, I do not think that it altered their legal duty.

The next question is this: If the defendants were under a duty to see that these premises were as safe as reasonable care and skill could make them, were they guilty on Jan. 14, 1942, of a breach of that duty? The step was very dangerous. Although it would seem that the chapel had only been built some 54 years, the step had worn down to the most extraordinary extent. There was a drop of about one in seven over the comparatively narrow width of that step. The state of the step through wear is not relied upon in the statement of claim expressly and I think that, if the plaintiff's case had depended merely upon the wear of the step, there would have been difficulties from several points of view. On this particular morning, however, the snow which had previously fallen had been beaten down by the passage of many feet into what was really solid ice on the step and on top of that there was fresh loose snow fallen which rendered the foothold reasonably secure. When the boy went in in the morning this newly fallen snow did not appear to him to be particularly slippery, but unfortunately he remained behind after prayers to get instructions from a mistress and the caretaker decided that she ought to clear away the snow.

She first cleared the loose snow, but not the ice, away from the step and then cleared away the snow along the front of the premises. By that time, according to her, a quarter of an hour or twenty minutes had elapsed since she cleared the step. That she regarded the step so cleared as being dangerous appears to be certain, because she says that her intention was to cast some ashes upon it before she left. Unfortunately in the interval between her clearing the step and putting ashes upon it the boy had come out from the premises on his way to the Abbey Institute and had sustained a fall which caused his injury.

To my mind this step was not as safe for the scholars of the school as reasonable care and skill could make it at the time the boy slipped on it: the governors continued to be responsible for the state of the premises, although the school had moved from Hastings to St. Albans; and, therefore, this action would succeed but for the defence based upon the Limitation Act, 1939, s. 21, which has replaced the well-known provision in the Public Authorities Protection Act, 1893, s. 1.

Counsel for the defendants has to establish that this action was brought against the governors of Hastings Grammar School in respect of some neglect or default in the execution by them of an act of Parliament or of a public duty or authority and, therefore, he has to satisfy me that in carrying on this grammar school the governors were executing a public duty or authority. He has also to prove that any neglect which is the foundation of this action was a neglect in the execution of that public duty or authority.

As to the second point, I think that I need say nothing. It is a point which was carefully examined in *Griffiths* v. *Smith* (3), but it does not arise here. The point that does arise here is whether the governors of Hastings Grammar School were executing a public duty or authority in carrying on that school. Counsel for the plaintiffs tries to meet the defence, first of all, by denying that the governors were executing a public duty or authority and, secondly, by relying upon the Limitation Act, 1939, s. 22.

It may be convenient if I deal first with sect. 22, which provides that, if, on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at a later date. To that there is a proviso:

> Provided that . . . (*d*) this section, so far as it relates to the disability of infancy . . . shall not apply to any action . . . unless the plaintiff proves that the person under a disability was not, at the time when the right of action accrued to him, in the custody of a parent.

There is a definition of "parent," to which I need not refer.

The facts about that are quite simple. This plaintiff lived at home with his mother in Clapton when he was not at school. His father was serving as a writer in the Royal Navy, but was coming home from time to time on leave, and knew about the accident as soon as it happened or very soon after. The post was open to him and other means of communication were open; and the plaintiffs have certainly failed to satisfy me that this young man was not in the custody of his father, although the care of his father was limited to such care as the father could give on leave and by postal and similar communications. But, even if I were satisfied that he was not in the custody of his father, the plaintiffs certainly fail to satisfy me that he was not, in that event, in the custody of his mother. It seems to me quite plain that he was in the custody of his father or mother; in other words, that he was in the custody of a parent. Indeed, in May, 1943, the mother brings this action as next friend, and there is no reason explained to me why she could not have brought it in Jan., 1943, instead of in May.

The accident occurred on Jan. 14, 1942, the writ was issued on May 21, 1943: clearly, then, the action was begun out of time; and the only question that remains is whether the defendants are entitled to avail themselves of the protection of sect. 21. It has been pointed out a long time ago that it is far from easy to define satisfactorily a public authority for the purpose of the then provision in the Public Authorities Protection Act, 1893. I think that it is also far from easy to define a public duty or authority for the purpose of the Limitation Act, 1939, s. 21, and I do not intend to attempt to do that which others have found it difficult or impossible to do; but I derive some assistance from authorities either cited to me or found by me.

In the first place, it is clear that not every authority which carries on its undertaking under statutory sanction can avail itself of this protection. In particular, it is clear, I think, that any authority is excluded from that protection which carries on its undertaking for commercial gain. There are authorities to that effect; and the view is perhaps confirmed by the definition of "public authority" contained in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 12 (2).

In the second place, I think that it is clear that the mere fact that the undertaking is of a laudable nature and in the public interest is not sufficient to make the body which carries it on a public authority. That, I think, appears from the Scottish case which has been cited to me, *Ayr* v. *St. Andrews Ambulance Association* (4). On the other hand, it would be quite hopeless nowadays to contend that the protection was only afforded to those authorities which are in the position of national or municipal authorities. A discussion on the matter will be found in *The Johannesburg* (5).

I have been referred to *Greenwood* v. *Atherton* (6), and, as I have already said, *Griffiths* v. *Smith* (3). Those are the two cases from which I derive the most assistance, although in those cases the courts were concerned with the managers of public elementary schools, whereas, in this case I am concerned with the governors of an endowed secondary school. Therefore, those cases are not directly in point; but, having regard to all the circumstances, I feel that the language of Goddard, L.J., in *Greenwood* v. *Atherton* (6) would be equally applicable to the present case.

The governing body of this foundation is by the scheme to consist of fourteen persons. Two of them are *ex officio*, namely, the Mayor of Hastings and the Chairman of the Education Committee of the council of the county borough. Nine of them are to be representatives: six appointed by the council of the county borough, one by the vestry of the parish of All Saints, one by the vestry of the parish of St. Clements and one by the council of the Senate of the University of Cambridge; so that, out of the eleven governors whom I have mentioned so far, the only one who was not appointed by an unquestionably public authority is the one appointed by the Senate of the University of Cambridge. Then there are to be three co-opted by resolution of the governors.

Then there comes the financial aspect of the matter. I have been told by the headmaster that the position is as follows. There are twenty foundation scholars, who enjoy a total exemption from tuition fees. That is dealt with in para. 42 of the scheme. Fees of £5 10*s*. a term, which includes a payment for the use of stationery are charged for all other boys except boarders. That £5 10*s*. is A paid to the school; and whether it is paid by the parents or whether it is paid by some authority (in the case of this particular plaintiff, the London County Council) does not affect the school authorities and does not affect my mind in any way. But when what can be obtained from fees has been obtained and when what can be obtained from endowments has been applied to the sanctioned purposes (which, as one would expect, are partly scholarships) the deficiency is met, in the first instance, out of the rates of the local authority at Hastings, B although the headmaster tells me that to the best of his belief 50 per cent. of that deficiency is passed on by the local authority at Hastings to the central authority in Whitehall and so comes out of taxes. In other words, any deficiency in the sum required to pay for the school is borne half by the rates and half by the taxes.

I now come back to the judgment of GODDARD, L.J., in *Greenwood* v. *Atherton* (6). There are only a few sentences and I should like to borrow them. He C said at p. 392 ([1938] 4 All E.R., at p. 688):

> These foundation managers are acting in pursuance of a public duty.

I ask myself: Does not that apply perfectly to the Mayor of Hastings, to the Chairman of the Education Committee of Hastings, to the six gentlemen appointed by the Council of the County Borough of Hastings, to the two appointed by the vestries in Hastings? and I see no reason why I should except D the one appointed by the council of the Senate of the University of Cambridge. Are not these persons acting in pursuance of a public duty? If not, what are they doing? It seems to me that it would be quite wrong to say that they are merely acting in pursuance of a charitable instinct and a desire to serve the community.

Then GODDARD, L.J., continued, at pp. 392, 393 ([1938] 4 All E.R., at pp. 688, 689):

E

> It seems to me really quite unarguable to say that they are not a public authority and not acting in pursuance of a statutory duty, and although it may be they could not be compelled to keep the school in existence, so long as they are in receipt of a grant from public funds I do not see how it can be said they are not public authorities. . .

I quite recognise that GODDARD, L.J., was dealing with a different kind of school, and I do not cite the words as authority but as expressing what I myself F feel about this case. I feel that, looking at all the facts and circumstances, it is really impossible for me to say that these governors, in performing their functions of managing this grammar school, are not performing a public duty or exercising a public authority. I think that they are and, therefore, I think that the neglect or default in respect of which they are sued is a neglect or default in the execution of a public duty or authority, namely, the public duty or authority of conducting this grammar school and providing this grammar G school with suitable premises in which its work can be carried on.

For these reasons I have come to the conclusion that, the dates being as I have described, the defence based upon the Limitation Act, 1939, must succeed and there must be judgment accordingly.

Judgment for the defendants.

Solicitors: *F. Bernard Smith* (for the plaintiffs); *Gardiner & Co.* (for the H defendants).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

JESSON *v.* JESSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), **December 1, 1943.**]

Divorce—Insanity—Alimony pendente lite and maintenance—Agreement under seal by petitioner to pay for respondent's maintenance -Undesirable as court has power to make and vary order according to circumstances. A

Pending proceedings for divorce on the grounds of his wife's insanity, a husband petitioner entered into an agreement under seal with the local authority which managed the mental home where his wife was detained whereby he covenanted to pay, during the joint lives of himself and his wife, a certain sum of money per week for maintenance :—

HELD : on a petition for divorce on the grounds of insanity the court has full power to make orders granting the respondent alimony *pendente lite*, or maintenance, and to vary them from time to time according to the circumstances of the moment. It is undesirable that the petitioner should enter into an agreement under seal to pay maintenance because, in such a case, the court has no power to set aside the deed and the petitioner would not be able to obtain alleviation below the amount which he has covenanted to pay, whereas an amount which the court has ordered the petitioner to pay can be increased or decreased by a variation of the order as the circumstances require. B C

[**EDITORIAL NOTE.** This is merely a practice note relating to the proper procedure as to maintenance where the respondent in a divorce suit is a patient in an institution.
AS TO PERMANENT ALIMONY AND PERMANENT MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 783-800, paras. 1238-1273 ; and FOR CASES, see DIGEST, Vol. 27, pp. 494-513, Nos. 5272-5513.] D

PETITION by a husband for divorce on the grounds of his wife's insanity. The facts are sufficiently set out in the judgment for the purposes of the report of the practice of a petitioner for divorce on the grounds of insanity entering into an agreement under seal to pay for the respondent's maintenance.

Ifor Lloyd for the petitioner. E
E. Holroyd Pearce for the respondent.

LORD MERRIMAN, P. : I have pronounced a decree *nisi* and dealt with costs but the question of maintenance is one about which I ought to say a word. I think it would be well, first of all, to begin with the law on the matter. When divorce for insanity was introduced by the Matrimonial Causes Act, 1937, specific provision was made in sect. 10 (2) to entitle the respondent to any such suit to claim for alimony *pendente lite*, or maintenance, as the case may be, on the same basis as would a petitioner in a suit of the more normal kind, and the Matrimonial Causes Rules—particularly r. 42—are adapted to meet the point. Now, in the cases in which the Official Solicitor acts as guardian *ad litem*—and they are the very great majority of such cases he makes it his first business to take up on behalf of the respondent the question of maintenance, goes into the respondent's means, and gets into correspondence with the local authority who are actually concerned with the mental hospital where the respondent is detained. The matter is then brought before the court with full information, and in the ordinary case the agreed order for maintenance is embodied in the decree *nisi*. F G

But the point is not affected, of course, one way or the other, by the question whether the agreement is made so that it can be embodied in the decree *nisi* or whether it is dealt with as a separate matter. The point is—and this is the point of real importance—that the court has in these matters power to make orders, and from time to time vary them, according to the circumstances of the moment. H

In this particular case, correspondence of the kind I have indicated was initiated between the Official Solicitor and the Blackpool Corporation on June 9, 1943. It so happened that for some time past the husband had been paying 5*s*. a week, but that in May of this year his circumstances had improved and he had agreed with the corporation to pay an extra half-crown, so that his liability for the moment was 7*s.* 6*d.*, and in reply to the Official Solicitor's letter this was set out, and the Blackpool Corporation, in the last paragraph of their letter of June 11, said :

> In the circumstances my committee will agree to a continuance of a payment of 7*s.* 6*d.* a week by the husband, and the Town Clerk has communicated with the husband's solicitor with a view to entering into an agreement for payment at that rate.

It is quite clear that the Official Solicitor thought that the Town Clerk was only referring to an "agreement" in the sense that the husband would agree to pay 7*s.* 6*d.*, but not in the sense that a formal document under seal was being entered into, and it is equally clear that the corporation were thinking of a document under seal, and so was the husband's own solicitor, who assented to the whole proceedings. So that there is not the slightest suggestion of any bad faith on the part of the Blackpool Corporation or anybody concerned—not the slightest suggestion of that—or of any attempt to oust the jurisdiction of the court. But, in fact, that is what has happened to some extent, and I am bound to say that I think it is undesirable that agreements of the kind to which I have referred should be entered into when the suit is pending before the court. What has, in fact, happened is that a document under seal, dated Aug. 17, 1943, (as I say with the full consent of the husband and under the advice of his solicitor) has been made, whereby he covenants with the Corporation to pay this 7*s.* 6*d.* during the joint lives of himself and his wife.

That does raise a difficulty. Any order for maintenance made by the court can, as I have already said, be varied up or down as circumstances require, and, of course, the court would not be bound by the fact that the Corporation had agreed to accept 7*s.* 6*d.* if the man's circumstances became such that it was obviously to the benefit of the respondent, and the Official Solicitor, as guardian *ad litem* brought the matter forward in that sense, that some much larger order should be made in her favour. But equally the circumstances might change the other way, and the man might not be able to afford to pay 7*s.* 6*d.* a week.

In these circumstances this court has no power that I am aware of to set aside this deed, and the result is, if it became a practice to get petitioners in this class of case to enter into deeds of this sort, the petitioner would always be put in the most unfavourable possible position, because he could never get any alleviation, while the order could always be varied against him.

In a word I think—although, as I say, there is not the slightest suggestion of anything improper in this particular proceeding—that it is very undesirable it should establish a precedent, and that these matters should, as Parliament clearly intended they should, be left to be dealt with by the court with full knowledge of all the circumstances, and with the assistance of the guardian *ad litem*, who, as I say, is usually, in fact, the Official Solicitor.

With these observations I shall adjourn the question of maintenance in this case, and see what happens.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Ascroft, Whiteside & Co.*, Blackpool (for the petitioner) ; *Official Solicitor* (for the guardian *ad litem*).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

LAND SETTLEMENT ASSOCIATION, LTD. *v.* CARR.

[Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.), **June 27, 1944.**]

Agriculture—Agricultural tenancy—Letting for successive periods of 364 *days—Term of years or from year to year—Agricultural Holdings Act,* 1923 (*c.* 9), *ss.* 25 (1), 57.

Landlord and Tenant—Tenancy—Terms of years or from year to year—Letting for successive periods of 364 *days.*

The respondent association developed a smallholdings scheme on a co-operative basis and for the purposes of the scheme required to retake possession as soon as possible of the holdings of which the tenants proved unsuitable for the purpose. They let a holding to the appellant for a period of 364 days and then for a further period of 364 days and thereafter for successive periods of 364 days determinable nevertheless as provided in the agreement. The provision for determination was that the agreement might be determined by either party at any time during the currency of the said term or successive period on giving 3 calendar months' previous notice in writing. The letting commenced on Oct. 1, 1939. On Aug. 23, 1943, the association gave the appellant notice to quit on Nov. 30, 1943. It was contended that the Agricultural Holdings Act, 1923, applied and that the notice was insufficient in length and, further, that, in any event, the notice should have expired at the expiration of one of the periods of 364 days :—

Held : (i) the Agricultural Holdings Act, 1923, did not apply to this letting, which was not a letting for a term of years or from year to year.

(ii) the provision for notice to quit provided for notice at any time, and it was not necessary that notice should expire at the expiration of one of the periods of 364 days.

[**EDITORIAL NOTE.** This is an important and valuable decision to agricultural landlords. For quite proper purposes it is often desired to contract out of the Act of 1923, and this decision approves a method which is the most useful one to both parties. It has been common to let agricultural land for a period of 11 months and then to have a completely new tenancy for another 11 months. The method here approved is a much more convenient arrangement for all parties and, so long as it is used for proper purposes, will be very helpful. The further point of the possibility of giving notice to quit at any time should be noted. The decision is not new, but the view is very prevalent that in the case of a periodic tenancy, the notice must expire at the conclusion of one of the periods. The law is that the notice to quit clause falls to be construed according to its terms and it may be drafted, as here, to give a power to determine at any time ; but the drafting is a matter requiring some skill and its form should be modelled on that in the document here considered.

As to Notice to Quit in the Case of Agricultural Tenancies, see HALSBURY, Hailsham Edn., Vol. 1, pp. 328, 329, paras. 520-522 ; and for Cases, see DIGEST, Vol. 2, pp. 8, 9, Nos. 22-27.]

Cases referred to :

(1) *Doe d. Plumer* v. *Mainby* (1847), 10 Q.B. 473 ; 2 Digest 6, *6* ; 16 L.J.Q.B. 303.

(2) *Bishop of Bath's Case* (1605), 6 Co. Rep. 34b ; 31 Digest 59, *2065* ; *sub nom. Fish* v. *Bellamy*, Cro. Jac. 71.

Appeal by the tenant from a decision of His Honour Judge Allsebrook at the Carlisle County Court on Feb. 24, 1944. The facts are fully set out in the judgment.

Percy Lamb for the appellant.

Valentine Holmes and *W. J. K. Diplock* for the respondents.

Scott, L.J. : The only question before the court is whether a notice to quit dated Aug. 23, 1943, and served upon the appellant two days later, requiring him to give up possession of his holding on Nov. 30, 1943, was an invalid notice. That would be so if it fell within the ban of the Agricultural Holdings Act, 1923, s. 25 (1). There was an alternative contention that it was bad in itself, but, in my view, the only arguable point is the former. A further defence based on the Rent Restriction Acts was dropped.

The respondent association owns an estate at Dalston, Cumberland, acquired by it for the purpose of encouraging a co-operative system of running smallholdings, in which the association, owning the land, lets it on conditions in regard to supervision, guidance, cropping and marketing, calculated to promote the success of the smallholders to a degree which it is well-known has proved unattainable in this country by smallholders trying to run independently, and without such assistance and control. The appellant's plot was known as "Holding No. 50." After a preliminary period of trial in 1938, it was let to him on the association's regular printed form of tenancy agreement on Oct. 20, 1939. It covered 5 acres and included a house, a glasshouse and various equipment for a mixed smallholding. The recitals disclose the general nature of the co-operative scheme. The association found the working capital—some £400—and the tenant entered into various covenants, the purpose of which was to compel compliance with the manager's advice, and to ensure good husbandry and profitable marketing through the association, the tenant agreeing to give a floating charge to secure the bank through which the association found the working capital. The tenant's covenants in cl. 4 were made effective by a suitable power to the association to give notice to quit; they contain the essence of the control necessary to ensure that co-operative action by all the associated smallholders in the settlement, which is the condition of the financial success of each. Freedom to give notice to determine the tenancy is in such a scheme essential to both parties.

The question of law upon which the appeal turns is whether the notice to quit was rendered nugatory by the Agricultural Holdings Act, 1923. Sect. 57 (1) of that Act says:

> In this Act, unless the context otherwise requires, "Contract of tenancy" means a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year. "Tenant" means the holder of land under a contract of tenancy . . .

The appellant's mixed holding was obviously agricultural within that Act if it applies. Sect. 25 (1) of that Act says:

> Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy.

The first three clauses of the agreement are as follows:

> (1) The association shall let and the tenant shall take the land premises and property described in the schedule hereto . . . Together with the landlord's fixtures thereon belonging to the association To Hold the same from Oct. 1, 1939 to Sept. 29, 1940 and thenceforward from Sept. 30, 1940 for the term of 364 days and thereafter for successive periods of 364 days as from Sept. 29, 1940 determinable nevertheless as hereinafter mentioned. (2) This agreement may be determined by either party at any time during the currency of the said term or any successive period giving to the other three calendar months' previous notice to quit in writing. (3) The rent shall be £33 12*s.* for the tenancy period of 364 days and shall be payable in equal monthly payments of £2 16*s.* such payments to be made on the last day in each month the first payment of £2 16*s.* to be made on Oct. 31, 1939, and the last payment to be made in advance on the thirtieth day next preceding the determination of the tenancy Together with the payment which falls due on that day.

It was contended by counsel for the tenant that cl. 1 created a tenancy either (*a*) for a term of years, or (*b*) from year to year. In either case the notice of Aug. 23, 1943, would be bad. It is obvious that the agreement of Oct. 24, 1939, was necessarily drawn with the intention of avoiding the operation of an Act which is radically incompatible with the whole scheme of the settlement. The Act was intended for the typical farmer or market-gardener, carrying on his business independently and in competition, on a landlord and tenant basis. Such tenants were thought by Parliament to need the sort of protection the Act gave them. But that protection would at once be fatal to the co-operative form of farming for which the Land Settlement Association stands. The antithesis is made plain by the recitals, and para. (ii) of the fourth recital says:

> Nothing in this agreement shall be construed as constituting a contract of tenancy within the meaning of the Agricultural Holdings Act, 1923, or any statutory modification thereof.

The purpose of the wording of cl. 1 is obviously to avoid creating either a term of years or a tenancy from year to year. It refers to and must be read with cl. 2. So read it provides, in my opinion, not for any term, but for a periodic tenancy—using the word "periodic" as it would apply to a weekly or a monthly tenancy (but without the ambiguity of the word "month"). As counsel for the respondents put it, cl. 1 (read without cl. 2) is for a period of 364 days to another like period. It is clear that that is not a tenancy "from year to year." But, says counsel for the appellant, "if the first period of 364 days is to be followed by a like period, and the second by a third, you get to a total tenancy over two years and that is a term of years." I do not agree. The notice to quit of Aug. 23, 1943, which was a perfectly good notice under the agreement, did not offend against sect. 25 (1) of the Act, because that subsection in terms presupposes a tenancy of which either the term or the periodicity is measured in years. There was no tenancy year which was "current" on Aug. 23, 1943, as predicated by the subsection, but only a period of 364 days which was then current. It was vital for the draftsman of the agreement to steer clear of any tenancy which would allow the fatal provisions of the 1923 Act to upset the association's power of control. I think he has succeeded.

There is a further point of construction. Cl. 2 should, I think, be construed as permitting a determination of the tenancy at the will of either party at any time, subject only to three months' previous notice in writing. That in itself seems to me a corroborative reason for saying that the tenancy for "a term of years" intended by the Agricultural Holdings Act, 1923, s. 57, was not such a tenancy as was the subject-matter of the association's printed form of agreement. It is true that there is authority for saying that, if a contract of tenancy indubitably contains a *terminus ad quem* sufficiently certain to satisfy the phrase "term of years," the certainty of the end will not be affected by a power to determine earlier. But counsel for the appellant is in the difficulty of being unable to find in cl. 1 any "term" to the tenancy whatsoever. The tenancy is expressed to continue indefinitely, period by period, subject only to the right of either party to bring it to an end at any time by a three months' notice. How can that be called a term of years ? The mere presence in a tenancy agreement of expressions showing that the parties contemplated (as in the agreement of Oct. 20, 1939) that it would last for more than one year does not make a yearly tenancy become a tenancy for two years at least ; *Doe dem. Plumer* v. *Mainby* (1). *A fortiori* does that observation apply to the bearing of the many expressions in the present agreement showing expectation that the relationship would continue for many years. That expectation is irrelevant to the question we have to decide.

Many of the ancient authorities about a term of years were cited to us : but I will only deal with a few. BLACKSTONE treating of estates less than freehold (Book II, p. 140), says :

> An estate for years is a contract for the possession of lands or tenements, for some determinate period ; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be put for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is stiled so in some legal proceedings ; a year being the shortest term which the law in this case takes notice of. (Littleton, sect. 67).

A little further on, at p. 143, he says :

> Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined : for every such estate must have a certain beginning, and certain end. (Littleton, sect. 45).

The passage in sect. 67 of COKE ON LITTLETON, Vol. I, to which BLACKSTONE refers, is as follows, p. 52 (*b*) :

> Also, if tenements be let to a man for term of halfe a yeare, or for a quarter of a yeare, etc., in this case, if the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum* ; but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

On p. 54 (*b*) under the caption "The writ shall say," after explaining the impossibility of altering a writ, the author continues :

> And this is the reason that in this case of halfe a yeare the words of the writ shall be without change, *quod tenet ad terminum annorum*, and the pleader must make a speciall declaration according to his case, for otherwise he should be without remedy.

Thus it is plain that nothing short of a year was even at that period of our law regarded as really a "term of years," the attribution of the name being a procedural fiction. In the *Bishop of Bath's Case* (2), it was made clear, at pp. 35a, 36a, that no time shorter than two years could constitute a "term of years":

> So it is true, that the continuance of it ought to be certain; but that is to be intended either when the term is made certain by express numbering of years, or by reference to a certainty, or by reducing it to a certainty by matter *ex post facto*, or by construction in law, by express limitation. . . . But if a man leases his land for years, it is a good lease for two years, because it shall be taken good for such a number with which at least the plural number will be satisfied, and that is with two years.

Counsel for the appellant argued that the definition (*xxvii*) in the Law of Property Act, 1925, s. 205, could be invoked to support his argument upon the meaning of the 1923 Act. But that is a fallacy for three reasons. Even although the 1925 Act repealed the Act of 1922 (which in 1925 was split up into its component divisions), the 1923 Agricultural Holdings Act is not to be construed by reference to a definition in an entirely different Act inserted solely for the interpretation of words in the other Act. Secondly, the 1923 Act was a consolidation Act and the definition of the phrase "contract of tenancy" came from an Act passed many years before the Law of Property Acts, namely, the Agricultural Holdings Act 1908, s. 48 (1), of which contains the identical definition which is repeated in the 1923 Act. Thirdly, the 1923 Act was a special Act and the Law of Property Act a general Act and *specialibus generalia non derogant.*

The appeal must be dismissed with costs.

MACKINNON, L.J.: The plaintiffs entered into an agreement with the defendant dated Oct. 20, 1939. By it they let to the defendant Holding No. 50 on their Dalston Estate in Cumberland for the period or periods specified in cl. 1 of it. By cl. 2 either party might terminate the agreement at any time by three months' notice to quit in writing. On Aug. 23, 1943, the plaintiffs served on the defendant a notice to quit upon Nov. 30, 1943, which was in writing. The defendant not having complied with this notice, the plaintiffs sued him in the Carlisle County Court. By the particulars of their claim dated Jan. 5, 1944, they claimed possession of the demised premises and mesne profits. The material part of the defence, dated Jan. 18, 1944, was the reliance by the defendant upon the Agricultural Holdings Act, 1923, s. 25, and an allegation that the demised premises were an agricultural holding within the meaning of that Act. Sect. 25 of that Act provides:

> Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy.

Under sect. 57 "contract of tenancy" is defined as meaning "a letting of or agreement for letting land for a term of years, or for lives and years, or from year to year."

The agreement sued on was certainly a letting of land. The only question in the case was whether it was a letting "for a term of years" or "from year to year." The judge held that it was not, and gave judgment for the plaintiffs. The defendant appeals.

The second paragraph in the fourth recital of the agreement is as follows:

> Nothing in this agreement shall be construed as constituting a contract of tenancy within the meaning of the Agricultural Holdings Act, 1923, or any statutory modification thereof.

Cl. 1 of the agreement is as follows:

> The association shall let and the tenant shall take the land premises and property described in the schedule hereto . . . Together with the landlords' fixtures thereon belonging to the association To Hold the same from Oct. 1, 1939 to Sept. 29, 1940 and thenceforward from Sept. 30, 1940 for the term of 364 days and thereafter for successive periods of 364 days as from Sept. 29, 1940 determinable nevertheless as hereinafter mentioned.

Cl. 3 provides:

> The rent shall be £33 12*s.* for the tenancy period of 364 days and shall be payable by equal monthly payments of £2 16*s.* such payments to be made on the last day in each month the first payment of £2 16*s.* to be made on Oct. 31, 1939 and the last payment to be made in advance on the thirtieth day next preceding the determination of the tenancy Together with the payment which falls due on that day.

It was contended for the defendant that "the tenancy period" specified in cl. 1 constituted this a letting "for a term of years." Reliance for that proposition was chiefly rested upon a passage in Blackstone's Commentaries, which has been read by Scott, L.J. I might add to that only that his citation was taken from my copy of the 6th Edn., which was published in 1774, and as Blackstone died in 1780 those are his own words. This passage is typical of the method of Blackstone in specifying exhaustive categories. In effect he says that any estate less than freehold, and not a tenancy at will or a tenancy on sufferance, must be a tenancy for years. That means that a tenancy for any fixed time—a week, a month, a year, or longer—must be a tenancy for years, since the law knows no period of time other than a year. In my view, the phrase "a term of years" in sect. 57 of the Act of 1923 has no reference to the categories of "estates less than freehold" thus analysed by Blackstone. It refers to a tenancy which, by the terms of its description in the lease, or agreement for tenancy itself, is found to be by those terms a letting for a term of years. On cl. 1 of the agreement of Oct. 20, 1939, I think this cannot be so found. It is a letting for successive periods of 364 days, and not for a term of years. It is manifest from these words, as well as from the recital to which I referred, that the whole object of the draftsman was to prevent the application of the Act of 1923. There is nothing illegal, immoral, or indecent in such an aim. The only question is whether the aim has been successfully achieved. I think it has, and that as a result this appeal should be dismissed.

Luxmoore, L.J.: The main question arising on this appeal is whether the appellant, who was the defendant in the court below, was at the material date the tenant of a holding within the meaning of the Agricultural Holdings Act, 1923. If the answer is in the affirmative, then it is admitted that the county court judge was in error in ordering him to give up possession of the property let to him and to pay to the respondent association mesne profits. There is a second question which has nothing to do with the Agricultural Holdings Act, 1923: Was the notice given to the tenant valid under the terms of the tenancy agreement? A third question was raised in the proceedings and in the notice of appeal, whether the Rent Restrictions Acts applied; but the appellant rightly abandoned this point.

The material facts are as follows. The association, which was incorporated at the instance of the Minister of Agriculture and Fisheries, owns an estate known as the Dalston Estate at Carlisle. As a matter of history, the estate was acquired by the association to enable it to develop smallholdings schemes for the benefit of unemployed workmen and their families to be organised in communities working on a co-operative basis. On Oct. 20, 1939, the association by an agreement of that date agreed to let to the appellant a smallholding on the Dalston Estate known as Holding No. 50, comprising about five acres. The agreement was on the printed form in common use by the association. It contained the following (among other) provisions: (1) Nothing in this agreement shall be construed as constituting a contract of tenancy within the meaning of the Agricultural Holdings Act, 1923, or any statutory modification thereof; (2) the term of the tenancy runs from Oct. 1, 1939, to Sept. 29, 1940 (a period of 364 days), and thenceforward from Sept. 30, 1940, for the term of 364 days and thereafter for successive periods of 364 days as from Sept. 29, 1940, determinable as thereinafter mentioned; (3) the agreement may be determined by either party at any time during the currency of the said term or any successive period giving to the other three calendar months' previous notice to quit in writing. In addition to those specified the agreement contained a number of provisions restrictive of the tenant's method of cultivation, grading and marketing of produce and live stock and compensation for disturbance.

On Aug. 25, 1943, the association served on the appellant a notice requiring him to quit and deliver up possession of the holding on Nov. 30, 1943. The reason why the notice was given was the subject of discussion in the court below, but it is immaterial so far as this court is concerned. If the tenancy created by the agreement is within the Agricultural Holdings Act, 1923, then it is admitted that the notice would be invalid because it is provided by sect. 25 of the Act that "notwithstanding any provision in the contract of tenancy a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then curernt year of tenancy."

The first question, therefore, is whether the agreement constitutes a contract of tenancy within the Agricultural Holdings Act, 1923. A careful consideration of the agreement leaves no doubt in my mind that the association in drafting it had in view the total exclusion of the provisions and operation of the Agricultural Holdings Act, 1923. Have they succeeded in so doing ? The Act does not apply to every tenancy of agricultural land. Its extent is governed by the definitions contained in sect. 57 of the Act. Those material to be considered in the present case are " holding," " contract of tenancy " and " tenant." " Holding " is defined as meaning—with an exception not material to be stated— " any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord." Apart from the special meaning given by the definition of " tenant," there could be no doubt but that the plot 50 on the Dalston Estate was a holding within the definition. " Tenant " is defined as meaning " the holder of land under a contract of tenancy " and a " contract of tenancy " is defined as meaning " a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year."

Obviously to fall within the definition " contract of tenancy " the agreement must either provide for the letting of the holding for a term of years or from year to year, because admittedly no question of a letting for lives can arise. The first argument of counsel for the appellant was to call in aid the provisions of the Law of Property Act, 1925, s. 1, which states that :

> The only estates in land which are capable of subsisting or of being conveyed or created at law are (*a*) an estate in fee simple absolute in possession and (*b*) a term of years absolute.

He then turned to the definition of "term of years absolute " in sect. 205 (1) (*xxvii*) in the last mentioned Act which, so far as material, provides that " the expression ' term of years ' includes a term for less than a year or for a year or years and a fraction of a year or from year to year." He claimed to read this definition into the earlier Act and argued that, even if the tenancy created by the agreement of Oct. 20, 1939, would not have constituted a contract of tenancy within the definition already quoted it was brought within it by the application of the definition of " term of years absolute " in the Law of Property Act, 1925. There is no warrant for this argument. The Agricultural Holdings Act, 1923, contains definitions applicable to the construction of that Act and those definitions cannot be altered or extended by any definition contained in some subsequent Act unless there is an express enactment to that effect.

Counsel for the appellant next argued that under the definition of " contract of tenancy " in the Agricultural Holdings Act, 1923, the tenancy created by the agreement of Oct. 20, 1939, was either for a term of years or from year to year. In support of his contention that the tenancy was for a term of years he quoted a passage from Blackstone's Commentaries (21st Edn., Vol. II, p. 140) which reads :

> An estate for years is a contract for the possession of lands or tenements, for some determinate period ; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be put for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is stiled so in some legal proceedings : a year being the shortest term which the law in this case takes notice of.

The authority quoted by the learned author in support of this statement is Littleton, sect. 67. Now it is to be observed that the learned author does not say that a lease for part of a year is in law a lease for years, but that the tenant of such a lease is respected (that is, treated) as a tenant for years and this is made abundantly clear if the authority quoted in support of the statement is considered. Littleton, sect. 67, is as follows :

> Also, if tenements be let to a man for terme of halfe a yeare, or for a quarter of a yeare, etc., in this case, if the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum* ; but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

This shows that, if land was let for a part of year, the lessor was allowed to describe the tenant as holding for a term of years although he did not in fact so hold because no other form of writ was open to him. The passage from Blackstone is, therefore, no authority for the proposition that a tenancy for a part of a year is in law a tenancy for a term of years. Indeed, there is well worn authority against such proposition to be found in the *Bishop of Bath's Case* (2), at pp. 35b, 36a:

> . . . if a man leases his land for years, it is a good lease for two years, because it shall be A taken good for such a number with which at least the plural number will be satisfied, and that is with two years.

Here the term is for a period of time which is in fact 364 days and not a year. It is described by reference to the first and last day of the period, namely, Oct. 1, 1939, to Sept. 29, 1940. The *habendum* in the agreement continues "and thenceforward from Sept. 30, 1940, for the term of 364 days and thereafter B for successive periods of 364 days." This is a tenancy for two periods of 364 days certain and not for two years certain and, therefore, cannot be described as for a term of years.

Counsel for the appellant next contended that the tenancy created by the agreement was from year to year. I can find no warrant for such an argument. The tenancy is from one period to another period, but the period is not a year and it is, I think, impossible to describe it as being from year to year. In C arguing this point, counsel called attention to references in the agreement to such phrases as "the last year of the tenancy," "every three years," "every second year." In my judgment, these phrases are not sufficient to displace the plain words used in the *habendum* or entitle the court to read them in some other way than in their ordinary and natural sense.

There seems to be strong indication in the Agricultural Holdings Act, 1923, that the Act is only directed to tenancies for years or from year to year and D larger estates (for example, leases for lives), for in sect. 25 the reference is to the "then current year of tenancy." Obviously, if the tenancy is for periods less than a year, it would be impossible to give a notice to terminate it at the end of the then current year because there is no such period fixed by or ascertainable under the agreement.

In my judgment, the judge was right in holding as he did that the tenancy E created by the agreement of Oct. 20, 1939, was not a contract of tenancy within the meaning of the definition in the Agricultural Holdings Act, 1923, s. 57, and consequently was not affected by the provisions of sect. 25.

The next point taken by counsel for the appellant was that the notice to quit was invalid because it was not directed to take effect at the end of one of the periods created by the agreement. The notice was given in pursuance of an express provision in the agreement which provides that the agreement F

> . . . may be determined by either party at any time during the currency of the term or any successive period giving to the other three previous calendar months' notice to quit.

It seems to me that the phrase "at any time" refers to the determination of the tenancy and not to the giving of the notice. The argument of counsel for the appellant that the only valid notice that can on the true construction of the clause be given is one which expires at the end of one of the periods created G by the agreement seems to me to give no sensible meaning to the words "at any time," for there is no need to give the parties power to give notice at any time, if in fact the only notice that can be effective is one which operates at the end of one of the periods created.

For these reasons I agree this appeal must be dismissed with costs.

Appeal dismissed with costs. H

Solicitors: *Wainwright & Co.*, agents for *Wannop & Co.*, Carlisle (for the appellant); *Farrer & Co.*, agents for *Thompson, Mawson & Harston*, Carlisle (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

A. S. LUCAS (H.M. INSPECTOR OF TAXES) *v.* CHARLES HAMMERTON & CO., LTD.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 17, 1944.**]

Income Tax —" *Tied houses* "—*Premium paid by tenant—Brewery acquiring tied houses from another company—Whether premiums payable by tenants to be taken into account—Income Tax Act*, 1918 (c. 40), *Sched. D, case* 1.

The respondent company was incorporated on Feb. 25, 1937, as a limited company under the name of Stockwell Brewery, Ltd. On the same day the respondent company entered into an agreement with H. company, which was incorporated in 1902, whereby it was agreed that the respondents should take over as at Sept. 30, 1936, the whole of the business and property of H. company whatsoever and wheresoever and all its liabilities. By an agreement with C. company dated Feb. 26, 1937, it was agreed that C. company should assign its business and sell and transfer certain properties to the respondents. By these agreements the respondents acquired a number of tied houses. The question for decision of the court was whether the respondent company ought to account for the premiums paid by the tenants of the tied houses under the rule in *Hoare's* case (2). On behalf of the respondent company it was contended that, as the premiums in question had been received by its predecessors in title, the premiums should not be taken into account :—

HELD : for the purposes of tax assessment the premium received in respect of a tied house must be regarded as spread over the term of the tenancy, and a brewery company which during the currency of the lease acquires the tied house must be deemed to be in receipt year by year of the appropriate part of the premium and must bring it into account.

[**EDITORIAL NOTE.** The question here is the application of the decision in *Hoare's* case to the case where one brewery company acquires leasehold licensed premises from another such company during the currency of the term and, at the same time, takes over all its assets and liabilities.

AS TO DEDUCTIONS ALLOWABLE IN RESPECT OF TIED HOUSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 158, para. 324 ; and FOR CASES, see DIGEST, Vol. 28, pp. 56, 57, Nos. 284-292.]

Cases referred to :

(1) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433 ; 28 Digest 56, *287* ; 84 L.J.K.B. 417 ; 112 L.T. 651 ; 6 Tax Cas. 399.

*(2) *Hoare & Co., Ltd.* v. *Collyer*, [1932] A.C. 407 ; Digest Supp. ; 101 L.J.K.B. 274 ; 146 L.T. 469 ; 17 Tax Cas. 169.

APPEAL by the Crown from a decision of the General Commissioners for the Division of second East Brixton. The facts are fully set out in the judgment.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the appellant.

F. Heyworth Talbot for the respondent.

MACNAGHTEN, J. : The respondent, Charles Hammerton & Co., Ltd., was incorporated under the Companies Act, 1929, on Feb. 25, 1937, under the name of Stockwell Brewery, Ltd., as a company limited by shares with a capital of £1,400,000, divided into 400,000 5 per cent. cumulative preference shares of £1 each, 1,000,000 ordinary shares of 10*s*. each, and 1,000,000 unclassified shares of 10*s*. each. The objects for which the company was established were (*inter alia*) to carry on the business of brewers in all its branches and to purchase and undertake all or any part of the business, property, rights and liabilities of any company carrying on that business. Accordingly, by an agreement dated Feb. 25, 1937—the day on which the respondent was incorporated—made between a company which had been incorporated in 1902, also called Charles Hammerton & Co., Ltd. (I will refer to that company as " the old company "), of the one part, and the respondent of the other part, it was agreed that the respondent should take over as at Sept. 30, 1936, the whole of the business and property of the old company whatsoever and wheresoever, and all its liabilities, and should allot to the old company or its nominees 340,000 cumulative preference shares of £1 each and 921,760 ordinary shares of 10*s*. each.

On the same day, Feb. 25, 1937, the respondent, by a special resolution passed at an extraordinary general meeting, changed its name from the Stockwell

Brewery, Ltd., to that of the old company, Charles Hammerton & Co., Ltd. The change was approved by the Board of Trade, as appears from the certificate of the registrar of joint stock companies dated the following day. And by an agreement dated Feb. 26, 1937, made between a company called the Commercial Brewery Co., Ltd., which carried on the business of dealers in and vendors of beers, ales, stouts and fermented liquors, of the one part, and the respondent of the other part, it was agreed that the Commercial company should assign its business and sell and transfer (*inter alia*) the freehold and leasehold properties described in the first schedule thereto to the respondent for the sum of £375,000, to be satisfied as therein mentioned partly in shares of the respondent and partly in cash. Each of these two agreements made provision for the prompt winding up of the vendor company.

Under the agreement of Feb. 25, 1937, the respondent acquired from the old company 32 licensed houses which the old company had let to tied tenants for terms of 14 or 21 years, subject to the payment of premiums and annual rents; and under the agreement of Feb. 26, 1937, it had acquired from the Commercial company 27 tied licensed houses which had been let on similar terms and conditions. Of these 59 licensed houses, 43 were freehold and 16 were leasehold. The dates of the leases and the premiums and rents paid by the tenants are set out in the schedule attached to the case, which also contains in the case of the freehold houses, the Sched. A assessments and in the case of the leasehold houses the rents paid by the respondent to its lessors. Since its formation the respondent has carried on the businesses which it took over from the old company and the Commercial company.

The question at issue on this appeal has arisen on the assessment of the respondent's profits under Sched. D, case 1, for the year 1942-43. *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1) established that a brewery company is entitled in computing its trade profits under Sched. D to deduct as a trade expense the amounts by which the rent received from the tenant of a tied house is less, in the case of a freehold, than the Sched. A assessment, and in the case of a leasehold than the rent paid by it to its lessor; and the subsequent case of *Hoare & Co.* v. *Collyer* (2) established that any premium paid by the tenant must also be brought into account to reduce that deduction. In that case the principle laid down by the House of Lords is stated very concisely by Lord Buckmaster at p. 410:

> The principle underlying this decision [in *Usher's Wiltshire Brewery's* case (1)] is that such houses were solely and exclusively acquired for the purpose of the appellant's trade and that by means of their exclusive use as a channel for the sale of the appellant's goods, the profits upon which they are to be taxed under Sched. D are earned. They are in fact regarded as business premises of the undertaking . . . In all cases where rents are below the Sched. A assessment, the premiums received in respect of such houses must be brought into the account for the purpose of determining what is the actual expense to which the appellants have been put in maintaining the house as part of their business. The actual method by which the premium is so to be dealt with is not before us, but it ought not to be difficult of calculation.

The question which arises in the present case is whether in computing the profits of trade of the respondent the premiums paid by tied tenants ought in accordance with the decision in *Hoare & Co.'s* case (2) to be brought into account. The respondent contended that since it had not received the premiums—they had been received by its predecessor in title—the decision in *Hoare's* case (2) was inapplicable, and the General Commissioners so decided.

In the case of the licensed houses taken over from the old company, since the respondent by the agreement of Feb. 25, 1937, took over the whole of the assets of the old company and its business as from a previous date, Sept. 26, 1936, it might be said that it did indirectly receive the premiums, in that, taking over as it did all the assets of the old company whatsoever and wheresoever, it must have taken over the assets, whatever they may have been, into which those premiums had been converted; but no such argument could be maintained in the case of the houses taken over from the Commercial company, for that company only sold its business and the properties mentioned in the agreement of Feb. 26, 1937; it did not sell all its assets.

The question at issue depends on the true meaning and effect of the decision of the House of Lords in *Hoare's* case (2). It was decided in that case that the premiums must be brought into account for the purpose of determining the expense to which the brewery company had been put in maintaining the licensed houses as part of its business. The actual method by which the premium is so to be dealt with was not determined by the House, but, as LORD BUCKMASTER said, "it ought not to be difficult of calculation."

Since the matter which is being dealt with is the question of an annual expense, the premium actually received on the day when the lease is granted to the tied tenant must needs be spread over the years during which the term extends, and A that in fact is what is done. If that be the true interpretation of the decision of the House of Lords in *Hoare & Co.* v. *Collyer* (2), it follows, I think, that, if the brewery business is sold and the licensed house is regarded as part of the business premises, it matters not whether the owner of the business is the person who received the premium when the lease was granted, since that premium for the purposes of assessment must be regarded, not as having been received on the day when the lease was granted, but as being received year by year B during the currency of the lease; and a brewery company which during the currency of the lease acquires the tied house must be deemed to be in receipt year by year of the appropriate part of the premium which was actually received by the person who owned the business when the lease was granted.

I, therefore, think that the decision of the General Commissioners was wrong and that the appeal must be allowed with costs.

Appeal allowed with costs.

C Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Freshfields, Leese & Munns* (for the respondent).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

MOSLEY *v.* GEORGE WIMPEY & CO., LTD.

D [KING'S BENCH DIVISION (Macnaghten, J.), **April 26, 1944.**]

Income Tax—Licence to take surface gravel—Income tax deducted from money due under licence—Whether gravel pit a "concern" within Income Tax Act, 1918, *Sched. A, No. III, rr.* 1, 2, 3—*Income Tax Act,* 1918 (*c.* 40), *All Schedules Rules, r.* 19, *Sched. A, No. III, rr.* 1, 2, 3—*Finance Act,* 1934 (*c.* 32), *s.* 21.

E The plaintiff granted to the defendant company a licence to take gravel at a certain price per cubic yard from certain land of which she was tenant for life. In order to obtain the gravel, which was about 3ft. below the surface, the defendants used a mechanical grab. The defendants contended that they were compelled by the provisions of the Finance Act, 1934, s. 21, to deduct income tax at the standard rate from the amount due to the plaintiff from the defendants for gravel taken under the licence; alternatively, that they were entitled to make such deduction by virtue F of the Income Tax Act, 1918, All Schedules Rules, r. 19. It was admitted on behalf of the plaintiff that the licence to take the gravel was an "easement" and the sum payable in respect thereof was a "rent" within sect. 21, but it was denied that the "easement" was used, occupied or enjoyed in connection with any of the concerns specified in Sched. A, No. III, rr. 1, 2 or 3, and that, therefore, the defendants were not entitled to make the deduction:—

G HELD: (i) upon the true construction of Sched. A, No. III, rr. 1, 2 and 3, the "easement" in question was not a "concern" enumerated in those rules. Further, in order to bring sect. 21 into force, there must be (*a*) an easement, and (*b*) a concern, within the meaning of the Act and the easement must be used, occupied or enjoyed in connection with the concern. This latter requirement of the section was not fulfilled.

H (ii) the defendants were not entitled under the Income Tax Act, 1918, All Schedules Rules, r. 19, to deduct income tax from the sum due to the plaintiff.

[**EDITORIAL NOTE.** In the main, this is a question only of the construction of Sched. A, No. III, but the last point concerns the question of what is an annual payment within All Schedules Rules, r. 19. On this it is held that a payment of so much per cubic yard excavated is not an annual payment.

AS TO CONCERNS WITHIN INCOME TAX ACT, 1918, SCHED. A, NO. III, see HALSBURY, Hailsham Edn., Vol. 17, pp. 138-149, paras. 279-308; and FOR CASES, see DIGEST, Vol. 28, pp. 8, 9, Nos. 28-43.]

Cases referred to :

*(1) *Stratford (H.M. Inspector of Taxes)* v. *Mole & Lea* (1941), 24 Tax Cas. 20.
*(2) *Earl Fitzwilliam's Collieries Co.* v. *Phillips*, [1943] A.C. 570 ; [1943] 2 All E.R. 346 ; 112 L.J.K.B. 554 ; 169 L.T. 242.
(3) *Jones* v. *Cwmorthen Slate Co.* (1879), 5 Ex.D. 93 ; 28 Digest 8, *29* ; 49 L.J.Q.B. 110 ; 41 L.T. 575 ; 1 Tax Cas. 267.
(4) *Glasgow Corpn.* v. *Farie* (1888), 13 App. Cas. 657 ; 34 Digest 604, *12* ; 58 L.J.P.C. 33 ; 60 L.T. 274.
(5) *Midland Ry. Co. & Kettering, Thrapstone & Huntingdon Ry. Co.* v. *Robinson* (1889), 15 App. Cas. 19 ; 11 Digest 150, *328* ; 59 L.J.Ch. 442 ; 62 L.T. 194.
(6) *Edinburgh Southern Cemetery Co.* v. *Kinmont (Surveyor of Taxes)* (1889), 2 Tax Cas. 516 ; 28 Digest 10, *d.*
(7) *Fry* v. *Salisbury House Estate, Ltd., Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432 ; Digest Supp. ; 99 L.J.K.B. 403 ; 143 L.T. 77 ; 15 Tax Cas. 266 ; *affg.*, [1930] 1 K.B. 304.
(8) *Croft* v. *Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317 ; [1942] 1 All E.R. 110 ; 111 L.J.K.B. 215 ; 24 Tax Cas. 126.
*(9) *Duke of Fife's Trustees* v. *George Wimpey & Co., Ltd.*, [1944] S.L.T. 41.
(10) *Hill* v. *Gregory*, [1912] 2 K.B. 61 ; 28 Digest 8, *28* ; 81 L.J.K.B. 730 ; 106 L.T. 603 ; 6 Tax Cas. 39.

Action to recover money due under a licence, counterclaim for a declaration that the defendant company was entitled to deduct from the amount due to the plaintiff income tax at the standard rate by reason of the Finance Act, 1921, s. 21, or, alternatively, by virtue of the Income Tax Act, 1918, All Schedules Rules, r. 19. The facts are fully set out in the judgment.

J. S. Scrimgeour for the plaintiff.

F. Heyworth Talbot for the defendants.

Macnaghten, J. : The defendants, who carry on business as civil engineers and contractors, were engaged in 1941 in constructing an aerodrome in the county of Leicester and for the purposes of that work they required some 50,000 cubic yds. of gravel. The plaintiff is the tenant for life of land in the parish of Hemington in that county which contains gravel and she granted to the defendants a licence to take gravel from her land on the terms set out in a letter dated July 14, 1941. By those terms the defendants agreed to pay 1*s.* 6*d.* or 1*s.* per cubic yd. according to the quality of the gravel taken by them.

In order to get the gravel the defendants had to remove the " over-burden " or surface which covered the gravel to a depth of about 3ft., and when they had done that they were able to take the underlying gravel by means of a mechanical grab.

This action is brought by the plaintiff to recover £1,115, the balance of a sum of £2,230 due to her from the defendants for gravel taken by them from her land under that licence. There is no dispute between the parties as to the amount due to the plaintiff ; but the defendants contend that they are compelled by the provisions of the Finance Act, 1934, s. 21, to deduct from the amount due to the plaintiff income tax at the standard rate, namely, 10*s.* in the £, or, alternatively, that they are entitled to make such deduction by All Schedules Rules, r. 19. The question and the only question at issue in this case is whether the plaintiff must submit to that deduction. She claims that she is entitled to the payment of the full amount of £2,230.

The Finance Act, 1934, s. 21, provides that where " rent " is payable in respect of any " easement " and the easement is " used occupied or enjoyed " in connection with any of the concerns specified in Sched. A, No. III, rr. 1, 2, 3, the rent shall be charged with tax under Sched. D, and shall be treated for the purpose of such of the provisions of the Income Tax Acts as refer to royalties paid in respect of the user of a patent as if it were such a royalty.

Sect. 21 (4) defines the words " rent " and " easement " for the purposes of the section, and counsel on behalf of the plaintiff admitted that, having regard to the decisions of the court in *Stratford (Inspector of Taxes)* v. *Mole and Lea* (1), and *Earl Fitzwilliams Collieries Co.* v. *Phillips* (2), the licence to take gravel granted by the plaintiff to the defendants was an " easement " and the sum payable by the defendants for the gravel was a " rent " within the meaning of those words as used in that section. So the question at issue is reduced to this : Was the so-called " easement " used occupied or enjoyed in connection with any of the concerns specified in Sched. A, No. III, rr. 1, 2, 3 ? If the easement was so used occupied or enjoyed, then it follows that the so-called " rent " must be treated as a royalty payable for the user of a patent, and in that case the defendants would be bound by the Finance Act, 1934, s. 21, to deduct income tax from the rent, and the claim of the plaintiff in this action would necessarily fail.

The concerns specified in Sched. A, No. III, r. 1, are quarries of stone, slate, lime-stone or chalk. Counsel for the defendants submitted that the gravel A which the defendants " grabbed " from the plaintiff's land was a quarry of stone. It is true that the stones were not large; they were little stones, but still they were stones and, therefore, the concern was a concern specified in Sched. A, No. III, r. 1.

I do not think that contention is well-founded. The Income Tax Act, 1918, is a taxing Act. There was some suggestion during the argument that it ought to be construed generously. I was in some doubt, when the argument was B used, as to whom the generosity was to be extended, whether to the Crown or to the subject. But I do not think that any taxing Act should be construed generously; it should be construed strictly. From the very foundation of the courts of common law at Westminster it has always been the duty of His Majesty's judges to protect the subject from exactions by the Crown. It is true that at the present time a judge when he is appointed takes an oath to serve the King, C but the older form of oath, going back to 18 Edw. III (1344), was that he would serve not only the King but also his people. It was certainly the duty of the judges—a duty which, except perhaps for the unhappy times of the 17th century, was always performed with courage by the judges—to protect the subject from any claim by the Crown which was not in accordance with law.

In those circumstances I think the words " quarries of stone " should be read in their ordinary and natural meaning; and there is no doubt, as one of the D witnesses who was called before me said, that a quarry of stone is where stone is cut out from a mass and excavated either by pick or by blasting; it certainly does not in ordinary language include gravel which can be " grabbed," although a case was cited to me under which apparently a gravel pit came within the meaning of the word " quarry " under an Act of Parliament which was designed for the protection of persons working in quarries.

Moreover, there is no less authority for that proposition than that of LORD E BRAMWELL when he was a judge of the Court of Appeal. In *Jones* v. *Cwmorthen Slate Co.* (3), LORD BRAMWELL expressed a view about the meaning of the word " quarry " similar to that which the eminent gentlemen who gave evidence before me expressed in the witness box. So I do not think that this " easement " is a " concern " which comes within r. 1.

The " concerns " in r. 2 are " mines of coal, tin, lead, copper, mundic, iron and other mines." Counsel for the defendants did not suggest that this gravel F pit was any of the designated mines, but he said it was one of the " other mines." There again, coming to the word " mines " in its ordinary meaning, I am of opinion that the word " mines " in ordinary diction refers to underground excavation, although cases may arise where the word " mines " in a document which has to be construed includes what would be open workings of a mineral. For the former proposition I refer to *Glasgow Corpn.* v. *Farie* (4), and for the G latter to *Midland Ry. Co.* v. *Robinson* (5).

This, of course, is a litigation between two subjects and the Crown is not a party to the suit; but it seems to me that I ought to construe the word " mine " for the purpose of the present action as referring to what is commonly understood to be a mine, namely, some underground excavation, and not to include an open gravel pit. Therefore, I do not think it comes within r. 2—that is to say, that " easement " is not a " concern " within r. 2.

H I now come to r. 3 and that is indeed a perplexing one, because it contains a list of concerns so varied that it is difficult to understand how they came to be all put together. The concerns in r. 3 are:

> . . . ironworks gasworks salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages . . .

Those are the multifarious concerns mentioned in r. 3.

Counsel for the defendants has not suggested, of course, that this easement is any one of the designated concerns, but he said it was a concern of the like nature, which seems astonishing because it is difficult to see any resemblance between a gravel pit and any of the enumerated concerns. But counsel for the defendants founded his argument with some appearance of conviction on a decision of the Court of Session in *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes* (6), where the Court of Session held that a cemetery was a "concern of a like nature" to those enumerated in r. 3. Unfortunately, the court did not say which of the enumerated concerns resembled a cemetery, and counsel for the defendants did not venture to do that which the court had omitted to do, nor, indeed, did he venture to say that this gravel pit was like anyone of these enumerated concerns although he did say that, if a cemetery is like one of the enumerated concerns, why not a gravel pit.

I admit the force of the argument of counsel for the defendants. At the same time, though this decision is not binding upon me, I should be loath to disregard it but for the fact that it seems to me the whole foundation of the argument has been destroyed by the decision in the *Salisbury House* case (7), and in particular in *Croft* v. *Sywell Aerodrome, Ltd.* (8). Therefore it seems to me that counsel for the defendants fails in showing that this easement was a "concern" within the meaning of either Sched. A, No. III, rr. 1, 2 or 3.

Even if I am wrong about that and this easement is really like one or other of the various "concerns" enumerated in r. 3, I do not think that that would entitle the defendants to make the deduction which has been made from the debt due to the plaintiff. Under sect. 21 of the Act, the easement must be an easement "used, occupied or enjoyed" in connection with another "concern." The easement itself cannot be the "concern." To bring sect. 21 into force there must be two things: (i) an easement within the meaning of the section; (ii) a "concern" within the meaning of Sched. A, No. III, rr. 1, 2 and 3. This was pointed out by the Lord President, Lord Normand, in *Duke of Fife's Trustees* v. *George Wimpey & Co., Ltd.* (9), the same defendants; the relevant observations of Lord Normand are to be found in the left-hand column at p. 45.

Therefore, for the reasons I have given, I think that the contention of the defendants in this case that they were bound by the Finance Act, 1934, s. 21, to make the deduction from what they owed to the plaintiff fails.

There was an alternative submission that, if the deduction was not required to be made under that section, the defendants were entitled to make the deduction under All Schedules Rules, r. 19, which provides:

> Where any yearly interest of money, annuity . . . or any other annual payment . . . is payable wholly out of profits or gains brought into charge . . .

an assessment is to be made upon the person making the payment. There is, of course, some difficulty in saying what the words "annual payment" in the All Schedules Rules, rr. 19 and 21, mean. The payment to be made in this case for gravel taken from the plaintiff's land certainly does not appear to be an annual payment; and, anyhow, so far as I am concerned I am well content to follow the decision of Hamilton, J., as Lord Sumner then was, in *Hill* v. *Gregory* (10). That was a decision in 1912 before the consolidation Act of 1918. But it certainly was not the intention of the Act of 1918 to make an alteration in the law, and that decision is applicable, and, indeed, binding on me in this case.

The conclusion, therefore, at which I arrive is that the defendants fail to establish any justification for the deduction of the amount due for the gravel which they took, and there must in consequence be judgment for the plaintiff with costs.

Judgment for the plaintiff on claim and counterclaim with costs.

Solicitors: *Maude & Tunnicliffe*, agents for *Taylor, Simpson & Mosley*, Derby (for the plaintiff); *Kenneth Brown Baker Baker* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

ADEL MUHAMMED EL DABBAH *v.* ATTORNEY-GENERAL OF PALESTINE.

[PRIVY COUNCIL (Viscount Maugham, Lord Thankerton and Sir Madhavan Nair), **May 18, 1944.**]

Privy Council—Palestine—Criminal law—Discretion of prosecuting counsel to call witnesses named on indictment or information—Constitution of Court of Criminal Assize—Order made by the High Commissioner—Ultra vires—Palestine Interpretation Ordinance, 1933 (1933, *No.* 69), *s.* 7—*Palestine Criminal Code Ordinance,* 1936, *ss.* 214, 216—*Emergency Powers (Defence) Act,* 1939 (*c.* 62), *s.* 1—*Palestine Defence (Judicial) Regulations,* 1942, *reg.* 3.

On Mar. 24, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize, by virtue of the Palestine Defence (Judicial) Regulations, 1942, reg. 3, convicted the appellant of murder under the Palestine Criminal Code Ordinance, 1936, s. 214 (*b*). The constitution of the court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Mar. 20, 1943, which had been approved by the Chief Justice prior to Mar. 15, 1943. It was contended on behalf of the appellant that the Court of Criminal Assize was not validly constituted on three grounds: (i) that the Palestine Defence (Judicial) Regulations, 1942, reg. 3, made by the High Commissioner under the Emergency Powers (Colonial Defence) Order in Council, 1939, and the Emergency Powers (Defence) Act, 1939, was *ultra vires* the High Commissioner, in that it involved a delegation of his powers which was not authorised by sect. 1 (3) of the 1939 Act; (ii) that a direction under reg. 3 by the Chief Justice that the Court of Criminal Assize should consist of the Chief Justice alone fell to be made by the Chief Justice himself and that there was no such direction in the present case; (iii) that, in any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, 1933, s. 7, which required publication in the Gazette before such an order could have the force of law. It was further contended on behalf of the appellant (*a*) that the Chief Justice in his judgment as finally issued by him made material alterations in the judgment as orally delivered by him; (*b*) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of the Palestine Criminal Code Ordinance, 1936, ss. 214 and 216, and, in any event, that he had neither considered this essential question nor made any finding thereon; and (*c*) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence witnesses whose names were on the information but who had not been called, was wrong and prejudiced the appellant's right to a fair trial:—

HELD: (i) the discretion conferred on the Chief Justice by the Palestine Defence (Judicial) Regulations, 1942, reg. 3, did not involve a delegation of the High Commissioner's powers but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions that the regulations were necessary or expedient for the purposes set out in the Emergency Powers (Defence) Act, 1939, s. 1 (i), and was, therefore, *intra vires.*

(ii) since reg. 3 of the 1942 Regulations made no provision for the form which the direction of the Chief Justice was to take, the course taken for fixing the constitution of the court, which was the usual method of administering the business of the court, was a proper method by which the Chief Justice should exercise the discretion vested in him.

(iii) the direction by the Chief Justice was not an order within the meaning of the Palestine Interpretation Ordinance, 1933, s. 7.

(iv) the alteration in the judgment was not a substantial one which would affect the conclusions arrived at by the Chief Justice.

(v) there was ample evidence for a finding that the killing in question was done with "premeditation" within the meaning of sects. 214 and 216 of the Code. The Chief Justice had considered the question of "premeditation" and had found that it had accompanied the killing.

(vi) it should be the general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender for cross-examination by the defence witnesses whose names appear on the information, but it is a matter for the discretion of the prosecutor.

[**EDITORIAL NOTE.** The case is mainly of local importance; but, at the conclusion of the judgment, their Lordships have dealt very fully with the position of prosecuting counsel so far as calling witnesses named on the indictment or information is concerned. A careful review is made of the authorities and the position is affirmed that, while the witnesses must be present, the court will not force the prosecution to call all of them if they do not desire to do so. The prosecution should, however, tender them for cross-examination unless counsel finds sufficient reason to the contrary.

As to Calling Witnesses named on the Indictment, see HALSBURY, Hailsham Edn., Vol. 9, p. 164, paras. 232, 233; and for Cases, see DIGEST, Vol. 14, pp. 274, 275, Nos. 2841-2864.]

Cases referred to:

(1) *R.* v. *Woodhead* (1847), 2 Car. & Kir. 520; 14 Digest 274, *2841*.
(2) *R.* v. *Cassidy* (1858), 1 F. & F. 79; 14 Digest 274, *2842*.
(3) *R.* v. *Nicholson* (1937), unreported.
*(4) *R.* v. *Dora Harris*, [1927] 2 K.B. 587; Digest Supp.; 96 L.J.K.B. 1069; 137 L.T. 535.

Appeal by the prisoner from a decision of the Supreme Court of Palestine sitting as the Court of Criminal Appeal, dated Apr. 17, 1943. The facts are fully set out in the judgment of the Board delivered by Lord Thankerton.

Gilbert Beyfus, K.C., and *John Bassett* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Kenelm Preedy* for the respondent.

Lord Thankerton: On Mar. 24, 1943, the Chief Justice of Palestine, sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder under the Palestine Criminal Code Ordinance, 1936, s. 214 (*b*), and sentenced him to death. An appeal by the appellant was dismissed on Apr. 17, 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal, and the appellant, by special leave, now appeals against that judgment.

Counsel, in his full and able argument on behalf of the appellant, conveniently submitted his contentions under two heads, *viz.*, those which challenged the constitution of the Court of Criminal Assize by which the appellant was tried, and those which alleged grave impropriety in the course of the trial.

As regards the constitution of the trial court, the Chief Justice sat alone by virtue of the Palestine Defence (Judicial) Regulations (No. 2), 1942, reg. 3, which provided as follows:

> 3. Whenever the Chief Justice considers it expedient so to do he may, either generally or for the hearing of any particular case, direct that the Court of Criminal Assize shall consist of the Chief Justice or a British puisne judge, sitting alone, or with any one or more judge or judges of the Supreme Court, or with a president, or relieving president, or any one or more Palestinian judge or judges, of the District Court.

At the date of making these regulations, the constitution of the Court of Criminal Assize was prescribed by the Courts Ordinance, 1940, s. 10, under which, in the absence of any application by the accused, such court must consist of three judges. No such application was made by the present appellant.

Counsel for the appellant submitted that the Court of Criminal Assize was not validly constituted on three grounds, *viz.* (i) that reg. 3 already referred to, which was made by the High Commissioner under the powers vested in him by the Emergency Powers (Colonial Defence) Order in Council, 1939, art. 3, and the Emergency Powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner; (ii) that, assuming that reg. 3 was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case; and (iii) that, in any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, 1933, s. 7, which was applied to the Defence (Judicial) Regulations, 1942, by reg. 9 thereof, and which required publication in the Gazette before such an order could have the force of law. These submissions were raised for the first time before this Board.

(i) It is unnecessary to refer to the Order in Council of 1939 in detail; it is sufficient to state that its effect was to extend the Emergency Powers (Defence) Act, 1939, to Palestine, and, for present purposes, that the parts of sect. 1 of the Act which are material may be read as originally enacted, with the substitution of the High Commissioner for His Majesty in Council. The material parts of sect. 1 are as follows:

> 1. (1) Subject to the provisions of this section, His Majesty may by Order in Council make such Regulations (in this Act referred to as "Defence Regulations") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community.
>
> (3) Defence Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and byelaws for any of the purposes for which such Regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to His Majesty in Council to be necessary or expedient for the purposes of the Regulations.
>
> (4) A Defence Regulation, and any order, rule or byelaw duly made in pursuance of such a Regulation, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Counsel maintained that the discretion conferred on the Chief Justice by reg. 3 involved a delegation of his powers by the High Commissioner which was not authorised by sect. 1 (3) of the Act of 1939, which only authorised a delegation in general terms of the High Commissioner's power to make regulations under sect. 1 (1) and (2), and that, therefore, the attempted delegation in reg. 3 was *ultra vires* of the High Commissioner. Counsel also maintained that the right conferred on an accused to be tried by a court of three by the Courts Ordinance, 1940, could not be modified or abrogated by any such regulation made by the High Commissioner, and that, in any event, the intention to modify or abrogate such a right must be made clear beyond any doubt in the regulations.

Their Lordships are unable to accept any of these contentions. In their opinion, it is clear that the High Commissioner satisfied himself that these regulations were necessary or expedient for the purposes stated in sect. 1 (1) of the Act of 1939, and, *inter alia*, that a flexibility in the constitution of the courts of criminal assize was necessary or expedient. It was rightly admitted by counsel for the appellant that he was not able to challenge the validity of the High Commissioner's conclusions. Their Lordships are of opinion that the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers, but was an executive discretion necessary to the carrying out of the High Commissioner's conclusions. Accordingly, no question can arise under sect. 1 (3) of the Act. As regards the other contentions as to modification or abrogation of the appellant's right to a court of three under the Courts Ordinance, 1940, reg. 3 of 1942 is clearly inconsistent with it, and, by virtue of sect. 1 (4) of the Act, the regulation must prevail. The suggestion made by counsel that the appellant's right was not modified or affected until the Chief Justice exercised his discretion is fallacious; it was modified by the regulation as soon as it came into operation.

(ii) Reg. 3 of 1942 makes no provision for the form which the direction by the Chief Justice is to take. In the present case the constitution of the court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Saturday, Mar. 20, 1943, which had been approved by the Chief Justice prior to Monday, Mar. 15, 1943. Their Lordships can see no ground for suggesting that this course for fixing the constitution of the court which was to try the appellant, and which is obviously the usual method of administering the business of the court, was not a proper method by which the Chief Justice should exercise the discretion vested in him.

(iii) The Palestine Interpretation Ordinance, 1933, s. 7, so far as material, provides as follows:

> 7. Where an Ordinance confers power on any authority to make regulations or orders, the following provisions shall have effect with reference to the making and operation of such regulations or orders . . . (*d*) all regulations and orders, save where otherwise provided, shall be published in the Gazette, and shall have the force of law upon such publication thereof or from the date named therein.

It follows from the views already expressed by their Lordships that the direction by the Chief Justice under reg. 3 of 1942 is not a regulation or order within the meaning of the above section, and that there was no need to publish it in the Gazette.

Their Lordships now turn to the second group of contentions raised on behalf of the appellant, which relate to the course of the trial, and are as follows: (*a*) That the Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him; (*b*) that there was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of the Palestine Criminal Code Ordinance, 1936, ss. 214 and 216, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and (*c*) that the refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was any obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

(*a*) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on Apr. 17, 1943, which the Chief Justice now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. In view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon is admitted by the Chief Justice in his statement, *viz.*, the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his deposition at the preliminary inquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villages, but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the Chief Justice.

(*b*) The appellant was charged under the Palestine Criminal Code Ordinance, 1936, s. 214 (*b*), as having "with premeditation" caused the death of the deceased, and sect. 216 provides as follows:

> 216. For the purpose of sect. 214 of this Code a person is deemed to have killed another person with premeditation when (*a*) he has resolved to kill such person or to kill any member of the family or of the race to which such person belongs, provided that it shall not be necessary to show that he resolved to kill any particular member of such family or race, and (*b*) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions, and (*c*) he has killed such person after having prepared himself to kill such person or any member of the family or race to which such person belongs, or after having prepared the instrument, if any, with which such person was killed.
>
> In order to prove premeditation it shall not be necessary to show that an accused person was in any state of mind for any particular period or within any particular period before the actual commission of the crime, or that the instrument, if any, with which the crime was committed was prepared at any particular time before the actual commission of the crime.

Under this section the three essential ingredients are cumulative, and while counsel for the appellant admitted that there was sufficient evidence to justify a finding under (*b*) and (*c*), he submitted that there was no sufficient evidence to justify a finding under (*a*), and that, subject to his next contention, the Chief Justice misdirected himself, and the conviction under sect. 214 could not be supported. It will seldom be found that there is direct evidence of a resolution to kill; such resolution will more often rest on legitimate inferences from the proved circumstances and the conduct of the accused, and, in the opinion of their Lordships, the circumstances proved in the present case and the conduct of the accused, along with the two others who accompanied him, but whose identity has not been proved, afford ample ground for a finding that the appellant resolved to kill the deceased.

The Court of Criminal Appeal, holding, in effect, that the Chief Justice had pronounced no finding as to premeditation, and forming an independent view of their own upon the evidence, stated, "it is quite clear to our minds that the irresistible inference—the only inference possible from the facts of this case—is that this killing was done with premeditation." While not accepting their criticism upon the judgment of the Chief Justice, their Lordships are unable to come to any different conclusion upon the facts, which are summarised by the Court of Criminal Appeal as follows:

> That the three armed men were seen proceeding from north to south at varying distances up to a maximum of a hundred metres from the house of the deceased; that shots were fired by those armed men into the doorway of the house of the deceased; that the deceased was found lying eighteen metres from his doorway with two shots in the back; that the three armed men were seen immediately after the shots had been heard proceeding together from south to north over the road by which they had approached the scene; that there is no evidence and no suggestion that there was any provocation or quarrel; and that it was night time.

On the question of common design, they state:

> Three men armed going to the scene of the crime, all returning from the scene together, all three actually shooting into the doorway of the house of the man who was eventually killed, two cartridges found showing that two shots had been fired two and a half and four metres from the place where the body of the deceased was found. From these facts it seems to this court that common design is proved beyond a shadow of a doubt, and that no other conclusion is possible.

It is also well to bear in mind the conclusions of the Court of Criminal Appeal as to proof of enmity between the appellant and the deceased and between their families, which have been already referred to. This evidence of enmity was also treated by the Chief Justice as relevant to the question of premeditation. It may be added that the appellant himself admitted that there were broken relations between the deceased and himself.

The appellant's counsel submitted that, in any event, the Chief Justice had neither considered, nor made any finding on, premeditation, and the Court of Criminal Appeal would appear to have accepted this criticism to some extent. In their Lordships' opinion, the judges did not pay sufficient attention to the clear and express language of the Chief Justice. The form of his judgment was provided for by the Criminal Procedure (Trial upon Information) Ordinance, 1933, s. 51, which provides:

> 51. Upon the conviction of any person for any offence the presiding judge shall, upon his notes of the proceedings, record the findings of fact on which the conviction is based: Provided that no conviction shall be invalid for failure to include in such record a finding of a fact if such fact shall appear to be sufficiently established by the evidence given in the case.

It is only necessary to make a short quotation from the judgment of the learned Chief Justice:

> It is not necessary for the prosecution to prove a motive for a murder, but it does explain what otherwise might be unexplainable. In this case it explains the shooting in cold blood of the deceased, and it was a premeditated murder.
>
> I, therefore, find that Adel, accused No. 1, was one of the three men who took part in this murder, and I, therefore, find him guilty of murder as charged . . . Adel Muhammed el Dabbah, as I said a few moments ago, this is a cold-blooded premeditated murder, of which I find you guilty.

The Court of Criminal Appeal does not pay attention to these findings as to premeditation, which expressly formed part of the charge, and one could not easily assume—even apart from his express reference thereto—that the Chief Justice had not considered this outstanding element in the law of murder in Palestine.

(*c*) The last contention of the appellant is that the accused had a right to have the witnesses, whose names were upon the information, but were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence, as was asked for by counsel for the defence, at the close of the case for the prosecution. The Chief Justice ruled that there was no obligation on the prosecution to call them. The Court of Criminal Appeal held that the strict position in law was that it was not necessary legally for the prosecution to put forward these witnesses, and that they could not say that the Chief Justice erred in point of law, but they pointed out that, in their opinion, the better practice is that the witnesses should be so tendered at the close of the case for the prosecution so that the defence may cross-examine them if they so wish, and they desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed in all courts. While their Lordships agree that there was no obligation on the prosecution to tender these witnesses and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognises that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive; no such A suggestion is made in the present case.

It will be sufficient to go back to the judgment of Alderson, B., in *R.* v. *Woodhead* (1), in which he said, at p. 520:

> You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied B on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule.

In reply to the counsel for the prisoner, who asked if he was to understand that, if he called them, he would make them his own witnesses, Alderson, B., said:

> Yes, certainly. That is the proper course, and one which is consistent with other C rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to show them unworthy of credit, however falsely the witnesses might have deposed.

In *R.* v. *Cassidy* (2), Parke, B., at p. 79, stated the correct principle to be that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly under- D took to have them in court for the prisoner to examine them, as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He would, therefore, follow the course said to have been pursued by Campbell, C.J., who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witnesses should be considered as his own. Cresswell, J., who was consulted by Parke, B., agreed with this view. E

It is consistent with the discretion of counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence; and this practice has probably become even more general in recent years, and rightly so—but it remains a matter for the discretion of the prosecutor. Archbold on Criminal Law, 31st Edn., contains a list F of a series of decisions, but in none of these has the court superseded the prosecutor's discretion. The most recent of these was an unreported case of *R.* v. *Nicholson* (3), at the Nottingham Assizes in 1937, where Hawke, J., declined to force the prosecution to call a witness whom they regarded as unnecessary. Reference should also be made to an interlocutory remark by Lord Hewart, L.C.J., in *R.* v. *Dora Harris* (4), at p. 590, to the effect that:

> . . . in criminal cases the prosecution is bound to call all the material witnesses G before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury.

In their Lordships' view, Lord Hewart, L.C.J., could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are. It may be noted that under the Criminal Procedure (Trial upon Information) Ordinance, 1933, s. 41, already referred to, the court has the right, of its own motion, to call upon persons to give evidence. H

This last contention of the appellant, therefore, also fails, and, on the whole matter, their Lordships are of opinion that the appeal should be dismissed, and the judgment of the Court of Criminal Appeal should be affirmed, and their Lordships will advise His Majesty accordingly.

Appeal dismissed.

Solicitors: *Piper, Smith & Piper* (for the appellant); *Burchells* (for the respondent).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

Re FITZHARDINGE'S LEASE. MACKENZIE *v.* SAMUEL ESTATES, LTD.

[CHANCERY DIVISION (Uthwatt, J.), **May 25, 1944.**]

Emergency Legislation—Landlord and tenant—War damage—Disclaimer and retention of lease—Lease comprised of two separate buildings—One building rendered unfit for occupation—Whether tenant entitled to disclaim as to one building and retain as to other—"Allow"—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 15 (3), (4), (5)*—Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (*c.* 41), *Sched.*

The applicant was the lessee of certain premises which comprised a main building and a separate smaller building under a ground lease for a term of 43¼ years of which 10½ years was unexpired on May 10, 1941, when the main building suffered war damage which rendered it unfit for occupation. On May 10, 1943, the landlord served upon the applicant a notice to elect under the Landlord and Tenant (War Damage) Acts, 1939-41. The applicant applied under sect. 15 of the Acts for an order to allow her to disclaim in respect of the main building and to retain the rest of the property:—

HELD: (i) it was equitable under sect. 15 (4) of the Act that the applicant should be allowed to exercise the right of disclaimer of the main building and the right of retention of the other building.

(ii) the property must be treated as two separate leases and the rent apportioned but not according to the value of the land free of buildings.

(iii) the word "allow" in sect. 15 presupposes that the tenant is asking permission to exercise some right.

[**EDITORIAL NOTE.** Sect. 15 applies the provisions relating to notices of disclaimer or retention to multiple leases. The tenant may want to disclaim the whole premises or part only thereof according to damage done. The main point considered here is the meaning of the word "allow" in subsects. 3 and 4. The landlord is not in terms by these subsections put in a position where he can force the tenant either to disclaim or retain the whole or part of the premises, because the word "allow" presupposes that the tenant is asking permission to disclaim or retain. It would seem, therefore, that the initiative is with the tenant so far as these two subsections are concerned.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939, s. 15, and THE LANDLORD AND TENANT (WAR DAMAGE) (AMENDMENT) ACT, 1941, SCHED., see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 996, 997, Vol. 34, p. 173.]

Cases referred to:

(1) *Re R. and S. Trailers, Ltd., and others Application*, (1943), 60 R.P.C. 7.
(2) *Westminster Bank, Ltd.* v. *Edwards*, [1942] A.C. 535; [1942] 1 All E.R. 470.

APPLICATION by the lessee for an order that she was entitled under the Landlord and Tenant (War Damage) Act, 1939, s. 15, as amended, to disclaim in respect of part of the lease and to retain in respect of the remainder. The facts are fully set out in the judgment.

G. D. Squibb for the applicant.

H. Heathcote-Williams for the respondents.

UTHWATT, J.: By a reversionary lease dated July 11, 1889, the premises No. 14, Charles Street, Berkeley Square, in consideration of a premium of £1,500 and a yearly rent of £140 were demised to General Mackenzie for a term of 43¼ years beginning on Sept. 29, 1908, being the date at which a then existing lease granted in 1846 would end. The present lease, therefore, is due to expire at Christmas, 1951. The applicant, Miss Mackenzie, is and has at all relevant times been the owner of the lease. The premises run from Charles Street to Hays Mews and are some 169ft. in depth and some 24 ft. in width. The main building, a residence, fronts on Charles Street. At the date of the demise there were apparently a coachhouse and outbuildings abutting on Hays Mews.

In 1931 Miss Mackenzie, at a cost of £1,450, converted those buildings into two flats and a garage. These buildings are some 34ft. in depth. There is at the back of them a small garden some 15ft. in depth which is separated from the rest of the demised premises by a low wall. Windows of the flats open upon this garden, to the use of which the tenant of the ground floor flat is entitled. I will refer to the main premises and the land held therewith down to and including the wall as No. 14, Charles Street, and to the other premises and the small garden as No. 12, Hays Mews.

On May 10, 1941, war damage occurred to No. 14, Charles Street, rendering it unfit for occupation ; the third and fourth floors were indeed entirely destroyed. Only slight damage, since made good, happened to the other building. In respect of No. 14, Charles Street, the War Damage Commission have decided that the case is one for a " cost of works " payment.

Until October, 1942, the property comprised in the lease was rated as a whole, the gross value being £175, and the rateable value £142. In that month the properties were valued separately for rating purposes. The values then attributed to the properties were : No. 14 Charles Street, gross £360, rateable £297 ; garage, gross £64, rateable £44 ; one flat, gross £70, rateable £54, and the remaining flat, gross £40, rateable £28.

No. 14, Charles Street was, until war damage happened, occupied by Miss Mackenzie. The flats and garage are let at inclusive rents which, after deduction of rates, etc., show a profit rental to Miss Mackenzie of some £230 a year. One of the tenants is protected under the Rent Restriction Acts. It is clear that the lease held by Miss Mackenzie is a multiple lease.

On May 10, 1943, the landlord served on the tenant a notice to elect under the Landlord and Tenant (War Damage) Acts, 1939-41. Following on the notice to elect, the tenant by her solicitors, on May 20, 1943, served on the landlord a notice of disclaimer of the lease. This notice was accompanied by a letter which stated that the tenant was about to apply under sect. 15 of the Act for an order declaring it equitable that the tenant should be allowed to disclaim as regards No. 14, Charles Street only, and that the notice of disclaimer should be of no effect as regards No. 12, Hays Mews. On June 3, 1943, this application was launched in the Westminster County Court by the tenant asking, in substance for an order to that effect. By an order dated July 5, 1943, the proceedings were transferred to the High Court.

The attitude of the landlords is that they desire to obtain possession of all the premises comprised in the lease with a view to its development as a whole, either alone or possibly in conjunction with adjoining premises belonging to them. On the evidence I am satisfied that the redevelopment of the site as a whole is the proper form for redevelopment to take. The landlords have made various offers to the tenant the basis of which is that they should have possession of the whole when redevelopment becomes a practical question, the tenant receiving in one way or another pecuniary compensation. It is unnecessary to refer to these offers in detail. It is sufficient to state that in my opinion they were, from a business point of view, fair offers.

The argument for the landlords on the Act is that the tenant has, under the preceding provisions of the Act, the right to serve a notice of disclaimer or a notice of retention ; that this is the right referred to in sect. 15 (3) as the " right of disclaimer or retention " ; that the point of subsect. (3) is only to put a bar upon the exercise of an existing right if the imposition of the bar is required in fairness to the landlord ; that in this case the landlord does not object, and that, therefore, the tenant should be allowed to exercise the right. The necessary consequence, as the tenant has in this case served a notice of disclaimer, is that the notice stands : see sect. 15 (3). Apart from this, it was argued that in any event " disclaimer " is the fair course.

The argument for the tenant is based on the language of sect. 15. The tenant argues that notwithstanding her notice of disclaimer, she is entitled to say (and does say) that she does not ask to be " allowed to exercise the right of disclaimer or retention " as regards the whole lease, and that " allowed " presupposes a request upon her part to be permitted to do something she wishes to do. There is on this contention no point to be determined under subsect. (3). The court, therefore, must pass on to subsect. (4).

In dealing with the matter, the general scheme embodied in the Act as amended should be recalled. That scheme is that a notice to elect, notice of disclaimer or a notice of retention may be served in the case of ground leases or multiple leases as in the case of other leases. Unless an application in regard to a multiple lease or ground lease is made under sect. 15 within a month after the service of one of these notices, the multiple lease or the ground lease, as regards the effect of these notices, stands in the same position as other leases, save only that the land is deemed, for the purposes of any proceedings pursuant to the notices, to have been unfit at the time of those notices.

One of the results is that the tenant upon whom the notice to elect is served is deemed to have served a notice of retention unless he serves a notice of disclaimer or retention within due time. In substance, therefore, the tenant is, unless an application is made under sect. 15, compelled to choose between disclaimer and retention. If, however, an application is made under sect. 15 within due time, then the court is directed to consider and determine certain matters.

The issue before the court under the section is not what is the fair course between landlord and tenant—disclaimer of the whole lease; retention of the whole lease; disclaimer as regards some only of the tenements comprised in the lease; or retention as regards some only of those tenements; or exclusion of the lease from the general scheme of the Act. The court is directed to proceed by steps.

The question posed by subsect. (3) falls first for consideration. The question posed by subsect. (4) cannot arise if the matter is dealt with under subsect. (3). In both subsections the substantive question is whether the tenant should be "allowed" to exercise the right of disclaimer or retention—under subsect. (3) as to the whole lease; under subsect. (4) as to some only of the tenements comprised therein.

The automatic consequences set out in subsect. (5) do not arise unless and until the effect of both subsects. (3) and (4) have been considered. Those consequences are that any notices given cease to have effect, and the land is not to be deemed unfit. The result is that the tenant retains his lease; that there is no obligation on any person to make good war damage; that the tenant is bound to pay the full rent, subject to any exercise of the power given to the court to reduce the rent until the war damage is made good if, having regard to the extent of the war damage, it thinks it equitable so to do.

That is the general scheme. The structure of sect. 15 makes it clear, I think, that the section is directed, in the first instance, to imposing a fetter on the exercise of the tenant's "right of disclaimer or retention" in respect of the lease as a whole. The court is not in terms asked to consider whether it is in any circumstances fair that the landlords should be entitled to compel the tenant to make a choice between disclaimer or retention of the lease as a whole. That right—often a valuable right—disappears from the picture found in subsect. (3) unless it is, in some indirect way, preserved by the language of that subsection.

To my mind the main question to be determined is the meaning to be attached to the word "allow" in the phrase which occurs in subsect. (3):

> If the court is satisfied that it is equitable to allow the tenant to exercise the said right [that is, the right of disclaimer or retention] in respect of the lease as a whole.

Does the word "allow" assume that the tenant is asking the court to be permitted to exercise the right so that the question is whether the court's sanction ought in fairness to the landlord to be given to the tenant's wish; or is the matter to be regarded independently of the tenant's wish, so that the question is whether independently of any wish by the tenant to exercise the right, it is fair to both parties that the right should be allowed to continue on foot as an exerciseable right?

In my opinion the word "allow" in ordinary use does presuppose that some person is actively seeking permission to do something; and I may observe that this was the meaning attributed to it by MORTON, J., in *Re Trailer's Application* (1), when considering the Patents Act, 1907-1942, s. 12 (2).

Further, the subject matter with which the word "allow" is used is the "exercise" of what is called in the section a "right", namely, the right of disclaimer or retention, which to my mind indicates that "allow" is, in subsect. (3), used in the sense I have mentioned, and I hold that this is the meaning borne by the word in the section.

This conclusion is fortified if the history of the section is considered. Under the Act of 1939, as it originally stood, ground leases were dealt with by a separate code and were excluded from sect. 15. The position as regards multiple leases, not being ground leases, was that the tenant's notice of retention could not be called into question. The original section came into operation only if the tenant served a notice of disclaimer, or if the landlord desired to prevent an effective notice of disclaimer being served in pursuance of a notice to elect. The phrase " allow the lease to be wholly disclaimed " in the original sect. 15 (3) could only mean, permit the lease to be wholly disclaimed in accordance with the then wish of the tenant ; and the section in its present form is an amendment of sect. 15 as it appeared in the Act of 1939.

This construction I have given to the word " allow," however, opens up a difficulty under both subsects. (4) and (5). The opening part of subsect. (4) runs as follows :

> If on such an application [that is, an application made in pursuance of the section] the court, having regard to the matters referred to in the last foregoing subsection, is not satisfied that it is equitable to allow the tenant to exercise the right of disclaimer or retention as respects the lease as a whole, but is satisfied that it is equitable to allow him to exercise the said right as respects one or more of the separate tenements comprised therein . . .

The court may make certain orders in relation to the property ; and subsect. (5) is in similar terms.

Dealing with the point by reference to the language of subsect. (4), it will be observed that the words " having regard to the matters referred to in the last foregoing subsection " apply to the first as well as the second condition precedent to the exercise of the jurisdiction. In the case where (as here) a tenant does not ask to be allowed to exercise the right of disclaimer or retention in respect of the lease as a whole, it may be questioned whether the first condition precedent to the exercise of the jurisdiction given by subsect. (4) has, on the construction I have given to the word " allow ", been complied with.

It may be argued that though, no doubt, the court is not satisfied that it is equitable to allow the tenant to exercise the right in question, that result has been achieved, not on a consideration of the matters referred to in subsect. (3), but because the point whether the court is satisfied has never arisen for determination. It may be suggested, therefore, that the first condition precedent has not been satisfied. On that footing the whole matter remains in the air. No order has been made under subsect. (3) ; none can be made under subsect. (4), and subsect. (5) does not come into operation.

In my view, however, the general intention of the section is clear that, failing an order under subsect. (3), the case may be considered under subsect. (4) ; and, failing an order under either subsect. (3) or (4), the consequences specified in subsect. (5) are to follow. I accordingly read the words " having regard to the matters referred to in the last preceding section " as meaning in their application to the first condition precedent : " having where necessary had regard to the matters referred to in the last foregoing subsection." It is only if the section is so read that it is workable at all.

Those are the only questions of construction of the section which it is necessary for me to decide for the purposes of this case. The result may not be satisfactory for, if I am right, a tenant under any multiple lease or ground lease can, if he so choose, bring his case within sect. 15 (5) with the consequences I have already stated.

The tenant takes the stand that she wishes neither to disclaim nor retain the whole lease. In my opinion the tenant is in no way precluded by her notice of disclaimer from taking up this attitude. Its service was unnecessary for the purpose of enabling her to launch proceedings under the Act, but it had this advantage from her point of view, that she would not stand committed to retention under sect. 4 (2) of the Act if the case fell to be dealt with under sect. 15 (3) and the court refused to extend the time for complying with the notice to elect. In light of the letter which accompanied the notice of disclaimer, the landlord was in no way prejudiced by its service. On the construction I have given to the relevant portion of sect. 15, subsect. (3) does not apply, and subsect. (4) is to be approached on the basis that the first condition precedent mentioned in it has been complied with.

I have already stated the relevant facts. On consideration of them I am of the view that it is equitable—which has no technical meaning, but only means " fair " ; see *Westminster Bank, Ltd.* v. *Edwards* (2)—that the tenant should be allowed to exercise the right of disclaimer or right of retention as she thinks fit as regards No. 14, Charles Street, up to and including the wall.

I accordingly order that the lease shall be treated as if there were two separate leases, one comprising No. 14, Charles Street, and the other No. 12, Hays Mews.

As regards the apportionment of the rent under the lease (which the parties apparently agree is a ground lease as well as a multiple lease) I do not accept the contention of the tenant that the rent should be apportioned only by reference to the comparative value of the ground treated as free of buildings; and I think that the ground values—2*s.* 6*d.* per foot as regards the disclaimable tenement, working out at £360, and 1*s.* per foot for the rest, working out at £60—given in evidence on behalf of the tenant are, as indeed all valuations at this time must be, open to question.

Nor, having regard to the date when it was made, can I rely on the value attributed to No. 14, Charles Street, for rating purposes. Viewing the matter as a whole, I propose to apportion the rent of £140 at £95 to No. 14, Charles Street, and £45 to the remainder of the property. Subject to this, and to the qualification I am about to mention, the covenants and conditions contained in the lease are to apply to the two properties respectively. There is not to be implied, as respects either property, any right of way over the other property or, as respects No. 12, Hays Mews, any right to light over No. 14, Charles Street, or over any other property of the landlords; and there is to be implied in the lease of No. 14, Charles Street, a right of light over No. 12, Hays Mews, in respect of any buildings for the time being on the site of No. 14, Charles Street.

I extend to four weeks from today the period within which the notice to elect is to be complied with as regards No. 14, Charles Street, and order that the existing notice of disclaimer be set aside. I empower the landlord, if the tenant serves a notice of disclaimer as respects No. 14, Charles Street, to enter upon the yard forming part of No. 12, Hays Mews for the purposes of doing any building or other work on the site of No. 14 Charles Street, subject to the provision that any damage done to the yard is to be made good with all due expedition. Further, if notice of disclaimer is served, the covenant for quiet enjoyment, so far as it relates to No. 12, Hays Mews, is not to extend to acts done by the landlord in pursuance of this power, or to any work of rebuilding done by the landlord on No. 14, Charles Street, or upon any other lands for the time being owned by the landlord.

Order accordingly.

Solicitors: *Mead, Sons & Bingham* (for the applicant); *Waltons & Co.* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

FISHER *v.* RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL AND COUNTY COUNCIL OF MIDDLESEX.

[KING'S BENCH DIVISION (Macnaghten, J.), **June 12, 1944.**]

Highways—Obstructions—Air-raid shelter in roadway—Lighting—Shelter sometimes illuminated—Trap.

The plaintiff was driving a car at 3 a.m. in a district which he did not know when, without any negligence on his part, he collided with an unlit air-raid shelter on the side of the road and thereby sustained injury. The shelter had been erected under the Civil Defence Act, 1939, by the second defendants and was under the management of the first defendants; it was provided with lights which were sometimes illuminated and sometimes not. On behalf of the plaintiff it was contended that the defendants had, by illuminating the shelter, imposed upon themselves a duty not to lay a trap for users of the road by failing to illuminate the shelter:—

HELD: since the plaintiff was a stranger to the district, it could not be said that the defendants had to his knowledge adopted a lighting system whereby he was led to believe that, whenever there was an obstruction, there would be a light. The defendants were, therefore, not liable to the plaintiff.

[**EDITORIAL NOTE.** As the law stands at present, the local authority is not under a duty to light air-raid shelters which are an obstruction to the highway. It was here contended that, by lighting some such shelters, they had made a trap for the plaintiff but, upon proof that he had not been in that district before, it is held that they had not by their conduct led him to believe that all shelters would be lighted.

As to Indicating Obstructions on the Highway, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and for Cases, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to:

(1) *Fox* v. *Newcastle-upon-Tyne Corpn.*, [1941] 2 K.B. 120; [1941] 1 All E.R. 563.

*(2) *Baldock* v. *Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, *1190*; 120 L.T. 470.

Action to recover damages for personal injuries. The facts are fully set out in the judgment.

G. H. Oliver for the plaintiff.

Harold B. Williams for the defendants.

Macnaghten, J.: The plaintiff is, and has been for a number of years, in the employment of the London Passenger Transport Board. On the evening of July 21 he was instructed to go from Turnham Green to Ruislip in order to pick up an inspector of the Board and convey him to some designated place. For that purpose the plaintiff was provided with a 16 h.p. Austin saloon car. He set out from Turnham Green soon after midnight and, journeying by the Western Avenue, when he came to the appropriate place, he turned north to Ruislip. He got safely to a road called Fore Street in the Ruislip district. It is a road some 24ft. wide. The accident happened in this way. The Middlesex County Council had erected a surface shelter of the usual description in the roadway of Fore Street. The overall width of the shelter was 8ft. 6ins. and it left about 15ft. for the traffic in Fore Street. The surface of the street was tarmac, and the street had large oak trees overhanging most of the road. In particular, there was a large oak tree nearly opposite to this shelter.

The shelter, although it was constructed so as to have a warning light at each of its four corners, which could be turned on and off from a switch inside the shelter, was at the time of the accident unlighted. The plaintiff, coming along Fore Street, struck the corner of the shelter with the bumper of his car. This brought the car to a dead stop and with the stopping of the car Fisher's head was jerked forward against the steering wheel, and he suffered the injuries for which he claims damages, which have been agreed at £199 6*s*.

The claim was, in the first place, based on the ground that this shelter was a dangerous obstruction and a nuisance to the highway. Such, undoubtedly, it would have been but for the fact that the shelter was lawfully erected under the Civil Defence Act, 1939, s. 9, and, according to authorities binding on this court, there was no duty whatsoever either under the Civil Defence Act, 1939, or any other statute or by common law to light the obstruction. That was established by *Fox* v. *Newcastle-upon-Tyne Corpn.* (1). In that case the court consisted of MacKinnon, Luxmoore, and du Parcq, L.JJ. du Parcq, L.J., dissented from the view of his colleagues; he thought in the circumstances existing in that case that although the corporation were authorised by the Act to erect the shelter in the roadway, there was a duty to take reasonable precautions to prevent an accident and that, therefore, the question whether reasonable precautions had been taken was a matter to be considered by the court. That view, however, was not accepted by his colleagues.

The claim, therefore, that the shelter was a dangerous obstruction and a nuisance to the highway cannot be maintained. In these circumstances the plaintiff, relying on the decision of the Court of Appeal in *Baldock* v. *Westminster City Council* (2), contended that the defendants had by their conduct imposed upon themselves the duty of lighting the shelter during the hours of darkness. The leading judgment was given by Bankes, L.J., and at p. 503 he put the matter in this way:

> The fact is that, in spite of these regulations [those are the regulations providing for the diminishing of light during the war], this particular local authority did continue to light all the shelters to which lights were provided, and that fact, in my opinion, imposes a duty upon them—it may be a self-imposed duty, but it is none the less a duty—and it becomes a duty, in my opinion, in this way: The local authority have no right to lay traps for people in their streets, and they would not contend for a moment

that they had. If a local authority consistently lights all the shelters in its streets, it publicly indicates to the persons who are in the habit of traversing those streets that the shelters are still lighted, and if it comes to the knowledge of the local authority that the lights which they so provide are untrustworthy or erratic, and are sometimes out and sometimes in, the local authority, I think, are providing something which is in the nature of a trap to the travelling public, because the public are allowed to believe that the shelters are lighted, and to the knowledge of the local authority they are sometimes lighted and sometimes not.

A The shelters in the Ruislip-Northwood Urban District are sometimes lighted and sometimes not lighted. But although the light in the present case, like the light in the *Baldock* case (2), was intermittent, it does not seem to me possible to bring this case within the principle laid down in that case. BANKES, L.J., speaks of the failure to light as a trap—a trap because the public, as the result of the lighting adopted by the Westminster City Council, were led to believe that B wherever there was an obstruction there would be a light. If you were so led to believe and did believe and proceeded on your way confident that the local authority were faithful to the practice which they had consistently, according to your experience, followed of lighting any obstruction in the road and you ran into an unlighted obstruction which the local authority had placed there, you could fairly say that you had been trapped, and there would be evidence in such circumstances on which a jury might find that the local authority had been C guilty of negligence. But I do not see how Fisher can avail himself of the principle laid down in the *Baldock* case (2). He was a complete stranger to Ruislip and Northwood. He had never been in Fore Street before in the whole course of his life. On his way from Turnham Green to Fore Street he remembers passing a shelter which, I understood, according to his recollection, was lighted, but was unable to say whether the shelter which he remembered passing was in Ruislip. I apprehend, to make the county council or the district council D liable, in order to come within the principle of *Baldock's* case (2), it would be necessary to show either that the county council had made a practice of illuminating all its air raid shelters which were placed in the road and placed in any road, or that the district council followed that practice. As a matter of fact, in view of the evidence which was given by a Mr. Hall who resided in Fore Street, the persons to whom BANKES, L.J., referred, persons in the habit of travelling the streets and roads in the urban district, so far from being liable to be trapped, E would, if their experience was the same as Mr. Hall's, know very well that while some of the shelters would be lighted, others would probably be unlighted. I am bound, I think, to come to the conclusion that the plaintiff fails to establish that either of the defendants is responsible in law to him for the accident which occurred.

The defendants raised the plea of contributory negligence, but the matter was F not discussed at all fully. As I pointed out, the preliminary question is: Were the defendants guilty of negligence? If they were not guilty of negligence then the question of contributory negligence does not arise.

In my opinion the action must be dismissed.

Judgment for the defendants with costs.

Solicitors: *Pattinson & Brewer* (for the plaintiff); *C. W. Radcliffe* (for the defendants).

G [*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

DANZIGER AND ANOTHER *v.* R. J. THOMPSON AND OTHERS.

[KING'S BENCH DIVISION (Lawrence, J.), **May 12, 1944.**]

Evidence—Admissibility—Document—Extrinsic evidence—Tenancy agreement—
H *Person called tenant mere nominee of actual tenant.*

In a written tenancy agreement, one of the defendants, the daughter of the other two, was described as the tenant. In an action for rent, the landlord sought to give extrinsic evidence to show that the daughter was merely a nominee for her parents. The parents contended, as a preliminary objection, that such evidence was not admissible, as it would be contradicting the written agreement:—

HELD: the evidence was admissible, since the description "tenant" does not negative agency.

[**EDITORIAL NOTE.** It is a common practice to have property conveyed or leased to a mere nominee. It was here suggested that, where in such a document a person is described as a particular party, such as tenant, evidence was not afterwards admissible to prove that he or she was a mere nominee, but this contention has been rejected.

As to the Admission of Extrinsic Evidence, see HALSBURY, Hailsham Edn., Vol. 10, pp. 265, 266, para. 331 ; and for Cases, see DIGEST, Vol. 17, pp. 305-312, Nos. 1176-1236.]

Cases referred to :

(1) *Humble* v. *Hunter* (1848), 12 Q.B. 310 ; 1 Digest 639, *2606* ; 17 L.J.Q.B. 350 ; 11 L.T.O.S. 265.

(2) *Formby Brothers* v. *Formby* (1910), 102 L.T. 116 ; 1 Digest 638, *2595*.

(3) *Drughorn* (*Fred*), *Ltd.* v. *Rederiaktiebolaget Transatlantic*, [1919] A.C. 203 ; 17 Digest 322, *1333* ; 88 L.J.K.B. 233 ; 120 L.T. 70 ; *affg. S.C. sub nom. Rederi Aktienbolaget Transatlantic* v. *Drughorn* (*Fred*), [1918] 1 K.B. 394.

Action for rent. The action was brought against three defendants, a father, mother and daughter. The daughter was named in the written agreement as tenant and by her pleading she admitted her liability for the rent. A preliminary objection was taken on behalf of the other defendants that no evidence was admissible to show that the daughter entered into the agreement as agent or nominee for them or either of them because it would contradict the description of the daughter in the agreement as tenant. The evidence was admitted by Lawrence, J., subject to the objection in order that all questions might be decided.

P. B. Morle for the plaintiffs.

T. F. Davis for the respondents.

Lawrence, J. : It was contended on behalf of the defendants that proof that Dulcie Thompson entered into the agreement on behalf of her father or mother contradicted the description of her in the agreement as tenant, and the cases of *Humble* v. *Hunter* (1), *Formby Brothers* v. *Formby* (2) and *Fred Drughorn, Ltd.* v. *Rederiaktiebolaget Transatlantic* (3), were relied upon.

In my opinion, the description " tenant " does not imply that the person so described is not acting as an agent or nominee. As Viscount Haldane points out in the *Drughorn* case (3), the description of a party to a contract as owner or proprietor of certain property does imply that at the time of entering into the contract he is the owner or proprietor of the property and evidence that he is the agent of the owner or proprietor and not the owner or proprietor himself therefore contradicts the written contract. It is, as Viscount Haldane says, at p. 207, not a question of agency, but a question of property, and, as Lord Sumner pointed out, at p. 210, not a question of property after the contract has been entered into, but prior to the time it is entered into. It is true that Lord Haldane contrasts a charterparty with a lease, but, as he was there dealing with a charterer and with the right of a principal to the benefit of a charterparty made by his agent he must, I think, have been referring to a lessor and the description " lessor " does imply an antecedent interest in the property, but the description " lessee " or " tenant " does not.

In my opinion, the description " tenant " no more negatives agency than would the description " contracting party." As Lord Sumner said about the description " charterer," the description " tenant " means the person " who by this contract becomes liable to the obligations and entitled to the rights, which this contract allots to the " tenant, and, as Lord Sumner and the House of Lords held, such a description is not inconsistent with a person so described being an agent.

For these reasons I am of opinion that the evidence was admissible.

Objection overruled.

Solicitors : *Soames, Edwards & Jones* (for the plaintiffs) ; *Freeman & Co.* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

MAJOR SIR JOHN P. G. M. FITZGERALD, BART. *v.* THE COMMISSIONERS OF INLAND REVENUE.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 11, 1944.**]

Income Tax—Covenant to pay annuity free of tax—Supplemental deed made after Act—Principal deed to have effect as if s. 25 had never become law—Variation after Act came into force—Whether includes a variation made after the Act—Finance Act, 1941 (*c.* 30), *s.* 25.

By a deed dated Mar. 30, 1939, the appellant covenanted to pay his step-daughter during their joint lives such a monthly sum as after deduction of income tax at the standard rate from time to time prevailing should amount to £175, provided that after the expiration of 7 years from date of the deed the appellant might with the consent therein mentioned revoke the whole or any part of the covenant. The appellant duly paid the sums and by a supplemental deed dated Mar. 21, 1942, recited that it was his intention to pay the £175 per month free of tax whatever the rate of tax might be. The deed also contained a clause that the principal deed should have effect as if the Finance Act, 1941, s. 25, had never become law. The question at issue was whether, in computing the appellant's liability to tax for 1941-42, the twelve monthly instalments of £175 or only 20-29ths of that amount should be regarded as the amount of the annuity payable under the principal deed. On behalf of the appellant it was contended that in sect. 25 the words "has not been varied on or after that date" included a variation made after the passing of the Act and that, therefore, the principal deed was not affected by the section :—

HELD : upon the true construction of the Finance Act, 1941, s. 25, the words "has not been varied on or after that date" refer to a variation made after Sept. 3, 1939, and before the date of the passing of the Act.

[**EDITORIAL NOTE.** It is believed that many persons have entered into deeds of this nature and generally upon the footing that they were entitled to deduct the whole amount from their sur-tax return. The point is purely one of construction and probably an oversight in the drafting of the Act.

FOR THE FINANCE ACT, 1941, s. 25, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, pp. 119, 120.]

APPEAL by the taxpayer on a question of the construction of the Finance Act, 1941, s. 25. The facts are fully set out in the judgment.

Cyril King, K.C., and *Norman C. Armitage* for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

MACNAGHTEN, J. : By a deed of covenant dated Mar. 30, 1939, the appellant covenanted to pay to his step-daughter during their joint lives as from July 31, 1938, "such a monthly sum as after deduction of income tax at the standard rate from time to time prevailing should amount to £175," such monthly sum to be paid on the last day of each month, subject however, to a proviso that after the expiration of seven years from Mar. 30, 1939, the appellant might, with the consent therein mentioned, revoke the whole or any part of the covenant. The increase in 1941 of the standard rate of income tax to 10*s.* in the £ caused great hardship in a number of cases, and, with a view to mitigating the hardship the Finance Act, 1941, s. 25, provided that any provision, however worded, for the payment of a stated amount free of income tax contained in any deed made before Sept. 3, 1939, which "has not been varied on or after that date," should "as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s.* in the £, have effect as if for the stated amount there were substituted an amount equal to 20-29ths thereof." The Finance Act, 1941, was passed on July 22 of that year and at that date there had been no variation of the appellant's deed of covenant. The standard rate of income tax was 10*s.* in the £, for the year 1941-42, and has remained the same down to the present time.

The effect, therefore, of the Finance Act, 1941, s. 25, was that, as from Apr. 6, 1941, the appellant's covenant must be read as if, instead of containing a covenant to pay £175, it contained a covenant to pay 20-29ths of that sum. The appellant, nevertheless, continued to pay the covenanted sum of £175, and by a supplemental deed dated Mar. 21, 1942, after reciting that at the date of the execution of the principal deed it was, and ever since has been, and was then, his intention to pay £175 per month free of income tax, whatever the rate of tax from time to time prevailing might be, and that he was desirous of varying the provisions of the original deed for the purpose of giving effect to such intention, he declared that the principal deed should operate and have effect

> . . . as if the Finance Act, 1941, s. 25, had never become law to the intent that the net monthly sum of £175 might be deemed to have become payable on each of the monthly dates mentioned in the principal deed as were then past and might thereafter be paid by virtue of the principal deed on every such date during the term mentioned in the principal deed, whatever the standard rate of income tax might be.

The question at issue is whether, in computing the appellant's liability to sur-tax for 1941-42, the twelve monthly payments of £175, amounting to £2,100 or only 20-29ths of that amount, should be regarded as the amount of the annuity payable under the deed of covenant dated Mar. 30, 1939. In the one case the appellant would be entitled to deduct £4,200 as a charge on his income; in the other case he could only deduct 20-29ths of that sum, namely, £2,897. The appellant cannot claim any deduction in respect of money paid under the supplemental deed because he has power to revoke that covenant within six years. Therefore he must contend that the original covenant is not affected by the provisions of the Finance Act, 1941, s. 25.

Counsel for the appellant urged that the words in the Finance Act, 1941, s. 25, "has not been varied on or after that date" should be read as including a variation made after the passing of the Act and that, therefore, the original covenant is not affected by the Finance Act, 1941, s. 25. I regret that I cannot so read these words. I think that the words "has not been varied on or after that date" refer to a variation made after Sept. 3, 1939, and before the date of the passing of the Act. That is, I think, the natural and obvious meaning of the words. It is, I think, a hard case, because, if Parliament had realised that a covenantor might wish to bear the hardship caused by the high rate of the tax rather than put the hardship upon his beneficiary, it seems probable that he would have been allowed to do so. But under the provisions the covenantor has no option in the matter. Willy-nilly the covenanted sum is reduced to 20-29ths. Therefore, the appeal must fail.

Appeal dismissed.

Solicitors: *Guscotte, Fowler & Cox* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

H.M. INSPECTOR OF TAXES. *v.* H. S. BARTER.
H.M. INSPECTOR OF TAXES *v.* C. W. WILLIAMSON.

[KING'S BENCH DIVISION (Macnaghten, J.), **May 24, 1944.**]

Income Tax—Schedule B—Nurseries and market gardens—Watercress beds—Assessment—Income Tax Act, 1918 (c. 40), *Sched. B, rr.* 1, 8.

Respondents were occupiers of land which was permanently adapted for cultivation of watercress and was used solely for that purpose. The respondent in the first case occupied eight acres and no other land while the respondent in the second case farmed 1,000 acres and a further 14 acres of watercress beds. The question was whether the land was a "garden" within the meaning of the Income Tax Act, 1918, Sched. B, r. 8:—

HELD: (i) the land was a "garden" within the meaning of the Act.

(ii) the second case was a proper case in which to deal separately with that part of the farm used for husbandry and that part used as a market garden.

[**EDITORIAL NOTE.** The cultivation of watercress is carried on by methods different from those of general farming and are here held to satisfy all the conditions laid down by the House of Lords in *Bomford* v. *Osborne* (1) to determine whether land is being used as a market garden and not as a farm.

AS TO NURSERIES AND MARKET GARDENS, see HALSBURY, Hailsham Edn., Vol. 17, p. 72, para. 145 ; and FOR CASES, see DIGEST, Vol. 28, pp. 15, 16, Nos. 75-83.]

Cases referred to :

*(1) *Bomford* v. *Osborne*, [1942] A.C. 14 ; [1941] 2 All E.R. 426 ; 110 L.J.K.B. 462 ; 165 L.T. 205 ; 23 Tax Cas. 642.

(2) *Monro & Cobley* v. *Bailey* (1933), 17 Tax Cas. 607 ; Digest Supp. ; 102 L.J.K.B. 471 ; 148 L.T. 505.

APPEALS by the Crown from a decision of the General Commissioners for the Salisbury Division in the county of Wiltshire discharging an assessment under Sched. B, r. 8, in respect of profits derived from watercress beds. The facts are fully set out in the judgment.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the appellant in each case.

F. Grant, K.C., and *John Clements* for the respondents in each case.

MACNAGHTEN, J. : The Income Tax Act, 1918, Sched. B, r. 8, provided that profits arising from lands occupied as " nurseries or gardens " for the sale of the produce (other than lands used for the growth of hops) should be estimated according to the provisions of the rules applicable to Sched. D, but should be assessed and charged under Sched. B as profits arising from the occupation of land. That provision has been repealed as from Apr. 6, 1941, by the Finance Act, 1941, s. 52 (7).

The late T. W. Barter was occupier of 8 acres of watercress beds situate in the parish of Bishopstone in Wiltshire, and was assessed to income tax under Sched. B, r. 8, on the profits arising therefrom. But the General Commissioners discharged the assessment on the ground that " the state of cultivation of the watercress beds was not such as to bring the beds within the classification of nurseries or gardens." The Crown has appealed and the only question at issue is whether on the facts stated in the case the watercress beds are a " garden " within the meaning of r. 8.

As the case finds, the land in question is permanently adapted for the cultivation of watercress, and was used solely for that purpose : " and was not and could not be used for any other purpose." The respondent occupied these eight acres of watercress beds and did not occupy any other land at all either in Wiltshire or elsewhere. Watercress beds are parts of old water meadows which have been specially levelled and drained for the purpose, and it is necessary that there should be in the immediate vicinity of the beds either a spring or an artesian well from which water can be fed direct to the beds either by gravitation or by pumping, because the water must be fed to the beds at a standard temperature through the year.

The cultivation of winter cress, which was the crop that the late Mr. Barter cultivated, is carried out as follows, and here I quote from the case :

> (1) The young shoots of the watercress are cut from the stock beds or adjoining growing beds and are planted in the growing beds by scattering them in very shallow water on the beds . . . Water is then admitted from the source and the outlet is so regulated as to control water in the beds at a height suitable for the growth of the plants. As the plants grow the water level is raised. In the autumn the beds are thinned out. There is no forcing of the cress. The plants require weeding and general supervision to keep down pests. (ii) The harvesting of the crop is done by hand cutting, a specially made very sharp knife being used for this purpose. The cress is then bunched and put into baskets and sent to market. The harvesting of the winter cress normally lasts from about the end of January till May or June. The beds are then drained and thoroughly cleaned with rakes, and by means of passing water through the beds. Occasionally a little artificial manure is laid on the beds and raked in. The preparation of beds for replanting is completed by the whole of the surface being beaten down hard with the back of a rake. (iii) The whole of the cultivation and gathering of the crop is done by hand, and it is not possible to use horses or any mechanical assistance in any part of the process, nor are any agricultural instruments used.

The case goes on to state that the growing of watercress is a skilled occupation ; that the men employed are highly skilled, and receive a slightly higher rate of pay than the ordinary agricultural workers, and that " the cost of labour on watercress beds varies between £60 to £80 per acre per annum," as against the cost of between £4 and £5 on a purely arable farm in the Salisbury district; and " that by far the greater part of the cost is incurred in harvesting the crop."

The question of what is a " garden " within the meaning of r. 8 came up for full consideration before the House of Lords in *Bomford* v. *Osborne* (1), and in that case, although no precise definition of a " garden " within r. 8 was given, the characteristic features of land used as a market garden as distinguished from land used for the purposes of husbandry or ordinary farming were explained.

The Solicitor-General, in his argument, pointed out that there were five characteristic features to which their Lordships drew attention. The first was that a " garden " used for the sale of produce must be a defined area of land—you cannot have a " shifting use " in the case of a market garden. The area must be defined and it must be cultivated as a market garden from year to year ; it cannot be a garden one year and an ordinary farm the next. Those two characteristics are essential. The third characteristic to which the Solicitor-General drew attention was the method of cultivation. The method of cultivation must be intensive. Though no precise definition of intensive cultivation may be possible, I think the spending of £60 an acre on the cultivation of land for the production of a crop indicates intensive cultivation : none the less so because the greater part of the expense is in harvesting the crop, for harvesting the crop is as necessary a part of the work of a market gardener as of that of a farmer. The fourth characteristic is the nature of the produce. That characteristic is not so helpful as those already mentioned because the produce of a market garden may be such as is cultivated on an ordinary farm. But it cannot, I think, be said that watercress is an ordinary farm crop. Finally, there is the size of the holding. That is not a very helpful feature because there are large as well as small market gardens. Certainly, the facts in the case of *Monro and Cobley* v. *Bailey* (2) indicate that you might have a very large market garden in a part of the country suitable for growing market garden crops. The *locus* in that case was in the Holland Division of Lincolnshire.

The Solicitor-General argued that having regard to the decision in *Bomford* v. *Osborne* (1), the General Commissioners were bound to hold that the watercress beds were a market garden. Counsel for the taxpayer, on the other hand, said that the question of whether it was a market garden or not is a question of fact : but that depends upon the meaning of the word as used in r. 8. Though no one would think of calling watercress beds a garden, nevertheless, if the watercress beds exhibit the characteristic features of a market garden, they come within the meaning of r. 8.

In view of the facts as found by them, I think the General Commissioners must have misapprehended the meaning of the word " garden " as used in r. 8. According to the description that they have given of the place and of the way in which it is cultivated, I think that their decision that it does not come within the classification of nurseries or gardens within the meaning of r. 8 is erroneous in matter of law, and that they ought to have come, on the facts as found by them, to the conclusion that it was a market garden within r. 8, and that the assessment ought not to have been discharged. The case will go back to the Commissioners to find what is the amount in accordance with the rules applicable to Sched. D.

There is a further point in the case of Williamson. The respondent here, besides occupying 14 acres of watercress beds, occupied 1,000 acres of farm land. The labour he employed was used indifferently for the cultivation of watercress beds and the rest of his farm. The farm, including the watercress beds, formed a single unit, and, therefore, in this case, there is the further question whether the watercress beds could be assessed under Sched. D separately from the rest of the farm. The decision in the House of Lords in *Bomford* v. *Osborne* (1) clearly indicates that a case may arise in which such a separation of the whole farm into two parts would be proper. It seems to me, if ever there could be a case in which it was proper to split the farm into that part which is used for the purposes of husbandry and that part which is used as a market garden, this is such a case.

Appeals allowed and cases remitted to Commissioners.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *R. L. Mason* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY) *v.* LLOYDS BANK LTD. (AS EXECUTOR OF THE WILL OF JOHN ROBERTS LILLICRAP, *deceased*).

[KING'S BENCH DIVISION (Macnaghten, J.), **May 11, 1944.**]

Income Tax—Penal provisions—False returns—Taxpayer entitled to same relief even if he had made true returns—Whether penalties applicable—Income Tax Act, 1918 (*c.* 40), *s.* 30.

For a number of years the deceased in making claims for deduction of income tax had made false returns as to his income. In proceedings against the executors of the deceased for the enforcement of the penalty prescribed in the Income Tax Act, 1918, s. 30, it was contended that the estate of the deceased was not liable to the penalties because the false statements made by the deceased as to his income over the period in question did not in fact give rise to any larger deductions than would have been the case if he had made a true return of his total income :—

HELD : the fact that the deceased had fraudulently concealed part of his income was sufficient for the purposes of s. 30, and it was immaterial that he would have been entitled to the relief he claimed if he had made the true returns.

[**EDITORIAL NOTE.** This is purely a question of construction of the section. The section prescribes a penalty for concealment of income and is not a provision for rectifying the receipt of tax by the revenue.

AS TO PENALTIES FOR MAKING FALSE RETURNS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 402-405, paras. 824-835 ; and FOR CASES, see DIGEST, Vol. 28, pp. 103, 104, Nos. 639-642.]

SPECIAL CASE stated by consent for the opinion of the court on an information by His Majesty's Attorney-General under the Income Tax Act, 1918, s. 221, against the executors of John Roberts Lillicrap, who died on Mar. 12, 1940.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and *Reginald P. Hills* for the informant.

Heyworth Talbot for the defendant.

MACNAGHTEN, J. : The deceased, for many years, carried on a cattle dealing business at Tavistock in Devonshire. As a result of disclosures it was discovered that from 1916 to 1940 he had made false returns of his income for the purposes of income tax, super-tax and sur-tax, and had thereby avoided being assessed to substantial amounts of tax in respect of that period.

The Finance Act, 1920, s. 17 (1) provided as follows :

> An individual who, in the manner prescribed by the Income Tax Acts, makes a claim in that behalf and who makes a return in the prescribed form of his total income shall be entitled for the purpose of ascertaining the amount of the income on which he is to be charged to income tax (in this Act referred to as " the taxable income ") to have such deductions as are specified in the five sections of this Act next following made from his assessable income.

In each of the four years ended Apr. 5, 1937, to 1940 the deceased made (*a*) a claim for a deduction under sect. 17 of that Act, and (*b*) a false return of his total income. He fraudulently concealed the following amounts of income, viz., for the year 1936-37, £201 ; for the year 1937-38, £405, for the year 1938-39, £373, and for the year 1939-40, £391.

The Income Tax Act, 1918, s. 30, provides :

> A person who, in making a claim for or obtaining any allowance or deduction . . . fraudulently conceals any income . . . shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income . . .

It is urged on behalf of the defendant that, notwithstanding fraudulent concealment of part of his income in each of the four years, the deceased did not become liable to the penalties provided by the Income Tax Act, 1918, s. 30, because the false statements of his total income did not in fact give rise to any larger deductions than would have been the case if he made a true return of his total income. But in my opinion that fact affords no defence. The relevant words of the section, which I have read, are quite plain and unambiguous. The deceased was bound, under the Finance Act, 1920, s. 17 (1), in making a claim for a deduction, to make a return—that must mean make a true return

—of his total income. Therefore, the fact that he would have been entitled to the relief which he claimed, if he had made a true return, seems to me to be immaterial. In making a claim for a deduction he fraudulently concealed part of his income and, therefore, became liable to the penalty prescribed by the Income Tax Act, 1918, s. 30, namely, to forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income.

The amount due under that section is agreed to be £7,519 16*s.* 3*d.*, and, accordingly, judgment will be entered for the Crown against the defendant for that sum *de bonis testatoris* and for costs of the action personally.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue* (for the informant); *Hyatt Mahon & Pascall*, agents for *John Pathybridge*, Bodmin (for the defendant).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

CARRIMORE SIX WHEELERS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), **May 17, 1944.**]

Income Tax—Returns—Income from hereditament taxable under Sched. A included in return under Sched. D, Case 1—*Application for relief under Finance Act,* 1923, *s.* 24—"*. . . in the exclusion from charge to income tax*"—*Finance Act,* 1923 (*c.* 14), *s.* 24 (3).

The appellant company was the owner of a factory on one fence of which was erected a billposting station which was assessable to tax as a hereditament under Sched. A. It was included in the Sched. A assessments with a note that it was assessed in the company's Sched. D assessment. The appellants leased the billposting station and the rent received was included as a trading receipt of the company under Sched. D, Case 1. The company claimed relief under the Finance Act, 1923, s. 24, on the ground that whether the rent for the billposting station was included under Sched. D, Case 1, wittingly or not, it was by law assessable only under Sched. A and, therefore, its inclusion in the Sched. D computation was an "error" within the meaning of the section.

Held: there was no error within the meaning of the section. The appellant's contention required the addition to the words in sect. 24 (3) "in exclusion from charge to income tax," of some such words as "under Sched. D" but the section could be properly construed without adding any words by implication.

[**EDITORIAL NOTE.** This case is concerned with what is an "error" within the Finance Act, 1923, s. 24 (3), and it is decided that the inclusion of income under one schedule when it should or might have been included under another is not such an error.

As to Error or Mistake in Returns, see HALSBURY, Hailsham Edn., Vol. 17, pp. 386, 387, para. 795; and for Cases, see DIGEST, Vol. 28, pp. 73, 74, Nos. 392-397.]

Case referred to:

(1) *London County Council* v. *A.-G.*, [1901] A.C. 26; 28 Digest 73, *392*; 70 L.J.Q.B. 77; 83 L.T. 605; 4 Tax Cas. 265; *revsg.* S.C. *sub nom. A.-G.* v. *London County Council*, [1900] 1 Q.B. 192.

Appeal by the taxpayer from a decision of Special Commissioners. The facts are fully set out in the judgment.

Roland Burrows, K.C., and *G. G. Honeyman* for the appellant: the word "error" in the expression "error or mistake" includes the case of an error of law even if there is no mistake of fact. Sect. 24 applies to assessments under Sched. D and as the rent was admittedly assessable only under Sched. A there would be no "exclusion from charge" within sect. 24 (3).

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) and *Reginald P. Hills* for the respondents were not called upon.

Macnaghten, J.: The appellant, in this case, Carrimore Six Wheelers, Ltd., carries on trade at North Finchley, in London, and year by year the profits of that trade have to be computed in accordance with the principles and rules of the Income Tax Acts for the purpose of assessment to income tax under Case 1 of Sched. D. The appellant applied to the Commissioners of Inland Revenue under the Finance Act, 1923, s. 24, for relief in respect of the assessments made upon it for the four years ending Apr. 5, 1936, 1937, 1938 and 1939, on the ground that the assessments were excessive by reason of an "error or mistake" in the returns made by it.

The error alleged was this, that the appellant had included as a trading receipt in the computation of its profits for those years, a sum of £90 which was in fact the rent received by it from a company called the Northern Billposting, Ltd., for the right to use a frontage belonging to the appellant for billposting and advertising purposes. It is said and said correctly that the billposting station was taxable as a hereditament under Sched. A and ought to have been assessed and taxed under that Schedule. The accountants employed by the company, however, preferred to include it as a trading receipt of the business of the company. There may or may not have been a good reason in the interests of the company for doing so, but counsel for the appellant, who has, as usual, argued this case with great lucidity, said that even if it were done wittingly and with a view to the advantage of the company, it was nevertheless an "error" within the meaning of the Finance Act, 1923, s. 24.

The Commissioners of Inland Revenue refused the application and their decision was upheld by the Special Commissioners on appeal. In my opinion also the decision was right. The matter is I think made quite plain by the Finance Act, 1923, s. 24 (3), which provides that:

> In determining any application under this section the Commissioners of Inland Revenue shall have regard to all the relevant circumstances of the case, and in particular shall consider whether the granting of relief would result in the exclusion from charge to income tax or super-tax of any part of the profits or income of the applicant . . .

One of the relevant circumstances of this case is that the appellant by its accountants included the rent as a "trading receipt" in the accounts submitted to the inspector of taxes. The £90 undoubtedly was part of the income of the appellant, and the result of the granting of the relief for which the appellant now applies would be that the £90 would be excluded from charge. Counsel for the appellant meets that point by saying that I ought to read the words in subsect. (3): "in the exclusion from charge to income tax" as if they were followed by the words "under Sched. D." Those words are not there and I can see no reason for adding them. On the contrary, I think that the subsection means exactly what it says—"exclusion from charge to income tax." There is not an income tax under Sched. A and another income tax under Sched. D; there is but one income tax, though it is chargeable under different schedules. I am but paraphrasing what was laid down some 50 years ago in *A.-G.* v. *London County Council* (1), at p. 35.

In my opinion the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *De Meza & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

NOTE.

DUNCAN *v.* CAMMELL LAIRD & CO., LTD.
CRAVEN *v.* CAMMELL LAIRD & CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.), **July 7, 1944.**]

The Court of Appeal reversed the decision of MACNAGHTEN, J., reported [1943] 2 All E.R. 621, and taking a different view of the facts of the case, did not, therefore, deal with the matters previously reported. Their Lordships found that Lieutenant Woods had relied upon a test cock for a purpose for which he knew, or ought to have known, that it was never intended and in addition failed to use the rimer and that this negligence was the cause of the disaster. The appeal of Cammell Laird & Co., Ltd., was, therefore, allowed, and cross-appeal by the plaintiffs against Lieutenant Woods was also allowed.

A. G. JENKINS *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), **May 9, 1944.**]

Income Tax—Sur-tax—Settlements—Avoidance of tax—Irrevocable settlements—Trust fund invested in companies controlled by settlor—Winding up by settlor destroying trust fund—" Income payable to settlor in any circumstances whatsoever "—Loan by settlor repaid out of income by trustees—Finance Act, 1936 (*c.* 34), *s.* 21—*Finance Act,* 1938 (*c.* 46), *s.* 38.

On June 21, 1934, the appellant caused to be registered a private unlimited company, hereinafter called the Woodlands company, with a share capital of £26,000 divided into 5,000 A shares and 21,000 B shares of £1 each. By the articles of association the profits of the company were to be applied first in the payment of a non-cumulative preference dividend of 2½ per cent. on the capital paid up on the B shares, and then in the payment of a dividend on the capital paid up on the A and B shares, or on one of those classes to the exclusion of the other. In a winding up the A shares were entitled to payment of double the amount paid up thereon. The A shares were entitled on a poll to 40 votes per share and the B shares on a poll to one vote per share. The appellant and his wife were the signatories to the memorandum of association and each subscribed for one A share. The appellant was the governing director of the company for life. On the same day the appellant caused to be registered a company, hereinafter called the Dilnot company, of identical structure except that the share capital of the Dilnot company was £38,000 divided into 12,000 A shares and 26,000 B shares of £1 each. On June 22, 1934, the appellant irrevocably settled £500 on each of his three daughters. His wife and his secretary were the trustees of the settlements with power to invest in any shares whatsoever with the consent of the appellant and with power to borrow money with the consent of the appellant. With the consent of the appellant the trustees invested the trust funds by subscribing for the 21,000 B shares of the Woodlands company, borrowing £19,500 from the appellant in order to do so. The appellant himself subscribed for the 4,988 A shares. The Woodlands company then subscribed for the 26,000 B shares of the Dilnot company, and the appellant subscribed for all but one of the A shares. Subsequently, the appellant sold to the Dilnot company certain property at a price of £48,699 9*s.* 8*d.*, of which £2,699 9*s.* 8*d.* was a loan from the appellant to the Dilnot company. The appellant was assessed to tax on the income arising from the settlements for the year 1936-1937 by virtue of the Finance Act, 1936, s. 21, and for the year 1937-1938 by virtue of the Finance Act, 1938, s. 38 :—

Held : (i) although the appellant could wind up the companies whenever he chose and thus put an end to the trust funds, he did not have the power to " revoke or otherwise determine the settlements " within the meaning of the Finance Act, 1936, s. 21.

(ii) the construction of the companies and of the settlements was such that the income of the trust funds might become payable to the appellant within the meaning of the Finance Act, 1938, s. 38.

[**EDITORIAL NOTE.** The Finance Act, 1936, s. 21, and the Finance Act, 1938, s. 38, contain very wide definitions of the word " revocable " inserted for the purpose of defeating arrangements for avoiding the incidence of income tax and more particularly sur-tax. It is a common feature of such arrangements that the funds of a settlement are invested in the shares of a company of which the settlor is a governing director. It is here suggested that such a settlor by putting such a company into liquidation would revoke the settlement within the meaning of the earlier section. This suggestion is rejected, for though the trust fund might be thus destroyed, the settlement is not revoked. On the other hand, the settlor is deemed to have an interest in the settled funds where he has power to lend money to the trustees and they have a discretion to apply any income to the repayment of such loan.

As to Revocable and Other Dispositions of Income, see HALSBURY, Hailsham Edn., Vol. 17, pp. 267-270 ; and for Cases, see DIGEST, Supp., Income Tax, Nos. 575b-576g.]

Case referred to :

(1) *Chamberlain* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 200.

Appeal by the taxpayer from decisions of the Special Commissioners.

The second appeal followed the first, the facts being the same. The facts are fully set out in the judgment.

F. Heyworth Talbot for the appellant.

J. H. Stamp and *Reginald P. Hills* for the Inland Revenue Commissioners.

MACNAGHTEN, J.: This is an appeal against additional assessments to sur-tax. In June, 1934, the appellant was minded to settle a sum of £500 upon each of his three daughters, Audrey, Brenda and Joyce. Accordingly, by an irrevocable settlement dated June 22, 1934, made between himself of the one part and his wife, Mrs. Mabel Dilnot Jenkins and his secretary, Miss Preidell as trustees of the other part, reciting that he had paid to the trustees the sum of £500, it was declared that the trustees should invest the same with his consent in any investments thereby authorised and hold the same upon trust for his daughter Audrey if and when she should attain the age of 25 years with power in the meantime to apply the income for her maintenance and benefit; and on the same date he made similar settlements in favour of his two younger daughters, Brenda and Joyce. The trustees were given the widest powers of investment: they were empowered to invest the £500 in any shares of whatsoever nature as though they were absolutely entitled to it beneficially. They were also empowered to borrow money with the consent of the appellant.

Armed with these unusual powers, the trustees decided to invest the trust funds in the shares of a company called the Woodlands Investment Trust Co., which the appellant had caused to be registered on the previous day, June 21, 1934, as a private unlimited company with a share capital of £26,000, divided into 5,000 A shares and 21,000 B shares of £1 each. The appellant and his wife were the signatories to the memorandum of association; they each subscribed for one A share.

The trustees thought fit, with the consent of the appellant, to invest the trust funds by subscribing for the 21,000 B shares of the Woodlands company, allotting 7,000 shares to each of the three trusts. The trustees were able to do this because the appellant lent them £19,500—£6,500 for each settlement. The appellant himself subscribed for the 4,998 A shares; and thus the whole of the share capital of the company, £26,000, was subscribed for and paid up in full.

The articles of association provided that the profits of the company should be applied first in the payment of a non-cumulative preference dividend of 2½ per cent. on the capital paid up on the B shares and, secondly, in the payment of a dividend on the capital paid up on the A and B shares, or on one of those classes to the exclusion of the other. In a winding up the A shares were entitled to payment of double the amount paid up thereon. The A shares were entitled on a poll to 40 votes per share; and the B shares were merely entitled to one vote per share; with the result that the appellant and his wife were entitled to 200,000 votes, and the trustees were only entitled to 21,000 votes. The appellant was governing director of the company for life.

On the same day the appellant caused another similar company, called the Dilnot Investment Trust and Estate Co. to be registered. The structure of that company was precisely the same as that of the Woodlands Investment Trust Co. The only difference between them was that the share capital of the Dilnot Investment Trust and Estate Co. was £38,000, divided into 12,000 A shares and 26,000 B shares of £1 each.

The Woodlands company subscribed for the 26,000 B shares of the Dilnot company. Mrs. Jenkins, as a signatory of the memorandum of association subscribed for one A share and the appellant subscribed for all the rest. The next step in the proceedings which have led to the making of the additional assessments to sur-tax of which the appellant complains, was that he sold to the Dilnot company certain freehold and leasehold property at the price of £48,699 9*s*. 8*d*. In order to pay that price the Dilnot company borrowed £8,000 from the Westminster Bank, and that sum, together with the £26,000 which the Woodlands company had paid for the 26,000 B shares and the £12,000 paid for the A shares amounted to £46,000. The balance of the purchase price, £2,699 9*s*. 8*d*., remained as a loan from the appellant to the Dilnot company.

Before the Special Commissioners the Crown contended that the formation of the two companies on June 21 and the making of the settlements on June 22, 1934, constituted a "settlement" within the meaning of the Finance Act, 1936, s. 21; and the Special Commissioners accepted that contention; but it is conceded that the judgment of the House of Lords on June 9, 1943, in *Chamberlain* v. *Inland Revenue Comrs.* (1) has established that the assessments cannot be supported on that ground. Accordingly, in this court the Crown sought to uphold the assessments not on the ground that had found favour with the Special Commissioners, but on different grounds.

So far as the assessment for the year 1936-37 is concerned, the claim of the Crown is based on the Finance Act, 1936, s. 21, and since that section does not A apply to irrevocable settlements, it was necessary for counsel for the Crown to rely on the provisions of subsect. (8) of that section, which provides as follows:

> For the purposes of this section, a settlement shall not be deemed to be irrevocable, if the terms thereof provide (*a*) for the payment to the settlor . . . of any income or assets in any circumstances whatsoever during the life of any child of the settlor to or for the benefit of whom any income, or assets representing it, is or are or may be payable or applicable by virtue or in consequence of the settlement. B

The argument for the Crown, as I understood it, was this. The appellant can wind up these companies whenever he pleases; and, if he does so, he will revoke the settlements, because the whole of the trust fund will disappear. In a winding up of the Dilnot company the liquidator would have to repay £8,000 to the bank; and £2,699 9*s.* 8*d.* to the appellant. Taking £48,699 6*s.* 8*d.* as the value of the only asset which Dilnot possessed, viz., the freehold C and leasehold property sold to it by the appellant, that would leave £38,000 for distribution among the shareholders. Out of that sum the appellant would be entitled to £24,000 in respect of the 12,000 A shares which he held, leaving no more than £14,000 for the Woodlands company in respect of the 26,000 B shares held by it. In the winding up of the Woodlands company the appellant would be entitled to £10,000 in respect of the 5,000 A shares held by him, and that would leave no more than £4,000 for the trustees of the settlements as holders D of the 21,000 B shares. The trustees, however, owe £19,500 to the appellant, and, therefore, the trust funds would be extinguished; and counsel for the Crown argued that the appellant, by means of the liquidation of the two companies, could revoke the settlement.

It so happens that by the Finance Act, 1938, s. 38 (1) (*a*), provision is made for the case where a person has power "to revoke or otherwise determine the E settlement." The appellant in this case can, by putting the two companies into liquidation, determine the settlement otherwise than by revocation. But I do not think it can be said that, by putting an end to the trust fund, he revokes the settlement.

I agree with the argument of Mr. Talbot on behalf of the appellant that there are no terms in the settlement which provide for the payment to the settlor of any of the income or assets of the settlement. It is quite true that the appellant F can get into his hands the whole of the trust funds; but that is not by reason of any terms contained in the settlements. It is by reason of the unhappy investment, if I may so call it, which the trustees thought fit to make of the £500 entrusted to their care for their infant beneficiaries. Therefore, in my opinion, the Finance Act, 1936, s. 21, does not apply to the settlements made by Jenkins on June 22, 1934; and the assessments to sur-tax made upon him for the year 1936-37 must, therefore, be discharged. G

In support of the assessment for the year 1937-38, the Crown relies upon the provisions of the Finance Act, 1938, s. 38 (3), (4), which does not apply to assessments for 1936-37, but does apply to those for 1937-38. These subsections provide:

> (3) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any H year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year, and not as the income of any other person . . . (4) For the purpose of the last foregoing subsection, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will, or may become, payable to or applicable for the benefit of the settlor . . . in any circumstances whatsoever . . .

As I have pointed out, the appellant had complete control of both these companies. The preferential dividend to which the B shares were entitled was non-cumulative; and he had the power to withhold the payment of any dividend to any of the shareholders. In fact he did cause dividends to be distributed in the case of both the Dilnot company and the Woodlands company; and the trustees did, in the year 1936-37, and in the year 1937-38, receive dividends on the shares which they held in the Woodlands company, that company having recived dividends on the shares which it held in the Dilnot company. So in those years the trustees had an income. The year 1936-37 may be disregarded for this purpose, because the Finance Act, 1938, s. 38, has no application to that year. Though, as I have said, under the terms of the settlements, the appellant had no interest in the income of the settlements, he in fact obtained the whole of the dividends which the trustees received in respect of their B shares; because the trustees, apparently, could not do anything better with the dividends that they received than pass them back to the appellant in reduction of the loans of £6,500 which they had received from him. They thought that was the best course to pursue, notwithstanding that the appellant had been so good as to lend them the money without interest. One might have thought trustees would have considered it advantageous to their beneficiaries to retain what income they could for their beneficiaries, so long as their creditor was so good as to leave the money in their hands without interest. But they in their absolute discretion thought it better to pay over the dividends to the appellant. Sect. 38 (4) provides that the settlor is to be deemed to have an interest in income arising under a settlement, if the income may become payable to him "in any circumstances whatsoever." In this case, not only might the income become payable to the settlor, but it was actually paid to him.

In those circumstances, it seems to me that he is a person who must be deemed to have an interest in the income; and that he can properly be assessed to sur-tax in respect thereof, for the year 1937-38, under the provisions of the Finance Act, 1938, s. 38 (1) and (4). The case will be remitted to the Special Commissioners for them to make any necessary adjustment of the figures.

Since the appellant has succeeded with regard to the first assessment and the Crown has succeeded in respect of the second assessment, I think each party should bear their costs of the appeal.

Order accordingly.

Solicitors: *E. & J. Mote* (for the appellant); *Solicitor of Inland Revenue* (for the Inland Revenue Commissioners).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

CARR *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Scott and du Parcq, L.JJ. and Uthwatt, J.), **July 11, 1944.**]

Revenue—Excess profits tax—Profits of profession dependent wholly or mainly on personal qualifications—Optician—Finance (No. 2) Act, 1939 (*c.* 109), *s.* 12 (3).

The appellant was a fully qualified optician whose profits were derived for the most part by fees charged for advice and for prescribing appliances to alleviate defective sight. He also received payments for such appliances supplied by himself, but these formed only a small proportion of his total receipts. Upon these facts the Commissioners held that the appellant was carrying on a profession and not a business within the meaning of the Finance (No. 2) Act, 1939, s. 12 (3):—

HELD: there was evidence upon which the Commissioners could find that the appellant was carrying on a profession and their finding on that point could not be disturbed on appeal.

[**EDITORIAL NOTE.** The question whether a man is carrying on a business or a profession is largely one of fact and degree. The point arose in *Webster* v. *Inland Revenue Comrs.* (3), where both the Commissioners and MACNAGHTEN, J., reached the opposite conclusion on the facts of that case. In this case, MACNAGHTEN, J., again took the view that the appellant's activities were a business and overruled the decision of the Commissioners, but the Court of Appeal have decided that there was evidence to support the Commissioners' finding and, therefore, it ought not to be disturbed whether the higher tribunal would or would not have come to the same conclusion. The matter is of considerable importance and the judgments herein discuss in some detail the characteristics distinguishing a business from a profession.

For the Finance (No. 2) Act, 1939, s. 12, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1193.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Maxse*, [1919] 1 K.B. 647 ; Digest Supp. ; 88 L.J.K.B. 752 ; 120 L.T. 680 ; 12 Tax Cas. 41.

(2) *Currie* v. *Inland Revenue Comrs.*, *Durant* v. *Inland Revenue Comrs.*, [1921] 2 K.B. 332 ; Digest Supp. ; 90 L.J.K.B. 499 ; 125 L.T. 33 ; 12 Tax Cas. 245.

*(3) *Webster* v. *Inland Revenue Comrs.*, [1942] 2 All E.R. 517.

Appeal by the taxpayer from a decision of Macnaghten, J., reversing a decision of the Commissioners. The facts are fully stated in the judgment of Scott, L.J.

E. Wooll, K.C., and *G. R. F. Morris* for the appellant.

The Solicitor General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

Scott, L.J. : The appellant was, as found by the Commissioners, an optician carrying on his profession in St. Helens. It is important to see exactly what were their findings of fact in the case, because Macnaghten, J., took the view that, although they had found as a fact that the appellant was carrying on a profession, the right view of the case was that he was not carrying on a profession within the meaning of that section but was conducting the business of selling spectacles. The special case ended with these findings :

> . . . that the respondent's profits are dependent wholly or mainly on his personal qualifications and that he was carrying on a profession within the meaning of the section.

It follows necessarily that, if there was evidence upon which they could so find, the judge was not entitled to take a different view of the position and upset that finding.

The findings of fact by the Commissioners are these :

> The respondent who gave evidence before us stated that, after serving an apprenticeship to his father for five years, he gained experience by working with and assisting oculists at clinics and surgeons at hospitals under the Lancashire County Council and with opthalmic surgeons at Home Office schools in Lancashire for upwards of 17 years including experience in the fitting of contact lenses. He then became a Member of the National Association of Opticians and the Joint Council of Qualified Opticians after furnishing evidence of his training and experience and recommendations of members of the medical profession. He further stated that his profits are wholly derived from fees paid for his advice to patients who consulted him as to appliances necessary to improve their eyesight and from his own assembly of such appliances to his own prescription and the subsequent supply thereof to his said patients. The fee charged is an inclusive one to include the sight-testing and the appliance supplied (such item not being shown separately on the statements rendered by him to persons consulting him) except in cases where after examination no appliance is supplied when a fee for examination is charged. The proportion of such latter cases is very small compared to those where an appliance is supplied. The respondent also stated that glasses prescribed by him have in fact been supplied by other opticians but that this had happened only very occasionally.

The accounts kept by the appellant, copied from his own books, were put in evidence. He had a waiting room and two consulting rooms at his premises in St. Helens. The special case adds :

> He further gave evidence that he did not advertise his profession or premises in any journal . . . On either side of the entrance was a small shop window front, each measuring 3ft. 6ins. wide and 18ins. in depth, which are used for the display of seven or eight types of optical frames without glasses and unpriced as normally supplied by him with glasses to his own prescription. The respondent's name appears once upon the front of the said premises but without the addition of any advertising matter beyond his description.

On those findings of fact, it seems to me that the following six considerations point to his carrying on a profession : (i) There was no advertising, even outside the premises ; (ii) he had the appropriate waiting room and two consulting rooms ; (iii) no prices were mentioned in connection with the seven or eight types of frame exhibited in his little windows for the observation of patients ; (iv) he carried out the functions of examining and testing eyesight and prescribing the suitable glasses—in itself a process calling for much skill and experience—and assembling them in their frames, meaning, no doubt, that they were set in the frames, for example, at the appropriate angle, which, of course, is essential; (v) his net earnings, whatever they were called, were very substantial, particularly in relation to the expenditure on material, that is, on what would be called the stock-in-trade of a business; and, finally, (vi) the proportion between those earnings and the item for stock-in-trade, so called in the account, was very large in relation to the stock-in-trade—far larger than it would normally be in any trading business.

On those considerations it seems to me quite impossible to say that there was not evidence, and ample evidence, for the Commissioners to find, as they did, first, that the activity carried on by the appellant was a profession, and, secondly, that, to use the words of the Finance (No. 2) Act, 1939, s. 12 (3), his profits were dependent wholly or mainly on his personal qualifications.

I think the proviso to that subsection is certainly consistent with and possibly supports the view that the selling of articles by a professional man is to be regarded as included in the fee charged by him for his professional examination, testing and so on, and his advice. That view is fortified by the words:

> Provided that for the purpose of this subsection the expression "profession" does not include any trade or business consisting wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts.

That goes to indicate that the essential notion of a "business," as contemplated by the excess profits tax provisions, is that it is commercial in character. I concede that that attribute is not exclusive, because a farmer carries on a business which is primarily not commercial in character, and nevertheless is within the Act; but it leaves in my mind a strong impression that the primary object of the excess profits tax was to deal with profits which were likely to be greatly augmented by the effect of war upon supply and demand without any relation to the efforts of the owner of the business. That aspect of the tax is, of course, merely a consideration of a general character; but it is consistent with that characteristic of the excess profits tax that professions, which are essentially dependent upon individual initiative of a skilled, but non-commercial, character, should be exempt from the tax.

The judgment below recited practically the whole of the findings and quite correctly stated the problem which had to be decided as the question of law for the court, namely, whether the facts stated in the case afforded any evidence on which the Commissioners could find as they did. MACNAGHTEN, J., justly observes that there is difficulty in defining what is or what is not a profession within the meaning of that word. He then goes on to say that the personal qualifications referred to in the section would seem to be some such qualifications as are needed in what are known as the learned professions. The Solicitor-General emphasised that aspect by saying that a profession is something in which the livelihood of the person exercising the profession is attributable to his intellectual qualifications. We ventured to put to him that that was too narrow a view of the different types of qualification which may create a profession. The attribute "intellectual" leaves out of account aesthetic qualifications—the arts, painting, sculpture, music—literary qualifications and a good many other qualifications that may be utilised by a professional man like the appellant, who is dealing with a subject-matter cognate to medicine. MACNAGHTEN, J., treated the work of prescribing spectacles as carried on by the appellant here as a very much simpler task than I think he was justified in treating it; and then added as the conclusion at which he had arrived, "that the General Commissioners were mistaken, in matter of law, in thinking that a person who professes to be an optician is carrying on a profession within the meaning of sect. 12." With great respect, the present case does not depend upon the consideration of a universal proposition about opticians in general, but solely on the question as to whether or not the conclusion of the Commissioners was based upon some evidence before them which justified it.

I think that in the present case the facts quite clearly were adequate to justify the conclusion at which the Commissioners arrived. Whether I personally should have come to the same conclusion or not is irrelevant. If there was evidence upon which they could reach it, this court cannot interfere with it.

One or two cases have been cited to us, including one containing a definition by SCRUTTON, L.J., in *Commissioners of Inland Revenue* v. *Maxse* (1). The definition appears on p. 657. SCRUTTON, L.J., ventured to propound, with a good deal of diffidence, a general proposition as to the meaning of the word "profession." I do not think it is necessary to analyse it in detail, but I think it was a little too sweeping. I prefer to follow LORD STERNDALE, M.R., in *Currie* v. *Commissioners of Inland Revenue* (2), at p. 336, where he said in very clear language that in a case of an appeal before the Commissioners, where A
there is some evidence each way, it must be a question of degree, with which it is characteristically the function of the Commissioners to deal, and to deal finally. It is a well-known passage and, in my view, could hardly be improved upon. I do not think it necessary to refer to the other cases cited to us. There was one case (*Webster* v. *Commissioners of Inland Revenue* (3)), in which the Commissioners had held, with evidence before them upon which they might have decided either way, that there was no profession being carried on. In the B
present case, also with evidence upon which they might have decided either way, they have held that a profession was being carried on. I leave it at that.

For those reasons I think that in this case we must allow the appeal with costs here and below.

DU PARCQ, L.J.: I agree.

I think that there is really no difficulty at all about the words "dependent C
wholly or mainly on his or their personal qualifications"; that is to say, I think that in this case there was plainly evidence on which the Commissioners could find that the appellant's profits were mainly dependent on his personal qualifications. The difficulty in this case, so far as one exists, arises out of the simple word "profession." The solution is, as my Lord has said, quoting LORD STERNDALE, M.R., that "there is a very large tract of country in which the matter becomes a question of degree." I hope that nobody will think that we are D
deciding here that opticians as a class are all carrying on a profession. We are, of course, deciding nothing of the kind. We are simply saying that in this particular case it was open to the Commissioners to find on the facts that the appellant was carrying on a profession. Speaking for myself, if the Commissioners had found the other way, I should not have been in the least inclined to say that it was not open to them to do so. I think it would have been; and I will not say how I would have been likely to decide the case if I had been E
sitting in their place.

It seems to me to be dangerous to try to define the word "profession," as SCRUTTON, L.J., realised. There are a good many cases about which almost everybody would agree. Everybody would agree, I should think, that when you find a business, however extensive and however distinguished in some ways it may be, which consists merely of selling property, whether real or F
personal, that is not a profession. It is necessary to add the word "merely," since a sculptor, for instance, may be said to be selling goods. I know there may be a question whether one can regard the contract in that case as a contract for sale, but, if it is not a contract for sale, it may be described as a contract to do work and labour, and there, again, everybody would agree as a general rule that a man who earns his money merely by doing work and labour, without more, is carrying on a trade and not a profession. Again the word "merely" G
has to be inserted to guard against it being thought that many people are not carrying on a profession who at the same time may be said to be doing work or labour. I think that everybody would agree that, before one can say that a man is carrying on a profession, one must see that he has some special skill or ability, or some special qualifications derived from training or experience. Even there one has to be very careful, because there are many people whose work demands great skill and ability and long experience and many qualifications H
who would not be said by anybody to be carrying on a profession.

Ultimately one has to answer this question: Would the ordinary man, the ordinary reasonable man—the man, if you like to refer to an old friend, on the Clapham omnibus—say now, in the time in which we live, of any particular occupation, that it is properly described as a profession? I do not believe one can escape from that very practical way of putting the question; in other words, I think it would be in a proper case a question for a jury, and I think in a case like this it is eminently one for the Commissioners. Times have changed.

There are professions to-day which nobody would have considered to be professions in times past. Our forefathers restricted the professions to a very small number; the work of the surgeon used to be carried on by the barber, whom nobody would have considered a professional man. The profession of the chartered accountant has grown up in comparatively recent times, and other trades, or vocations, I care not what word you use in relation to them, may in future years acquire the status of professions. It must be the intention of the legislature, when it refers to a profession, to indicate what the ordinary intelligent subject, taking down the volume of the statutes and reading the section, will think that "profession" means. I do not think that the lawyer as such can help him very much.

I agree that in this case there was evidence to support the finding of the Commissioners and that the appeal should be allowed.

UTHWATT, J.: I agree. It appears to me that there was evidence on which the Commissioners could properly come to the conclusion they did, and on that footing their finding ought to stand.

Appeal allowed with costs.

Solicitors: *Snowball, Kyffin, Taylor & Pruddah* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Distinguished. CURL *v.* ANGELO.
[1948] 2 All E.R. 189.

VICKERY *v.* MARTIN.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **July 5, 1944.**]

Landlord and Tenant—Rent restriction—Premises within the Acts—Boarding house—Tenant reserving for own use certain rooms according to requirements—Whether subject to control—Rent and Mortgage Interest Restrictions Act, 1939 (*c.* 71), *s.* 3 (3).

The appellant was the assignee of a lease of a house. The assignor had covenanted to use the premises as a private dwellinghouse only, but had in fact used it as a boarding house to the knowledge of the landlord who had not objected. After the assignment the appellant also used the premises as a boarding house, reserving for her own use certain rooms which she changed as circumstances required. The question for the determination of the court was whether the premises came under the Rent Restrictions Acts or were excluded therefrom as being business premises. It was contended on behalf of the respondent landlord that sect. 3 (3) of the 1939 Act did not apply where the substantial user of the house was for business purposes:—

HELD: upon the true construction of sect. 3 (3) of the 1939 Act, the test is not whether the dwellinghouse is substantially used for business purposes but whether in fact part of the premises are used as a residence.

[**EDITORIAL NOTE.** This decision reaffirms the proposition that, where premises are used partly for business purposes and partly as a residence, they are within the Acts although the part used as a residence is smaller than the part used for business premises. There is no question of the substantial user of the premises. If part is used as a residence, the premises are controlled.

AS TO RENT RESTRICTION ON PARTLY BUSINESS PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 315, 316, para. 371; and FOR CASES, see DIGEST, Vol. 31, pp. 558, 559, Nos. 7054-7067.]

Cases referred to:

*(1) *Epsom Grand Stand Assocn., Ltd.* v. *Clarke*, [1919] W.N. 170; 35 T.L.R. 525; 31 Digest 581, *7296*.

*(2) *Hicks* v. *Snook* (1928), 93 J.P. 55; Digest Supp.

*(3) *Colls* v. *Parnham*, [1922] 1 K.B. 325; 31 Digest 559, *7060*; 91 L.J.K.B. 335; 126 L.T. 480.

APPEAL by the tenant from a decision of His Honour JUDGE ARCHER, K.C., dated Mar. 29, 1944. The facts are fully set out in the judgment of LORD GREENE, M.R.

G. R. Mitchison for the appellant.

W. A. L. Raeburn for the respondent.

Lord Greene, M.R.: In the action out of which this appeal arises, the appellant was seeking to recover from the respondent rent which she had paid for certain premises on the ground that the premises were subject to the Rent Restrictions Acts, and the contractual rent was higher than the standard rent. There is no question that, from the point of view of rateable value, these premises fall within the Act. There is no question that the standard rent, if they do fall within the Act, was £35, whereas the contractual rent is £80, and the appellant was seeking to recover two years' difference between those two figures.

The house in question is what would popularly be described as a dwellinghouse. It is so described in the tenancy agreement, and it is known by the name of Deans and is situated in Ashenground Road, Haywards Heath. The actual tenancy agreement was made between the respondent landlady and a lady called Mrs. Manners. It was for three years at the rent of £80 per annum, and it contained the usual type of covenants that are to be found in the lease of a dwellinghouse. It contained a covenant not to exercise or carry on or permit or suffer to be exercised or carried on at any time during the said term any trade or business or profession but to use the same as a private dwellinghouse only.

The tenant, Mrs. Manners, was associated with the present appellant, and those two ladies, being desirous of adding to their income, determined that the house was a convenient house into which to take paying guests, or to carry on as a lodging house, boarding house, guest house, or whatever form of words one fancies. The landlady was aware of their intention and, in spite of the covenant in the lease, she made no objection to these ladies taking in guests or lodgers.

The two ladies, unfortunately, did not get on entirely well and eventually, after a comparatively short time, they parted company and the lease was assigned on July 30, 1940, by Mrs. Manners to the present appellant, Mrs. Vickery.

The house is obviously not a large house. During the whole time that paying guests had been taken there, the total number on the books has been twenty. That does not mean that there were twenty there at the same time. At the time of the trial, there were three and we are not told what the maximum capacity of the house was. But from the rent and the rateable value, I should assume that it is a comparatively small house. At any rate, the present appellant, whose husband was in the army, and who enjoyed a separation allowance of, I think, £1 19*s*. a week, desired to supplement her income and, accordingly, she took this house and used it to take in paying guests or lodgers. She said in her evidence, and it was not cross-examined to or contradicted, that she arranged with Mrs. Manners to take a house and take in lodgers. That referred to the original letting. Mrs. Manners rented the house and the two ladies provided the furniture, part one and part the other, and when Mrs. Manners went away, the appellant bought her furniture. She said she had a sitting room, bedroom and spare room and a living room and a scullery. The other rooms were used for paying guests. She also said:

> I only use the sitting room when I have no guests. I have always had a bedroom and living room and always a spare room.

The county court judge described her manner of living in that house in the following words:

> She moved her own occupation of the rooms about as the exigencies of the business demanded.

That is not the evidence because her evidence was that she always had her living room and she always had a spare room and she always had a bedroom. We are told that there was some reference in the evidence, which is not recorded on the note, that on one occasion, if not more, she had changed her bedroom in order that a guest could have her own bedroom and she, I suppose, went into a smaller one.

But the real fact of the matter is that she was living in this house subject from time to time to the right of her guests to the use and occupation of such parts of the house as she chose to let them occupy. Subject to that, the house was hers. It was there that she lived, and she took it for the purpose of living there and carrying on this business, if it is so to be called, of taking in guests or lodgers.

The judge found one or two other facts. He said that the parties intended that the house should be used as a boarding house. That certainly does not bring the respondent home, or anywhere near home, because the user as a boarding house is not inconsistent with the house being a dwellinghouse within the meaning of the Rent Restrictions Acts. He then found that the house was taken by Mrs. Manners, that was the first lessee, solely for use as a lodging or guest house. If that means she did not take it also as a dwellinghouse for herself, it seems to me that it is not supported by any evidence.

Then the next matter that I need refer to in the judge's finding in reference to the appellant is :

> The plaintiff was on the business premises managing the business. Her living there was entirely ancillary to carrying on the business.

I do not quite follow what that means because, if a lady takes in lodgers for the purpose of supplementing her income and enabling her to keep up her house, it might equally well be said that the taking in of the lodgers was ancillary to her occupation of the house as a dwellinghouse. It seems to me that it not only does not carry the matter any further, but it is paving the way for the application of a test which is not the right test. Then he said she moved her occupation of rooms about and that I have already referred to.

The question arises whether the appellant on those facts was entitled to the protection of the Act. The house is what is called a 1939 house and the most relevant section is sect. 3 (3) of the Act of 1939. The first part of that subsection reads as follows :

> Subject to the provisions of para. (*a*) of the last preceding subsection, the application of the principal Acts, by virtue of this section, to any dwellinghouse shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes . . .

That is repeating in practically so many words a provision of the Act of 1920, the second proviso in sect. 12 (2) of that Act. The phrase used in the 1939 Act is " dwellinghouse." The expression in the 1920 Act is " house." But that does not, I think, make any difference because we find in sect. 16 of the Act of 1933 that " dwellinghouse " in that Act has the same meaning as in the principal Acts ; that is to say, a house let as a separate dwellinghouse or part of a house being so let. Therefore, " dwellinghouse " here means a house let as a separate dwelling. .

I would like to say a word about the history of that subsection of the Act of 1920 ; that is to say, the second proviso to subsect. (2). It first appeared in this legislation in that Act. In 1919 a case was decided in this court which, in effect, shows that the law before that subsection was enacted was the same as it was afterwards. That was *Epsom Grand Stand Assocn., Ltd.* v. *Clarke* (1). That was the case of a hotel in which the defendants lived running their hotel business. The question arose whether those premises were protected by the Act.

With regard to that, BANKES, L.J., delivering the leading judgment, said, at p. 171 :

> Then is this hotel a dwellinghouse ? The Act contains no definition of a dwellinghouse. The only conditions are that the premises must be a house or part of a house and let as a separate dwelling. If they fulfil these conditions and others relating to value then they are to be deemed to be a dwellinghouse to which the Act applies.

Then he refers to the residence there and that the premises were let for occupation, and he held, at p. 171 :

> It is in the fullest sense a dwellinghouse, and none the less so because it is also a public house.

That was the law before the Act of 1920 was passed.

Then in a subsequent case in this court reference was made to that authority and to the new section of the 1920 Act. It is *Hicks* v. *Snook* (2). In the middle column on p. 56 SCRUTTON, L.J., said of that decision :

> In that case the Court of Appeal held that as he was dwelling in the house and had a right to dwell in the house, the house was a dwellinghouse, and the fact that besides being a dwellinghouse part of it was used for business premises did not prevent it being a dwellinghouse to which the Act applied.

Then, after quoting the proviso in the Act of 1920, he said, at p. 56 :

> That proviso appears to me to affirm in statutory form what the Court of Appeal had decided.

That is the history of this provision. It is to be noted that, after that pronouncement in the Court of Appeal in 1928, this phraseology reappears unaltered in the Act of 1939. It must be taken, therefore, that the legislature is satisfied with that phrase as construed and considered by this court as being sufficient to express its intention.

Let me turn back to the actual words and see what they say. They say this, and I do not see myself any particular difficulty about it. Once a house is a dwellinghouse within the meaning of the Act, it is not sufficient to exclude it from the operation of the Act merely to show that part of the premises is used as a shop or office or for business, trade, or professional purposes. A

The first question, therefore, in relation to any particular premises is : Are these premises a dwellinghouse within the meaning of the Act ? If they are, it is no use the landlord coming and saying that part of the premises are used for business purposes because that is the very thing which the subsection says is not sufficient to exclude them. If he wishes to exclude them, he has got to show something more. He can show, no doubt under the Act, a variety of things which will keep the premises away from the protection of the Act ; but B it is not sufficient to show only that part of the premises is used as a shop or office or for business purposes, and so forth.

Here, as I have said, this house is unquestionably in my opinion a dwellinghouse. On the facts, it was impossible to hold otherwise. It was a house in which this lady lives. She had the exclusive part use of it. It is her home. She has her husband to come and live there when he is available, and her children, and it is hers exclusively subject to such licences as she may from time to C time grant to such persons as come as lodgers, or guests, in the house. Subject to that, it is her home and it is her dwellinghouse, and the fact that she puts herself from time to time to a certain amount of inconvenience does not alter the fact that it is her home and her house, and there she lives. If the judge's judgment is to be read as saying this is not a dwellinghouse, then, in my opinion, there was no justification on the evidence for so holding. D

The house being a dwellinghouse, what is it which is alleged to be sufficient to exclude it from the Act ? It is the very thing which the subsection says is not sufficient, namely, that part of it, to wit, such part as from time to time is used for the purposes of the guests or the lodgers, is used for that particular business. That is not enough and that is what the section says.

Counsel for the respondent says that the section cannot be read literally and something has to be read into it. What he says has to be read into it is E this. He says it must be construed, at any rate in relation to the facts as we have here, as meaning " and shall not be excluded by reason only that a non-substantial part of the premises is used as a shop or office or for business, trade or professional purposes." He says in the present case the substantial user of these premises was for business purposes and the reading in of the word "non-substantial," as I have just read it, can only mean that the use is excluded from the Act. I can find no justification whatever for reading anything into this part of the F subsection. The subsection was enacted at a time when the legislature had before it the decision of this court in the *Epsom Grand Stand* case (1). It repeated precisely the same language when it had before it the decision of this court in *Hicks* v. *Snook* (2). It is unthinkable to me that the legislature can have intended that such a word as " non-substantial " should be read into this by judicial interpretation. I can see no reason for doing such violence to the G subsection at all.

The county court judge in effect took the view which counsel for the respondent has put before us, because he directed his attention to the substantial use of these premises. I can sympathise with him, as I always do sympathise with county court judges who are confronted with the task of trying to interpret these Acts of Parliament, and particularly when the word " substantial " was taken by the county court judge from the language of a decision of SHEARMAN, J., H in the Divisional Court, in *Colls* v. *Parnham* (3). That was six years before the decision of this court in *Hicks* v. *Snooks* (2), and SHEARMAN, J., in his judgment there, referring to the *Epsom Grand Stand* case (1), said this, at p. 327 :

> . . . but *Epsom Grand Stand Assocn.* v. *Clarke* (1) had previously decided that where premises in one letting were partly let for trading purposes, but there was a substantial letting and user of them for residential purposes, they constituted a dwellinghouse within the Rent Restriction Act, 1915 . . .

With respect to that learned judge, he misapprehended, in my opinion, the meaning of the decision in the *Epsom Grand Stand* case (1). What that decision meant has been made perfectly clear by this court in *Hicks* v. *Snooks* (2), and it is only fair to the county court judge to say that he did not have the latter decision before him.

Nevertheless, I cannot take the word "substantial" in the judgment of SHEARMAN, J., as being a test for the purpose in which we are at present engaged. It seems to me on the clear language of this section and on the facts of the case, that the premises are undoubtedly a dwellinghouse, and that nothing is put forward as taking them out of the Act, save the fact that part of the premises are used for business purposes, and I decline with that language in front of me to embark upon an enquiry as to what is the substantial use or what, in the language of the judge, is the principal or the ancillary use of these premises.

I may conveniently conclude by referring to some words in the judgment of SANKEY, J., in *Hicks* v. *Snook* (2), which appear to me to put the matter from a very useful angle. He said, at p. 56:

> So far as this case is concerned, and on the facts of this case, I prefer to put my judgment in the form of a negative. It cannot be said that the house in question was not let as a dwellinghouse (see the lease); it cannot be said that in this case the plaintiff had not a right to dwell there . . . and it cannot be said that the plaintiff has not in fact dwelt there, or has not dwelt there . . . for twenty-five years, and is still dwelling there. I think we were told that there were more rooms occupied in these premises for dwelling purposes than were occupied as a shop. But I do not, however, rest my judgment upon that. I prefer to go on the admitted facts of this case without saying what would happen if the facts in some future case which may be brought up are different.

Every word of that appears to me to apply to the facts in the present case. The defendant has failed to show circumstances sufficient to exclude the house from the operation of the Act, and the appeal must be allowed and judgment must be entered for the plaintiff for £90 and costs on the same scale as were allowed below, scale C.

MACKINNON, L.J.: I agree.

LUXMOORE, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *Elvy Robb & Co.* (for the appellant); *Church, Adams, Tatham & Co.*, agents for *Waugh Brunnall and Bally*, Haywards Heath (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CONSTANTINE *v.* IMPERIAL LONDON HOTELS, LTD.

[KING'S BENCH DIVISION (Birkett, J.), **June 28, 1944.**]

Inns and Innkeepers—Hotel—Refusal to accommodate guest—No special damage—Right to general damages.

The defendants, who were innkeepers, refused without any just cause to accommodate the plaintiff, who was, however, accommodated at another hotel of which the defendants were the proprietors. The plaintiff brought this action for wrongful refusal to receive him as a guest but did not allege or claim any special damage:—

HELD: (i) the action was maintainable without proof of special damage; but, in the circumstances of the case, the plaintiff was only entitled to nominal damages.

(ii) the fact that the plaintiff was received in another hotel in the same ownership was no defence, having regard to the circumstances in which he was refused admission to the first hotel.

[**EDITORIAL NOTE.** The real question here is whether such an action lay against the innkeeper without proof of special damage. The matter is very fully considered in the judgment and in the result the court has relied upon *Ashby* v. *White* (6) and applied the principle that, where the law gives a right, it also affords a remedy and will presume at least nominal damages. Though the plaintiff in this case had suffered considerable indignity and humiliation, exemplary damages were refused.

AS TO NECESSITY TO PROVE DAMAGE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 9, 10, para. 10; and FOR CASES, see DIGEST, Vol. 1, pp. 23-25, Nos. 187-205.]

Cases referred to:

(1) *Rothfield* v. *North British Ry. Co.*, [1920] S.C. 805; 29 Digest 7, *72i*; 57 Sc.L.R. 661.

(2) *Fell* v. *Knight* (1841), 8 M. & W. 269 ; 29 Digest 6, *60* ; 10 L.J.Ex. 277.
(3) *White's case* (1558), 2 Dyer 158 *b* ; 29 Digest 4, *29*.
(4) *Hawthorn* v. *Hammond* (1844), 1 Car. & Kir. 404 ; 29 Digest 6, *52*.
(5) *R.* v. *Sprague* (1899), 63 J.P. 233.
*(6) *Ashby* v. *White* (1703), 2 Ld.Raym. 938 ; 17 Digest 81, *20* ; Holt K.B. 524 ; 6 Mod. Rep. 45 ; 1 Salk. 19 ; *revsd. on other grounds* (1704), 1 Bro. Parl. Cas. 62.
*(7) *Jones* v. *Jones*, [1916] 2 A.C. 481 ; 32 Digest 28, *177* ; 85 L.J.K.B. 1519 ; 115 L.T. 432.
(8) *Savile* v. *Roberts* (1698), Carth. 416 ; 33 Digest 507, *510* ; 1 Salk. 13 ; 5 Mod. Rep. 394 ; 12 Mod. Rep. 208 ; Holt, K.B. 150.
(9) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674 ; 33 Digest 468, *21* ; 52 L.J.Q.B. 488 ; 49 L.T. 249.
*(10) *Neville* v. *London Express Newspaper, Ltd.*, [1919] A.C. 368 ; 17 Digest 155, *560* ; 88 L.J.K.B. 282 ; 120 L.T. 299.
(11) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415 ; 17 Digest 81, *21* ; 9 L.J.O.S.K.B. 42.
(12) *Embrey* v. *Owen* (1851), 6 Exch. 353 ; 17 Digest 84, *37* ; 20 L.J.Ex. 212 ; 17 L.T.O.S. 79.
(13) *Webb* v. *Portland Manufacturing Co.* (1838), 3 Sumner's Rep. 189.
(14) *Browne* v. *Brandt*, [1902] 1 K.B. 696 ; 29 Digest 7, *75* ; 71 L.J.K.B. 367 ; 86 L.T. 625.

Action for damages for refusing to receive and lodge the plaintiff at the defendants' hotel in London. The defence denied the allegation and stated that the plaintiff, after he had been received in the hotel, left voluntarily and was accommodated at another hotel in the ownership of the defendants. The facts sufficiently appear from the judgment.

Sir Patrick Hastings, K.C., and *R. Heilbron* for the plaintiff.

G. O. Slade, K.C., and *A. Aiken Watson* for the defendants.

Birkett, J. : The pleadings and correspondence in this case made it quite clear that this was not a claim for damages for defamation and, although it was alleged that contemptuous and insulting words were used by the manageress of the Imperial Hotel, there was no claim before the court for damages for slander ; nor was there any claim for damages for breach of contract. Counsel for the defendants conceded that the plaintiff had a contract with the defendants and, on proof of breach of that contract, he would have been entitled to nominal damages at least ; but no claim in contract is made.

The plaintiff's claim was simply that the defendants were innkeepers ; that the Imperial Hotel was a common inn kept by the defendants for the accommodation of travellers and that they were under a duty in the circumstances to receive and lodge him ; that they refused to receive and lodge him ; that he was compelled to go elsewhere and was put to much inconvenience. No special damage was alleged or claimed. Counsel for the defendants conceded from the outset (i) that the defendants, for the purpose of this case at least, were innkeepers and that the Imperial Hotel was a common inn ; (ii) that the plaintiff came to the Imperial Hotel on July 30, 1943, and requested the defendants' servants to receive and lodge him as a traveller ; (iii) that the defendants had sufficient room for the purpose of receiving him ; (iv) that he was ready and willing to pay to the defendants all their proper charges and had in fact previously paid a deposit of £2 for the necessary accommodation ; (v) that he was a man of high character and attainments, a British subject from the West Indies, and, although he was a man of colour, no ground existed on which the defendants were entitled to refuse to receive and lodge him. It is important that that should be known.

I find on the facts that the defendants did refuse to receive and lodge the plaintiff in their hotel, as alleged in the statement of claim, without any just cause or excuse and that plaintiff did not leave voluntarily, as the defendants allege.

Before dealing with the law, I ought perhaps to deal with a further submission made by counsel for the defendants ; that, as the plaintiff went to the Bedford Hotel that night, after leaving the Imperial Hotel and the Bedford Hotel also belongs to the defendant company, and he was received and lodged there, the defendants were in the same position as though he had been received and lodged at the Imperial Hotel and there had, therefore, been no refusal on which the plaintiff could rely in this case. I reject this contention. Apart from the fact that the two hotels were in the same ownership, no further evidence was given as to the relationship between them ; and the circumstances in which the plaintiff removed to the Bedford Hotel were such that it is impossible to find that the defendants did not refuse to receive and lodge him.

In *Rothfield* v. *North British Ry. Co.* (1) LORD ANDERSON said at p. 812 :

> It was suggested that, as the pursuer might have obtained accommodation at another hotel in Edinburgh, he was not entitled to insist on obtaining it at the defenders' hotel. I do not agree. A traveller is, in my opinion, entitled to choose the hotel at which he desires to be a guest, and the defenders are not entitled to put a traveller, desiring A to use their hotel, to the trouble and expense of finding another hotel.

In *Fell* v. *Knight* (2) it was held that an innkeeper was only bound to provide reasonable accommodation ; and counsel for the defendants said in the present case that by offering accommodation at the Bedford Hotel they had fulfilled their duty. I cannot accept this view. The claim before me is that the defendants refused to receive and lodge the plaintiff at the Imperial Hotel and I hold it to be no answer that he went to the Bedford Hotel under protest B in the circumstances of this case.

On that clear state of the facts I have come to a clear conclusion, and I could state it in a couple of sentences; but, out of respect to the arguments which were addressed to me on the law, I must deal with that aspect of the matter in just a little detail. The first and main submission of the defendants was that the present action is an action on the case and the gist of the action on the case is the damage actually suffered and proved, and here no damage was suffered C and no special damage is either alleged or proved.

The statute of Edward I, authorising the writ *in consimili casu* produced the writs which were classified under the common denomination "writs of trespass on the case" and the actions on the case based on them included the present form of action before me, certainly from very early times, based on the common law and on what was termed the custom of the realm. The distinction between D the writ of trespass, and the writ of trespass on the case would appear to be that trespass was the appropriate remedy for the direct invasion of a right by force either actual or implied by law, and case was the remedy for a wrong in which one at least of those elements was lacking. In an ordinary trespass, in which a forcible act directly caused damage to the plaintiff's person or property, the connection between the act and the damage was usually obvious ; but in trespass the damage was presumed ; but in case the damage arising from the E wrongful act was the gist of the action. Indeed, it has been said by the late SIR WILLIAM HOLDSWORTH, to whose HISTORY OF ENGLISH LAW I am much indebted, that the constant need to inquire whether the damage complained of was the proximate consequence of the act of the defendant familiarised the courts with the comparatively modern conception of the idea of negligence in law ; but, although it was the general rule that the damage was the gist of the action on the case, and although without question the action before F me is an action on the case, it is said by counsel for the plaintiff that that rule is by no means an inflexible rule and that in certain cases, of which he says that this is one, damage will be presumed and that the plaintiff can recover.

It is to be observed that *White's* case (3), *Fell* v. *Knight* (2), and *Hawthorn* v. *Hammond* (4), were all actions on the case ; and incidentally an indictment may be brought, as in *R.* v. *Sprague* (5), which was a case brought so recently G as 1899 at the Surrey Quarter Sessions and shows that the innkeeper could be indicted and, indeed, in that case was indicted for not receiving a guest who was attired in what in those days was called rational dress. The great and celebrated case of *Ashby* v. *White* (6), to which counsel for the plaintiff drew my attention and to which I shall have to refer in one moment, it must always be remembered, was itself an action on the case and I observed in reading the very interesting argument in HOWELL'S STATE TRIALS, vol. 14, that the Mr. Slade of that day H used the very language that the Mr. Slade of this day used before me : that the action would not lie, inasmuch as it was an action upon the case and that damage was the gist of the action and that no damage had been proved or could be presumed. Reference was also made to the action for defamation, which is, of course, an action on the case, but in libel damages need not be proved ; they are presumed. The action for slander is, of course, an action on the case, but in certain specified cases damage need not be proved, but is presumed.

These matters go very far back into the history of law. In the beginning of the sixteenth century the common law courts began to take from the ecclesiastical courts most of the suits for defamation. The common law remedy was an action on the case and damage was undoubtedly the gist of the action; but the court of Star Chamber regarded defamation as a crime and, when the Court of Star Chamber was abolished, the law of defamation included these two separate and divergent parts from the common law and from the Court of Star Chamber. In slander, too, by the middle of the seventeenth century the categories that we know to-day so well in which words are actionable *per se* had been established; the imputation of a criminal offence punishable by imprisonment; the imputation of a contagious disease or the imputation of unfitness for carrying on a trade or profession. The first of these categories arose from an attempt to distinguish the spheres of jurisdiction of the common law courts and the ecclesiastical courts; the others, most probably, upon the quite obvious tendency of the imputation itself to cause damage. In libel, after the Restoration the courts held that libel was a wrongful act from which damage could be presumed; but in slander no extension of the settled categories is permitted to this day.

In *Jones* v. *Jones* (7) LORD WRENBURY in his speech in the House of Lords, said this, at p. 506:

> The fact that the imputation is a gross and grievous attack upon personal character is not of itself enough. For otherwise a statute would not have been necessary to enable a woman or a girl to sue for slander upon her chastity. The imputation must be such and the state of facts such, not as that a judge would necessarily or reasonably presume or infer damage, but as that judges in the past have presumed or inferred damage. This involves a confession which I fear must be made, that the law of slander rests not upon any principle whose elasticity will admit new cases, but upon artificial distinctions. An artificial and arbitrary rule is not a principle. The plaintiff must for success bring his case within the very limited class of cases in which slander has been held actionable. He must show that the imputation is such and the state of facts is such as that a presumption of damage as matter of law has been made in the past under like circumstances.

The fact, therefore, that libel is an action on the case and yet damage is to be presumed is based upon the historical development of the law of defamation, as, of course, is the highly artificial position of the law of slander, and it affords me very little help in the question which I have to decide today.

Reference was also made in the course of the argument by counsel on each side to the action for malicious prosecution. It was the development of the action on the case, founded upon the statutory writ of conspiracy, which gave rise to the tort of malicious prosecution; and HOLT C.J., defines the law in *Savile* v. *Roberts* (8). It is to be noted that, amongst other things, he laid down that the plaintiff must prove one of three kinds of damage: (i) damage to his fair fame; (ii) damage to his person; (iii) damage to his property. The ground of the action was not conspiracy, but the damage; and as a rule no action will lie for bringing a civil action maliciously, but the bringing of an action maliciously may give rise to an action on the case if special damage is proved. In *Quartz Hill Gold Mining Co.* v. *Eyre* (9) BOWEN, L.J., said this, at p. 609:

> The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the doctrine laid down by HOLT, C.J., in *Savile* v. *Roberts* (8).

He then refers to the three matters to which I have referred as to the kinds of damage and continues:

> It is clear that HOLT, C.J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution.

Then there is the following passage which I particularly want to cite, as I have had it before me in the consideration of this matter:

> . . . although every judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

> But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution.

Counsel for the defendants further relied upon the decision of the House of Lords in *Neville* v. *London Express Newspaper, Ltd.* (10). That is clearly an authority of very great importance. The case dealt in 1919 with most interesting questions about the tort of maintenance. In the middle ages the offence of maintenance was treated, as was defamation and conspiracy, both as a crime and as a tort; but in modern times it came to be regarded as a tort rather than a crime. In defamation and conspiracy, the civil action was an action on the case, in which damage was the gist of the action; but in maintenance it appears to have been doubtful whether the action was not an action in the nature of trespass, in which nominal damages could be recovered. In 1919, in *Neville's* case (10), there were two very closely connected questions which were raised and decided. The first was whether an action for maintenance would lie in the absence of proof of special damage, which is, of course, *mutatis mutandis* the question which I have to decide in the present case; and the second question, closely allied, was whether the success of the maintained litigation was a bar to the action: The decision of the majority of the House of Lords, Lord Finlay, Lord Shaw and Lord Phillimore, was that the action would not lie in the absence of proof of special damage; and counsel for the defendants pressed that decision upon me in this case. Lord Haldane and Lord Atkinson dissented; and counsel for the plaintiff said that, although I was bound by the majority decision, if this were a matter of maintenance, the principles enunciated by the dissentient Lords were applicable to the facts before me.

The dissentient Lords thought that, as maintenance was admittedly illegal, the law should give a remedy in tort for nominal damages, as in the case of trespass and libel, since, as Lord Atkinson said, at p. 405:

> . . . the mere invasion of the plaintiff's legal right imports damage and is sufficient to maintain the action.

If conduct be illegal or, indeed, criminal, it does not necessarily follow that an action in tort for nominal damages will lie. If the action for maintenance is to be regarded not as an action on the case, analogous to trespass, no doubt an action would lie for nominal damages; but the majority of the House of Lords treated the action as an action on the case and applied the general rule in that case.

On the second question the majority of the House of Lords held that the success of the maintained litigation was not a bar to the right of action for maintenance. This is, if one may say so with the very deepest respect, in apparent conflict with the decision on the first question, for, if the maintained litigation was just and succeeded and is not a bar to the action, the plaintiff could scarcely claim anything but nominal damages and, according to the answer to the first question, the action for nominal damages will not lie. There is a passage in the speech of Lord Finlay which I think is of importance in the present case. He said, at p. 379:

> The action for maintenance is, in my opinion, one which can be sustained only if special damage has been occasioned to the plaintiff by the maintenance. The maintenance may be punishable as an offence, but to give a right of action the commission of the offence must have caused damage to the plaintiff. Of course, if a right has been infringed, as in *Ashby* v. *White* (6), where a man was deprived of his right to vote, no proof of damage is necessary. As Lord Holt expressed it "an injury imports a damage, when a man is thereby hindered of his right."

At p. 381, Lord Finlay, speaking of damages says:

> As there was no damage in the present case, I am of opinion that the action for

maintenance must fail and that judgment must therefore be entered for the defendants on this head of claim. I think it would be futile to send the case down for a new trial even if it were regarded as one in which for the maintenance of the action proof of damage is not necessary. We have all the facts before us, and it is clear that even on this view only nominal damages could be recovered. Any verdict giving substantial damages on these facts would be perverse and would be set aside. If then the action for maintenance were to be regarded as one for the invasion of a right, to sustain which special damage is not necessary, the proper course would be to give judgment for the plaintiff for nominal damages. But, in my opinion, this head of claim fails altogether.

I need not cite other than a passage from the dissentient judgment of Viscount Haldane, which shows quite clearly that what he was there doing was to say that in the action for maintenance the proper principle to be applied was the principle which is enunciated by Holt, C.J., in *Ashby* v. *White* (6). The passage to be referred to is at p. 392 :

> My Lords, as Lord Holt showed in *Ashby* v. *White* (6), every violation of a right imports damage in contemplation of law. This principle applies whether the right arises out of a contract, as in *Marzetti* v. *Williams* (11), or out of a tort, as in *Embrey* v. *Owen* (12). The damage may be substantial, but may also amount to what is merely nominal.

A little later, after quoting Parke, B., he says :

> But where the right is, as it often is, an absolute right the doctrine laid down by Lord Holt in *Ashby* v. *White* (6) applies, and every infringement of such an absolute right gives a claim to nominal damages, even though all actual loss or injury is disproved.

Then on p. 393 Viscount Haldane said :

> Under these circumstances I think he was entitled to no more than nominal damages for the violation of his right, and that the jury ought to have been directed to this effect. I think that justice will be done if judgment on the claim for maintenance is entered for him for merely nominal damages, unless the jury on a new trial think that exemplary damages should be given. No direction suggesting such damages should be given.

It is clear, therefore, upon that case that the real point to be decided was with what class of case the House of Lords was dealing, the majority saying that it was an action founded upon the case, in which special damage is essential ; Viscount Haldane and Lord Atkinson saying that it was a claim that was akin to the action in *Ashby* v. *White* (6).

The case before me is admittedly in the form of an action on the case ; but the plaintiff's main contention was that this was a case in which the law will presume damage ; that the decision in *Neville* v. *London Express Newspaper, Ltd.* (10), to which I have just referred, does not affect this case, and he relies very strongly on the most celebrated case of *Ashby* v. *White* (6), which is dealt with with very great fullness and with very great interest in Howell's State Trials, Vol. 14, where the contentions before the court are very clearly set out and discussed.

The case is so very well known that I do not think that I need trouble to detail any of the facts ; but at p. 950, Holt, C.J., says :

> The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer. I am of opinion that judgment ought to be given in this case for the plaintiff.

At p. 950 he said :

> I did not at first think it would be any difficulty, to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it.

There is a very long disquisition upon that matter and then at p. 953 comes the very famous passage upon which counsel for the plaintiff relies and which was, of course, the passage cited by the dissentient Lords in *Neville* v. *London Express Newspaper, Ltd.* (10). Holt, C.J., says :

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it ; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

At p. 955 he said :

> And I am of opinion, that this action on the case is a proper action. My brother

POWELL indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.

Is the principle of that case to be applied to the facts of this case? As I have said, the argument which counsel for the defendants addressed to me A was the very argument which was addressed to the court in *Ashby* v. *White* (6), and in HOWELL'S STATE TRIALS, vol. 14, it is most interesting and most instructive to see the arguments developed on these matters. In *Embrey* v. *Owen* (12) PARKE, B., said this at p. 368:

> It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any B abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued, would be the foundation of a claim of adverse right in that proprietor.
>
> We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume C damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby* v. *White* (6), by LORD HOLT, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced in a very able judgment of the late STORY, J., in *Webb* v. *Portland Manufacturing Co.* (13).

The passage from STORY, J., the very able and learned writer and judge, is this or this is, at any rate, part of it (at p. 192):

> But I am not able to understand how it can correctly be said, in a legal sense, that an D action will not lie, even in case of a wrong or violation of a right, unless it is followed, by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages.

E The last case to which I need refer is the case which was referred to in argument but was not cited. A reading of the case is a most instructive thing. It is the Scottish case (and it is to be remembered that it is a Scottish case and I do remember it) of *Henry Rothfield* v. *North British Ry. Co.* (1). It is so recent a case as 1920. In a sentence, Mr. Rothfield brought a claim against the North British Railway Company for refusing to allow him to stay at their hotel, the North British Station Hotel, at Edinburgh. LORD ANDERSON, upon the F hearing of the case, awarded him on the first hearing one guinea damages. There were further matters, but finally it was decided by the full court that the defendants in that case were entitled to refuse to receive Mr. Henry Rothfield in their hotel. From the report it appears that:

> On Nov. 8, 1918, the Lord Ordinary (LORD ANDERSON), after a hearing in the Procedure Roll, being of opinion that he could decide the case without any inquiry into the facts, found and declared in terms of the declaratory conclusions of the summons, G and found the pursuer entitled to damages, which he assessed at the sum of one guinea.

The form of the action there was (*a*) for a declaration and (*b*) for damages, and the damages that were claimed were stated to be "for payment by the defenders of the sum of £105 in name of damages." I need not read from the judgment of LORD ANDERSON, although it is really most exhaustive and most instructive both upon the English law and upon the Scots law. The matter H came a second time before the Lord Ordinary, when he affirmed his previous decision, after listening to the evidence. Then at p. 825, the LORD JUSTICE-CLERK said: "He therefore raised the action to have his rights declared." Then a little later he said:

> The origin and development of this branch of the law have been different in England and Scotland. In England it is apparently based on the "custom of England," and has been the subject of many judicial determinations. In Scotland it had its origin in statutory provisions in the fifteenth century and has received little elucidation by judicial utterances, so far as the question raised in the present case is concerned,

A little later at p. 826 he said :

> But, if I may take the judgment of LORD ALVERSTONE, in *Browne* v. *Brandt* (14), as correctly stating the law of England, there does not seem to be much, if any, difference in the result between the laws of England and of Scotland on this subject.

Why I cite the passages in this case is because they may be helpful to me as showing what other minds felt upon similar facts, and I see that the LORD JUSTICE-CLERK, at p. 827, said this :

> Further, if members of the public have rights as to accommodation in an hotel, which I think they have, and if the keeper of an hotel is subject to the liabilities before referred to, then I am inclined to think that an action of declarator may be competently brought by a traveller, who desires to establish the existence of these rights and liabilities, against an hotelkeeper who refuses to recognise them, when the traveller legitimately and properly asks that they should be recognised and accorded to him, or, in the appropriate circumstances, puts forward his claim to have these rights declared. I am further inclined to be of opinion that the denial of such rights and liabilities, when legitimately and properly required to be recognised and observed by an individual traveller, would justify an appropriate action of declarator and damages, though the damages awarded might, of course, be merely nominal. I am not satisfied that a declaratory conclusion is an essential preliminary to a conclusion for damages in such an action.

LORD DUNDAS said at pp. 829, 830 :

> The pursuer concludes for £105 in name of damages. A claim of that nature must, I think, be supported by averment and proof of some actual legal wrong sustained by the pursuer, for which the defenders are responsible . . . A general denial of the pursuer's statement of his alleged rights does not, in my judgment, constitute the infliction of a legal wrong sounding in damages.

Then at p. 834 LORD SALVESEN said :

> There is, therefore, no evidence upon which we are entitled judicially to proceed of the pursuer having suffered any legal wrong from which a claim of damages, however nominal, might emerge.

LORD ORMIDALE said, at pp. 837, 838 :

> In this action the pursuer seeks to recover damages. He avers that he made application as a traveller for, and was refused, admission to the defenders' hotel, and so suffered a legal wrong. In my opinion, he may be held on one occasion to have made such an application and to have been refused . . . Accordingly, it seems to me that the pursuer did—apart from the question whether the defenders had good ground for refusing him—on this occasion suffer a legal wrong sounding in damages.

I have had to give my consideration to the whole of this case and, with the utmost respect for authority and with the utmost desire most loyally to follow authority which is binding upon me, I find that I have yet to decide the express point in this case without any express authority upon the point to guide me. Having given the matter the fullest consideration, I hold this action is maintainable without proof of special damage. The right, I think, is founded upon the common law. That right I find was violated in this case. The law affords a remedy and that injury imports damage. I think that the principles of the decision in *Ashby* v. *White* (6) apply to this case.

It only remains for me to say in a final sentence that I was urged by counsel for the plaintiff to award exemplary damages or substantial damages in this case, because of the circumstances in which the denial of the right took place, when the plaintiff suffered, as I find that he did suffer, much unjustifiable humiliation and distress. I do not feel upon the authorities that I can accede to that submission and request, having regard to the exact nature of this action and the form in which it comes before me.

My conclusion upon the whole matter is that I must give judgment for the plaintiff for nominal damages only and I, therefore, award him in this action the sum of five guineas.

Judgment for the plaintiff for £5 5s. with costs up to date of payment in and after that date the general costs upon liability, any costs upon the question of amount to be the defendants' and to be set off.

Solicitors : *Isadore Goldman & Sons*, agents for *Sydney W. Price*, Liverpool (for the plaintiff) ; *Durant Cooper and Hambling* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* RANDALL.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Morton, J.), **July 13, 1944.**]

Bankruptcy—Imprisonment for debt—Crown debt—Whether the Debtors Act, 1869, *applies to the Crown—Debtors Act,* 1869 (*c.* 62), *s.* 4.

The appellant was a judgment debtor to the Crown in respect of arrears of purchase tax, and was arrested under a writ of *capias ad satisfaciendum.* The question for the determination of the court was whether the Crown was bound by the Debtors Act, 1869 :—

HELD : the Crown is not mentioned expressly or by necessary implication in the Debtors Act, 1869, and therefore the Crown is not bound by the Act.

A.-G. v. *Edmunds* (1) *approved.*

[**EDITORIAL NOTE.** The Debtors Act, 1869, was held not to bind the Crown in 1870, almost immediately after it became law. This, however, is the first time that that decision has been approved by the Court of Appeal.

AS TO EXCEPTED CASES, see HALSBURY, Hailsham Edn., Vol. 2, pp. 447, 448, paras. 612-614 ; and FOR CASES, see DIGEST, Vol. 5, p. 1022, Nos. 8343, 8344.]

Cases referred to :

*(1) *A.-G.* v. *Edmunds* (1870), 22 L.T. 667 ; 16 Digest 41, *422.*

*(2) *Re Smith* (1876), 2 Ex.D. 47 ; 16 Digest 41, *423* ; 46 L.J.Q.B. 73 ; 35 L.T. 858.

(3) *A.-G.* v. *Hancock* [1940] 1 K.B. 427 ; [1940] 1 All E.R. 32 ; Digest Supp. ; 109 L.J.K.B. 243.

APPEAL by the debtor from a decision of MACNAGHTEN, J., given on May 26, 1944, and holding that the Crown was not bound by the Debtors Act, 1869. The facts are fully set out in the judgment of the court delivered by MORTON, J.

W. A. L. Raeburn for the appellant.

Valentine Holmes for the Attorney-General.

MORTON, J. [delivering the judgment of the court] : On Apr. 21, 1944, the Attorney-General, on behalf of the Crown, recovered judgment against the appellant for the sum of £3,500, being arrears of purchase tax due to the Crown. On Apr. 27, 1944, a writ of *capias ad satisfaciendum* was issued at the instance of the solicitor for H.M. Customs and Excise. On May 4, 1944, the appellant was arrested and taken to H.M. prison at Brixton, where he is still confined. On May 17, 1944, the appellant issued a summons asking for an order that the writ of *capias* be discharged and that the appellant be forthwith discharged from custody. This application came before MACNAGHTEN, J., on May 26, 1944, and he dismissed it with costs. From that decision the appellant now appeals. Counsel for the Crown took the preliminary objection, before MACNAGHTEN, J., and before this court, that the proceeding by summons was not open to the appellant and that his proper course was to apply to the divisional court for a writ of *habeas corpus.* MACNAGHTEN, J., did not deal with this preliminary objection but dismissed the application on its merits. This court decided to hear the appeal on its merits, and then to deal with the preliminary objection if this proved to be necessary. In the result we are satisfied that the appeal should be dismissed, and we have not formed any view as to whether the preliminary objection is or is not well-founded.

The only question argued before us on this appeal was whether or not the Debtors Act, 1869, binds the Crown. That Act abolished imprisonment for debt, with certain exceptions. It is conceded by counsel for the appellant that, if that Act does not bind the Crown, the appeal must fail. The precise point came before WILLES, J., in 1870, in *A.-G.* v. *Edmunds* (1). That was an application on the part of one Edmunds calling on the Crown to show cause why he should not be discharged out of custody. Judgment had been obtained against him on an information in the Exchequer by the Attorney-General to recover the amount awarded to be paid to Her Majesty by two arbitrators, to whom it had been referred to take the accounts between Edmunds and the Treasury. Counsel for Edmunds contended that the defendant was entitled to be discharged on the ground that the Crown was bound by the Debtors Act, 1869. WILLES, J., reserved judgment for two days, and his judgment is reported as follows, at p. 667 :

> On the main question he had taken time to consider the point raised, not because he had any doubt on the general principle as to the right of the Crown, but whether the

case might come within any exception to the general rule. His opinion was, that the case did not come within the Act of Parliament abolishing imprisonment for debt. The general principle was that the Crown was not affected except by express enactment, or by necessary implication. There were no express words in the statute, and no necessary implication as to Crown debts. And, in reference to the Bankruptcy Act, it seemed that the Crown was to preserve the remedy it possessed, and not to be defeated. There were certain exceptions pointed out, and all he wished to consider was whether there was any exception to interfere with the general principle he had mentioned, whether the Crown was bound by any exception, or whether, in fact, the change made was universal. There were exceptions as to cases of breach of trust, and there must be debts due to the Crown arising therefrom, but that was not the point before him in this case. The question was whether there was any universal change, so as to absorb and extinguish the Crown of its general prerogative. There was no express enactment or necessary implication bringing the case within any exception, and therefore he must refuse to make an order for the discharge of Mr. Edmunds.

So far as we are aware, the decision in *A.-G.* v. *Edmunds* (1) has never been questioned during the 74 years which have elapsed since it was reported. Moreover, in *Re Smith* (2), it was admitted in argument and accepted by LORD COLERIDGE, L.C.J., and POLLOCK, B., that the Act of 1869 did not bind the Crown; the argument and the judgments were directed entirely to the question whether the debt under consideration was or was not a debt due to the Crown. Further, it would appear that the point now before us may have been considered in 1876 by the House of Lords, for in the report of the same case in the Law Journal Reports, there appears the following passage, at p. 73:

> On appealing from a judgment of the Court of Chancery to the House of Lords, Smith, the appellant, had entered into the usual recognisance required by the Standing Order No. 61 of the House, to secure payment of costs. He thereby "acknowledged himself to owe to Our Sovereign Lady the Queen, the sum of £400," the condition being that on payment of costs to the respondent in case the decree appealed from should not be reversed, then the recognisance to be void. The appeal was heard and dismissed with costs. The appellant failed to pay the costs of the respondents who, thereupon, applied to the House of Lords for his committal for contempt. The House having regard to the provisions of the Debtors Act, 1869, and to the case of *A.-G.* v. *Edmunds* (1) refused to commit.

We thought it right to have inquiry made as to whether the House of Lords did consider and pronounce upon the point, but that inquiry threw no further light upon the matter. We are therefore content to assume, in favour of the appellant, that the House of Lords did not decide the point now before us.

Counsel for the appellant submitted that *A.-G.* v. *Edmunds* (1) was wrongly decided. He contended that there were certain limitations or qualifications upon the general principle stated by WILLES, J., and that WILLES, J., stated that principle in terms which were too wide in their application. We do not accept this contention. In our view the general principle was correctly stated by WILLES, J., and that principle has been recognised and applied in a number of cases which were conveniently summarised by WROTTESLEY, J., in *A.-G.* v. *Hancock* (3). We entirely agree with that judge's conclusion as stated on p. 439 ([1940] 1 All E.R., at p. 32), that:

> . . . the rule is now well laid down and clear that if an Act of Parliament would otherwise divest the Crown of its property, rights, interests or prerogative, it is not to be construed as applying to the Crown unless the Crown is mentioned either expressly or by necessary implication.

The second argument of counsel for the appellant was that there are words in the Act of 1869 which show by necessary implication that the Crown was to be bound thereby. He relied in particular upon the opening words of sect. 4 of the Act:

> With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment: 1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.

The reasoning of counsel for the appellant may be summarised as follows: This exception can only apply to a penalty, or sum in the nature of a penalty, due to the Crown. The Crown must be bound by the Act, otherwise the exception would be unnecessary. The short answer is that the exception would equally well apply to a penalty, or sum in the nature of a penalty, due to a subject. For instance, if a common informer recovered judgment for a penalty imposed by a statute, and default were made in payment of such penalty, such default would clearly come within the exception. Counsel contended that such default would be default in payment of a judgment debt, and not default in payment of a penalty, but we decline to take so narrow a view as to the construction of the exception.

The Crown is not mentioned expressly in the Act, and we are satisfied that the A Crown is not mentioned by necessary implication. It is perhaps of some significance that, although amendments have been made in the Debtors Act, 1869, the legislature has never thought fit to amend the Act by providing that the Crown shall be bound thereby. This fact indicates that the view taken by WILLES, J., a year after the Act was passed, gave effect to the intention of the legislature. The result is that this appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

B Solicitors: *Titmuss Sainer & Webb* (for the appellant); *Solicitor of Customs and Excise* (for the Crown).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re NICOL, NICOL *v.* NICOL.

C [COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **June 28, 29, 30, July 3, 24, 1944.**]

Charities—Bequest of money on educational trusts—Asset representing testator's rights under agreement for dissolution of partnership—Whether "a charge or incumbrance affecting or to affect land"—Charitable Uses Act, 1735, s. 3.

The testator, who died on Jan. 15, 1878, bequeathed a legacy of £40,000, to be paid on the death of his widow, the tenant for life, upon trusts for the D advancement of education in Aberdeenshire. The widow died on Jan. 31, 1943. One of the assets of the testator's estate at his death was a sum of £32,293 16*s.* 10*d.* representing the balance of a sum payable under an agreement of 1877 for the dissolution of a partnership under which the testator retired and the other partners carried on the business. The sum was left in the business by the testator by way of loan and the agreement provided that, if and when an event occurred entitling the testator E to wind up the business, the proceeds of the liquidation were to be applied in discharge of the outstanding debt. The question to be decided was whether the provisions in the agreement concerning the loan constituted a charge or incumbrance affecting land so that resort to the proceeds of the asset for the purpose of satisfying a charitable bequest would be prohibited by the Charitable Uses Act, 1735:—

F HELD [MACKINNON, L.J., *dissenting*]: the agreement of 1877 constituted a charge on a future fund to be derived from the sale of partnership assets, which, at the date of the testator's death, consisted partly of land. The testator's interest in the outstanding debt was, therefore, secured by a contingent charge or incumbrance affecting land within the meaning of the Charitable Uses Act, and could not, at the time of his death, be legally bequeathed for charitable purposes.

G [**EDITORIAL NOTE.** The importance of this case is limited by the fact that the Act upon which it has had to be decided has been repealed. The judgments, however, contain matters which may be of importance in considering other matters and, although it is unlikely that the actual point decided will ever occur again, the same subjects may well have to be discussed in connection with other matters.

AS TO MEANING OF "LAND" IN THE MORTMAIN AND CHARITABLE USES ACTS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 138, 139, para. 181; and FOR CASES, see H DIGEST, Vol. 8, pp. 266-273, Nos. 280-400.]

Cases referred to:

*(1) *Re Corcoran, Corcoran* v. *Riddell* (1892), 62 L.J.Ch. 267; 8 Digest 274, *418*; 67 L.T. 754.

*(2) *Re Hamilton, Cadogan* v. *Fitzroy*, [1896] 2 Ch. 617; 8 Digest 274, *419*; 65 L.J.Ch. 815; 75 L.T. 113.

*(3) *Re Dawson, Pattisson* v. *Bathurst*, [1915] 1 Ch. 626; 8 Digest 273, *391*; 84 L.J.Ch. 476; 113 L.T. 19.

(4) *Ashworth* v. *Munn* (1880), 15 Ch.D. 363; 8 Digest 273, *397*; 50 L.J.Ch. 107; 43 L.T. 553.

(5) *Brook* v. *Badley* (1868), 3 Ch.App. 672 ; 8 Digest 273, *398* ; 37 L.J.Ch. 884.
(6) *Attree* v. *Hawe* (1878), 9 Ch.D. 337 ; 8 Digest 272, *384* ; 47 L.J.Ch. 863 ; 38 L.T. 733.
(7) *Re Watts, Cornford* v. *Elliott* (1885), 29 Ch.D. 947 ; 8 Digest 268, *310* ; 55 L.J.Ch. 332 ; 53 L.T. 426.
(8) *Durham Brothers* v. *Robertson,* [1898] 1 Q.B. 765 ; 8 Digest 444, *196* ; 67 L.J.Q.B. 484 ; 78 L.T. 438.
(9) *A.-G.* v. *Weymouth* (*Lord*), (1743) Amb. 20 ; 8 Digest 266, *281* ; 27 E.R. 11.
(10) *Knightsbridge Estates Trust, Ltd.* v. *Byrne,* [1940] A.C. 613 ; [1940] 2 All E.R. 401 ; Digest Supp. ; 109 L.J.Ch. 200 ; 162 L.T. 388.
(11) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 ; 20 Digest 334, *770* ; 58 L.J.Q.B. 75 ; 60 L.T. 162.

Appeal by the charitable legatees from a decision of the VICE CHANCELLOR given in the Chancery Court of the County Palatine of Lancaster on May 1, 1944. The facts are fully set out in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., and *W. L. Blease* for the appellants, the trustees of the charity.

The Attorney-General for the Duchy of Lancaster (*Sir Herbert Cunliffe, K.C.*), and *H. McMaster* for the Duchy of Lancaster.

Harold Christie, K.C., and *W. Geddes* for the residuary legatees.

E. Ackroyd for the present trustees of the will.

Roxburgh, K.C. : The effect of the agreement of 1877 was : (i) There were to be new partners ; (ii) the agreement was not intended to prevent the new partners from dealing with the assets in the ordinary course of business ; (iii) in no event was the testator to have priority over unsecured creditors, therefore, there could be no charge ; (iv) there could be no charge because an individual could not create one like this ; (v) alternatively, if there was a charge, it was a contingent and not a present charge and, therefore, offended against the perpetuity rule ; (vi) alternatively, if the charge was a present one, it was only a floating charge and did not affect any particular asset until it crystallised. It had not crystallised at the death of the testator and, therefore, it had not fastened on land. The fact that the unsecured creditors were to be paid before the testator in the event of a winding up would make it a most abnormal form of charge. The fact that the partners could deal with the equity of redemption without the consent of the testator unless default were made, distinguished this case from *Ashworth* v. *Munn* (4), where the partners could sell land without such consent. If the provision was not intended to be a charge what was it intended to be ? It was intended to confer on the testator a licence or authority to take certain steps in the name and on the behalf of the partners in a certain event. The effect was to constitute the testator the agent of the partners to carry out the liquidation of the business in their name in certain events. [Counsel referred to *Attree* v. *Hawe* (6), and to *Brook* v. *Badley* (5).]

Cunliffe : I am merely concerned that the money should go to the proper individuals on the proper conditions. A doubtful document should not be construed as a charge if it is obvious that it was certainly not the intention of the parties to create a charge.

Christie, K.C. : The Mortmain Act was framed in very wide terms—terms wide enough to bring the provision within the Act even if it was merely a charge upon an interest. We have to consider not how the testator dealt with the property, but the nature of his interest, if any. One must put the charity in the testator's shoes and see if in that case it would come within the mischief of the Act. If, in order to get a sum of money, it is necessary to deal with land, it looks as though there is an interest in land : *Re Watts* (7). The agreement amounts to a charge on all the assets of the partnership as at the testator's death—either a floating charge or a fixed charge on the interests of the partners. My submissions may be summarised as follows : (i) The true test is whether the testator himself had an interest in land to give—not what the charity receives : *A.-G.* v. *Lord Weymouth* (9) ; (ii) the agreement on its true construction gave the testator an interest in the partnership land, including a charge on real estate and profits, either a floating charge on the assets or an equitable assignment of the fund to arise from the realisation of the assets ; (iii) it is immaterial that the rights of the testator are only future or contingent or even that they are never exercisable : *Re Dawson* (3) ; (iv) the year 1884, when the testator could call his money in, was well within the perpetuity period ;

(v) if the document creates a mortgage, the *Knightsbridge* case (10) is sufficient authority that the perpetuity rule does not apply.

Roxburgh, K.C., in reply: I agree that no particular form of words is needed to create an equitable assignment, but the intention so to do must be clear: *Tailby* v. *Official Receiver* (11). There is nothing to support the view that a charge was intended beyond the word "secured" in cl. 2, which there has no technical legal significance, but is merely used in a business sense. It does not follow that there would be land in the partnership at the relevant date merely because of the covenant to carry on business, because it might be a breach of that covenant which led to the operation of cl. 11. With regard to the perpetuity rule, it has only been decided in terms that this rule has no application to the position between a mortgagor and mortgagee under a legal mortgage. I would submit that the decision has nothing to do with a future or contingent charge whereby in a certain future event a mortgagee would acquire an interest in property, and that such a charge would come within the mischief of the rule against perpetuities. Another question for decision is whether the fund out of which the legacy is payable is the fund as it stood at the death of the testator or at the date of payment. This is a future legacy, in terms expressed to be given after the death of the wife, and, therefore, the material date is the date when the legacy falls to be paid. When the wife died all the property would be pooled again. A testator does not dispose of a legacy until it is payable.

LORD GREENE, M.R.: The judgment which I am about to read is the judgment of LUXMOORE, L.J., and myself.

The testator, Robert Nicol, died on Jan. 15, 1878. He left surviving him (i) his widow, who lived for a further 65 years and died on Jan. 31, 1943 (ii) three brothers and two sisters named in his will as his residuary legatees whose legal personal representatives are respondents to this appeal. The appellants are the persons designated in the will to act as trustees of a legacy of £40,000 bequeathed by the testator on the death of his widow upon trusts for the advancement and promotion of education in the city and county of Aberdeen. The question for our decision, shortly stated, is whether the proceeds of a certain asset belonging to the testator at his death may be resorted to in order to make up the £40,000 or whether resort to those proceeds for that purpose is prohibited by the Statute of Mortmain (9 Geo. 2, cap. 36). The learned Vice-Chancellor held that the latter view is the correct one. The result of that decision is, we are informed, that the appellants will receive only about £12,000, while, if the decision is held to be incorrect, they will be entitled to the full amount of the legacy. The question, therefore is one of substantial importance to the parties. If the testator had died after and not before the enactment of the Mortmain and Charitable Uses Act, 1891, the question now presented to us would never have arisen owing to the change in the law relating to gifts of impure personalty for charitable purposes introduced by sect. 3 of that Act.

The relevant words of the Statute 9 Geo. 2, cap. 36, are contained in sect. 3. They are as follows:

> All Gifts, Grants, Conveyances, Appointments, Assurances, Transfers and Settlements whatsoever, of any Lands, Tenements, or other Hereditaments, or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect any Lands, Tenements or Hereditaments . . . to or in Trust for any charitable Uses whatsoever, which shall at any Time from and after the said 24th day of June, 1736, be made in any other Manner or Form than by this Act is directed and appointed, shall be absolutely, and to all Intents and Purposes, null and void.

The testator had these provisions in mind when on May 4, 1878, he made his will. His dispositions may be summarised as follows. He devised and bequeathed his real and residuary personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay or provide for certain pecuniary legacies including a legacy of £1,000 bequeathed:

> . . . out of such part of my personal estate as may legally be bequeathed for charitable purposes . . .

to the Treasurer of the Royal Infirmary of Aberdeen. Out of the residue the trustees were to set aside and invest a sum of £35,000 and to pay the income thereof to his widow for life. The income of the remainder of his estate during the life of his widow was to be paid to his brothers and sisters. The will then proceeded as follows:

> And from and after the decease of my said wife I bequeath out of such part of my personal estate as may legally be bequeathed for charitable purposes (and as shall remain after paying or providing for the before-mentioned legacy of £1,000 to the Treasurer of the Aberdeen Infirmary) to the persons who shall at the time of the decease of my wife hold the following offices or positions . . .

The will then set out the offices or positions now held by the appellants. The trusts of this legacy were, as we have said, for the advancement and promotion of education in the city and county of Aberdeen. There followed a marshalling clause for the benefit of his charitable bequests in which the testator again refers to the portions of his estate "which may legally be bequeathed for charitable purposes." After the death of his wife the testator directed that the residue of his estate should be held in trust for his brothers and sisters already mentioned. Among the investments authorised by the investment clause were mortgages of freehold or leasehold or other real property in Great Britain.

The asset in respect of which the present controversy has arisen consists of the rights possessed by the testator under a certain agreement of Sept. 20, 1877. For some years before the execution of this agreement the testator had carried on in partnership the business of manufacturers, embroiderers, merchants and warehousemen in England and America. His partner in the English business was one William Devonshire Ryde and his partners in the American business were William Devonshire Ryde and Charles Edward Smith. The English business was carried on at Ashenhurst Works, Blakeley, and also in Manchester and London.

The agreement of Sept. 20, 1877, was made between the testator of the first part, Ryde of the second part and Smith of the third part. It recited that arrangements had been made between the partners for the dissolution of both partnerships and that by an agreement of even date arrangements had been made for the continuation of the businesses by Ryde and Smith in partnership with other persons and for the introduction of capital which with the capital of Ryde would amount to £45,000 at the least. The operative part of the agreement so far as is material to the present question was to the following effect. Cl. 1: Both the existing partnerships were to cease from Jan. 1, 1878. Cl. 2: The testator on the terms and for the considerations therein "agreed to be paid or secured" agreed that Ryde and Smith should from the same date take over the whole share and interest of the testator in the assets of the two partnerships as their own absolute property. Cl. 4: The testator was not to participate in the profits or be liable for the losses of the businesses after June 30, 1877. Cl. 6: Ryde and Smith were to pay to the testator for his share and interest in the two partnerships the sum of £63,390 2*s.* 9*d.* of which £28,390 2*s.* 9*d.* was to be paid by instalments as therein mentioned and the balance, namely, £35,000 was to be lent and advanced by the testator to Ryde and Smith as from June 30, 1878, at interest at the rate of 10 per cent.:

> . . . on condition that the capital employed in the said businesses [by Ryde and Smith] and any other person or persons carrying on the said businesses . . .

should not so long as any part of the £35,000 should remain owing, amount to less than £45,000 irrespective of the £35,000 and that the whole of such capital should be employed in the businesses to the best advantage. Cl. 8: Ryde and Smith undertook to carry on the businesses efficiently, to keep proper books, to have proper valuations of stock and stock-takings and to furnish the testator with copies of stock-takings and balance sheets. Cl. 9: Ryde and Smith undertook not to incur any liability outside the usual course of business by which the partnership property or their shares therein might be liable to be taken in execution and were prohibited from entering into various classes of transaction except in the usual course of business. Cl. 10: Ryde and Smith undertook to insure the partnership property and to produce policies and premium receipts to the testator. Cl. 11 (the most important clause for present purposes): The testator was empowered so long as any part of the £35,000 remained owing to enter on the premises of the businesses, inspect the mode of carrying them on and all books of accounts, etc., to take copies and have stock taken. The next branch of the clause empowered the testator by notice in writing to Ryde and Smith to "require repayment" of the amount then owing to him in either of two cases, namely (*a*) if upon any inspection or examination or stock-taking it should appear to him that the joint capital of Ryde and Smith "and such other partners to be introduced by them as aforesaid" was reduced to £40,000 or less; (*b*) in case of the breach of any of the conditions contained in the agreement. So far the clause gave to the testator no more than a right to demand repayment of the outstanding indebtedness, but it proceeded to add a further right the nature of which has given rise to the present dispute. In default of payment at the time named in the notice the testator or any person appointed by him was given:

> . . . full power and authority to enter upon the premises where the said businesses may be carried on and either forthwith to discontinue the said partnership businesses and to wind up the same and dispose of all the stock property and effects thereon or to continue such businesses as long as may be found necessary or expedient in order to wind up the same beneficially and as the attorney or attorneys and in the names of the said William Devonshire Ryde and Charles Edward Smith to collect the debts and goods and effects owing or belonging to the said concern and give discharges for the same and to repay himself or themselves the whole amount of principal and interest then due to him or them under or by virtue of these presents and in case of deficiency to sue for and recover the same from them in any way he or they may think proper.

Cl. 12: On the death or retirement of Ryde or of Smith his capital was not to be withdrawn so as to reduce the capital of the partnership below £50,000 irrespective of the £35,000 so long as any part of the latter sum remained owing to the testator, it being the intention of the parties:

> . . . that the amount due to him shall have priority and take precedence over the claims of [Ryde and Smith].

Cl. 13: Ryde and Smith undertook to pay to the testator on Jan. 1, in each year a sum equal to one half of the clear profits of the business towards repayment of the £35,000. Cl. 14: The payment of the £35,000 might be "accelerated" by mutual consent. Cl. 15: This clause contained mutual covenants for further assurance. Cl. 16: So far as the parties could lawfully so declare, all the stipulations and provisions of the agreement relating to Ryde and Smith were to be "applicable so far as may be to any partner or partners for the time being" of Ryde and Smith or either of them. Cl. 17: If Ryde and Smith should observe and perform all the agreements and conditions of the agreement, the testator agreed not to call in the debt until June 30, 1884.

A memorandum of even date signed by the testator, Ryde and Smith was indorsed on the agreement providing (cl. 1) that Ryde and Smith should be jointly and severally liable for the due payment of the whole sum of £63,390 2*s*. 9*d*. (Cl. 2) that the powers given to the testator by cl. 11 of the agreement were to apply to the whole sum of £63, 390 2*s*. 9*d*., and not merely to the sum of £35,000.

The sum of £28,390 2*s*. 9*d*. was as to £20,000 secured to the testator by a mortgage, dated July 3, 1875, of the Ashenhurst Works of the partnership. At the date of the death of the testator £2,706 3*s*. 2*d*. had been paid in reduction of the debt of £35,000 but the balance, viz., £32,293 16*s*. 10*d*., remained owing upon the terms of the agreement. The mortgage for £20,000 was still outstanding at the testator's death and it is not disputed that such part of his estate as is referable to it could not lawfully be bequeathed for charitable purposes. The sum of £32, 293 16*s*. 10*d*. was paid off during the life-time of the testator's widow and was represented at her death by pure personalty. The question raised for our decision is whether for the purposes of the will of the testator this sum of £32,293 16*s*. 10*d*. owing to the testator at his death under the agreement of Sept. 20, 1877, was personal estate which he might legally bequeath for charitable purposes.

It is convenient to begin our examination of this question by dealing with an argument on the construction of the will raised by counsel on behalf of the appellants. Assuming, he said, that the nature of the testator's rights under the agreement were at his death such as to make them incapable of being given for charitable purposes by reason of the Statute of Mortmain, the directions in the will ought to be construed as making the death of the widow and not the death of the testator the time at which the character of the assets constituting the residuary estate ought, for the purpose of the statute, to be ascertained. He then pointed out that at the death of the widow the particular asset was represented by pure personalty and that accordingly recourse to the investments representing it could lawfully be had for the purpose of making up the £40,000 required to satisfy the charitable legacy to the appellants.

In support of this argument reference was made to *Re Corcoran* (1). In that case the testator directed his trustees on the death of his widow to transfer the whole of his residuary personal estate and the securities :

> . . . whereon the same may be then invested or so much and such parts thereof as may by law be so applied . . .

to charitable trustees. At the death of the widow part of the residuary estate, the greater part of which had consisted of pure personalty at the testator's death, stood invested on a mortgage of an inn. The question was whether the charitable trustees were entitled to the sum so invested. North, J., held that they were not, the ground of the decision being that on the true construction of the will all that the charitable trustees could claim was so much of the estate as, having regard to its state of investment at the death of the widow, could lawfully be applied for charitable purposes. This case was distinguished in *Re Hamilton* (2). In that case the testatrix, after dealing specifically with such parts of her personal estate as could not by law be devoted to charitable purposes, bequeathed the residue of her personal estate upon trust for sale conversion and investment (real securities being an authorised investment) and for payment of the income to her daughter for life and after her death, subject to certain legacies, upon trusts in favour of charity. During the lifetime of the daughter the trustees invested part of the residuary personal estate, which at the death of the testatrix consisted of pure personalty, on mortgage of real estate. Lindley, L.J. (at p. 623) pointed out that in *Re Corcoran* (1) North, J., had to construe a will which referred distinctly to the state of the fund at a future period. Such was not the case in *Re Hamilton* (2), and it was held that the exercise by the trustees of their power to select an investment on mortgage of real estate could not deprive the charitable trustees of their right to the sum invested. The character of the estate, upon the true interpretation of the will, clearly fell to be ascertained at the death of the testatrix. The argument of counsel for the appellants in effect was that the present gift was similar to that in *Re Corcoran* (1).

We cannot accept this argument. In our opinion, upon the true construction of the will the ascertainment of that part of the personal estate of the testator which could "legally be bequeathed for charitable purposes" in reference to the £40,000 legacy must be made at the death of the testator and not at the death of the widow when the legacy became payable. The will refers to such part of the testator's personal estate as could legally be bequeathed for charitable purposes, in three places. The first is in connection with the £1,000 legacy to the Aberdeen Infirmary, the second is in connection with the £40,000 legacy, the third is in the marshalling clause. The language used is identical in each case and there is nothing to suggest that there is any difference in the times at which the legality of the bequest is to be ascertained. In the case of the £1,000 legacy and in the case of the marshalling clause the time can only be the death of the testator. Is there anything in the language to suggest that the time is intended to be a different one in the case of the £40,000 legacy ? We can find nothing. On the contrary, we do find an indication the other way. The fund out of which the £40,000 legacy is to be paid is :

> . . . such part of my personal estate as may legally be bequeathed for charitable purposes (and as shall remain after paying or providing for the before-mentioned legacy of £1,000 to the Treasurer of the Aberdeen Infirmary).

This appears to us to show that the fund out of which the two legacies are to be paid is intended by the testator to be one and the same fund. Quite apart from this, we do not think that in the absence of clear words the will ought to be construed as fixing the death of the tenant for life as being the date on which the character of the fund is to be ascertained. So to construe it would mean that the amount to be received by the charity would depend on the way in which the trustees had exercised their discretion with regard to investments. As Lindley, L.J., said in *Re Hamilton* (2), at p. 622 :

> . . . there is a presumption against a testator leaving to his trustees a discretion whether the trusts declared by his will shall take effect or not.

In the present case, if the argument is correct, the appellants would have got nothing if at the death of the widow the whole estate had been invested on real securities.

We now turn to the main question in the case which turns not upon the construction
of the will but upon the answer to the question, what at the date of
the testator's death was the true nature of his rights under the agreement of
Sept. 20, 1877 ? At that date the testator was, as we have said, a creditor
of Ryde and Smith under that agreement in the sum of £32,293 16*s*. 10*d*. The
situation with regard to the new partnership referred to in the agreement is
not clear since the agreement therein recited for the formation of the new
A partnership is not forthcoming and, we were told, cannot now be found. There
were, however, produced to us copies (the originals having apparently been lost)
of three deeds relating to the £20,000 mortgage above referred to which throw
some light on the matter. The first is dated July 3, 1875, and is a mortgage
of the Ashenhurst Works by the testator and Ryde to one W. G. Cowlishaw
to secure the sum of £20,000. The second, dated Apr. 17, 1878, is a transfer
of that mortgage by the executors of W. G. Cowlishaw to one John Cooper
B as trustee for the testator. By this date the testator had ceased to be a partner.
The third deed is dated July 20, 1878. The parties to it were Cooper of the
first part, Ryde, Smith and four others of the second part and the testator
of the third part. It recited the mortgage to Cowlishaw, the transfer to Cooper
as trustee for the testator, the English partnership between the testator and
Ryde and the fact that the mortgaged premises formed part of their partnership
C property, and the retirement of the testator. It also recited that Smith and the
four other persons above referred to had before the date of the transfer become
and then were partners with Ryde in the said business and as such were interested
with him in the equity of redemption. By the operative part Cooper transferred
the mortgage to the testator and the six members of the new partnership
covenanted to pay the mortgage debt and interest. From this it appears and
it is common ground that the new partnership owned the equity of redemption
D in the Ashenhurst Works.

It does not appear what other land, if any, was owned by the new partnership
at the date of the death of the testator. Nor is there any direct evidence that
the new partners adopted or ratified the agreement of Sept. 20, 1877. That
agreement purported to give to the testator various rights and powers in regard
to the new partnership and its assets but as the new partners were not parties
to the agreement it could not bind them apart from some act on their part.
E There may have been other documents executed of which we have no knowledge ;
but it would, we think, be reasonable to infer that the new partners submitted
in some way to be bound by the agreement which otherwise would have lacked
the force which it was clearly intended to have. We mention these matters
because it was suggested by counsel for the appellants that as the agreement,
in so far as it purported to give to the testator rights in relation to the assets
of the new partnership, was necessarily inoperative as against the new partners
F unless they in some way gave their adherence to it, it ought to be construed
as being purely contractual in its nature and not as giving to the testator any
interest in or charge upon the partnership assets. We do not think that there
is any weight in the suggestion, if only for the reason that whatever rights the
agreement purported to give must in any event have been effective against
the interests of Ryde and Smith. If necessary we should be prepared to draw
G the inference that the new partners in fact adhered to the agreement so as to
be bound thereby, a thing which having regard to the terms of the agreement
they can scarcely have avoided doing since they were enjoying the benefit
of the capital left in the business by the testator.

On the basis, therefore, that the equity of redemption in the Ashenhurst
works formed part of the partnership assets at the death of the testator, the
question is, had the testator by virtue of the agreement any " interest " in it
H or " any charge or incumbrance affecting or to affect " it ? It is, we think,
clear that, apart from the words in the latter part of cl. 11 quoted above, there is
nothing in the agreement to create such an interest charge or incumbrance.
Attention was called to the words " to be paid or secured " in cl. 2. But the
word " secured " is clearly insufficient to create a charge and can be referred
to the various rights conferred upon the testator by the agreement. Next
it is, we think, equally clear that the agreement does not impose upon the
partners any restriction as to their dealing with the assets of the business subject
to their obligation to conduct it properly. There was clearly no fixed charge

on any of the assets. Had there been one, the business could not have been carried on.

Counsel for the respondents argued that the effect of cl. 11 was to create a floating charge and he referred to *Re Dawson* (3) as showing that debentures of a trading company constituting a floating charge on the assets of the company could not, if the company owned land, be validly bequeathed to a charity. We are unable to accept the view that the agreement creates a floating charge. Let it be accepted for the sake of argument that, apart from the Bills of Sale Acts, there is no legal objection to the creation of a floating charge by an individual as distinct from a corporation, but it is extremely unlikely that in the year 1877 a security of that description would have been within the contemplation of the parties. In any event, a floating charge requires apt words to create it. A floating charge is a present charge although owing to its special nature it does not attach to specific assets until it crystallises. It is nevertheless a present charge and requires for its creation words which show an intention to create an immediate charge subject to the qualification that it is to be floating in character. In the present case there are no such words. The agreement does not purport to create anything in the nature of a charge until a future time, viz., the happening of an event specified in cl. 11. Until such an event happened the testator's rights were purely contractual.

The true effect of cl. 11 is, in our opinion, that suggested by Luxmoore, L.J., in the course of the argument. It is an equitable assignment of such part of a fund which is to come into existence at a future date as will be sufficient to satisfy the testator's claim. If and when an event occurred entitling the testator to wind up the business the fund which came into existence as the result of the winding up was to be applied in discharge of the outstanding debt. Such a provision in our opinion unquestionably operates as an equitable assignment and as such constitutes an interest in or charge upon the fund the moment that it comes into existence. It was argued by counsel for the appellants that even on this view of the agreement the statute would not apply. He said that, although at the testator's death the partnership assets consisted in part of land, it was impossible to say that this would be the case when the liquidation of the business took place since by that time the partners might have disposed of all their interests in land—indeed, such disposal might be the very thing which gave the testator the right to intervene under cl. 11. It followed, he said, that it was impossible to assert one way or another that the interest in or charge upon the future fund created by cl. 11 would comprise any proceeds of sale of land and accordingly it was impossible to say at the relevant date, viz., the death of the testator, that the £40,000 legacy was a legacy which would fall to be satisfied by resorting to an interest in or charge affecting or to affect land.

This argument is a tempting one but we do not see our way to accepting it. The position at the death of the testator was that, if at the date when the testator's powers under cl. 11 came to be exercised the partners still owned the equity of redemption in the Ashenhurst works, the proceeds of sale of that equity would constitute part of the fund and the statute would apply. We do not think that the operation of the statute can be defeated where there is a contingent charge of this character. The position in this respect appears to us to be analogous to the case of a floating charge. In that case it cannot be stated one way or the other that when the charge crystallises there will be any land comprised in it. It may or may not be so according as the event turns out. The very point was dealt with by Lord Cozens-Hardy, M.R., in *Re Dawson* (3), at p. 636. He said:

> This court put the more simple case of an individual who covenants to pay £10,000 twelve months hence and to charge any real estate which at that time he may have in payment of it. Could it possibly be said that pending the twelve months there was not even a contingent charge upon the real estate? Any charge or interest whether it be contingent or not is quite sufficient to satisfy the statute.

We may conclude this part of the discussion by referring shortly to certain matters of principle which are relevant lest it be thought that we have overlooked them. The first is, that in considering whether the Act applies to a given case, the question is, to quote the words of Cotton, L.J., in *Ashworth* v. *Munn* (4), at p. 373:

> . . . not what the charity can take . . . but what was the interest of the testator

in the property which he attempted to devise to that charity ? . . . what the Act points at is the devise of land—that is, it prevents testators giving by their wills that which in them is land or an interest in land.

The second is that a legacy payable out of personalty and of the proceeds of the sale of real estate is an interest in land and no apportionment can be made as between the personalty and the interest in land (*Brook* v. *Badley* (5)). The result in the present case is (and it is not disputed) that no dissection of the A partnership assets is permissible. The third matter is that a share in a partnership, the assets of which comprise real estate, cannot in cases affected by the statute be lawfully bequeathed to charity (*Ashworth* v. *Munn* (4)). If in the present case the only charge which the testator had was a charge on the shares of Ryde and Smith as distinct from a charge on all the assets of the new partnership, he could not lawfully bequeath money secured by that charge to charity any more than Ryde or Smith could have bequeathed his share itself to charity.

B One last argument put forward by counsel for the appellants must be mentioned. He submitted that as the charge on the fund representing the proceeds of the liquidation of the business was only to come into existence at a future date and that as that date (according to his argument) might not occur until after the period allowed by the rule against perpetuities, the charge as a charge was void. There is, in our opinion, a short answer to this argument, namely, that C on the true construction of the agreement the charge must necessarily take effect during the lives of Ryde and Smith or one of them or possibly during the continuance of the new partnership mentioned in the recitals to the agreement.

In our opinion, therefore, the learned VICE-CHANCELLOR came to the right conclusion and this appeal must be dismissed. We are sorry to find ourselves compelled to take this view, but we are bound to construe both the will of the testator and the agreement according to ordinary principles and we are not D entitled to adopt a forced construction of either in order to escape the clutches of the statute. That statute has been given a strict and far-reaching operation in past decisions by which we are bound. Had the testator died some three years later than he did, the question would not have arisen and his charitable intentions would have had their full operation. As it is, they are defeated by a provision of the statutory law of the country with regard to impure personalty, the policy of which was reversed by the legislature more than 50 years ago. E *Fiat justitia, ruat coelum* is as appropriate to the decision of this appeal as it was to the events which were taking place while it was being argued.

MACKINNON, L.J.: This is an appeal from the Chancery Court of the County Palatine of Lancaster. Robert Nicol, of the city of Manchester, made his will upon May 4, 1878. He died on Jan. 15, 1879. His will was proved by the executors named therein on Mar. 7, 1879. The present proceedings F appear to have been instituted shortly afterwards, and on Aug. 6, 1879, the court gave a judgment declaring that the trusts of the will ought to be performed and carried into execution. The suit being still in existence, a petition asking for further directions was heard by the court in 1944, and on May 1, 1944, the VICE-CHANCELLOR gave a judgment from which the present appeal is brought.

By the will the testator directed his executors and trustees to sell his real estate and collect and convert into money his residuary personal estate. He G made bequests of £1,000 to his wife, of £1,100 to one of the three executors, and of £100 each to the other two. He bequeathed:

> . . . out of such part of my personal estate as may legally be bequeathed for charitable purposes . . .

£1,000 to the Aberdeen Infirmary. As to the residue of his estate he directed the trustees to invest it, and during the lifetime of his wife to pay to her the H interest from £35,000 of such investments, and during her life to pay the balance of the income equally to his three brothers and two sisters or such of them as should be alive at his death. On the death of his wife the trustees were to pay, out of such part of his personal estate as might be legally left to charity, the sum of £40,000 to certain officials in Aberdeen as trustees for the advancement of education. The ultimate residue was to go in equal shares among the brothers and sisters above mentioned.

The testator's widow, strange to say, survived him for just over 64 years, dying on Jan. 31, 1943. At that date the whole estate had for at least half a century been converted into investments and money to a total amount amply sufficient to pay the £40,000 to the Aberdeen trustees, and a balance among the representatives of the brothers and sisters. Those representatives opposed the payment of the £40,000 on the ground that by the terms of the will, and by the law in force upon Jan. 15, 1879, that legacy could only be paid out of such part of the personal estate as could legally be bequeathed to charity. It was said that on Jan. 15, 1879, a portion of the estate consisted of "an estate or interest in land" or of "a charge or incumbrance affecting or to affect land," and, therefore, that part of the estate, or the money or investments now representing that part, were within the prohibitive provisions of the Statute 9 Geo. II, cap. 36, s. 3.

I frankly avow that in my opinion this is a contention which the court ought to overrule if it possibly can under the rules of law which govern it. The policy of this Act of 1736 is stated in the preamble to be that the alienation of land is "prejudicial to common utility," and that the purpose of the Act is to check :

> . . . improvident alienations of land made by languishing and dying persons . . . to the disherison of their lawful heirs.

This capable Scot was childless. He made an eminently fair and reasonable will. Any interest he had in any land has been for at least half a century converted into cash, and 65 years after his death this Act is invoked, on behalf of people he can never have known or cared for (great nephews and nieces or perhaps great-great nephews and nieces) in order to defeat the manifest desire of his will to establish a useful and laudable public purpose. Not only is the expressed policy of the Act utterly repugnant to the notions of to-day, but the old decisions upon it, as PHILLIMORE, L.J., said in *Re Dawson* (3), at p. 641 :

> . . . went very far, and I might almost say into extravagant consequences.

The testator had made his fortune by carrying on a manufacturing business in partnership with one Ryde in Manchester and London, and in partnership with Ryde and one Smith in America. In 1877 he was retiring from these partnerships, and an agreement of Sept. 20, 1877, was made between Nicol, Ryde and Smith to provide for the payment off of the testator's share in the partnership assets. It is said, and it is no doubt true, that those assets included certain land and buildings, though there seems no evidence what or where they were. The amount to be ultimately paid to the testator was agreed to be £63,390 2*s.* 9*d.*, of which £28,390 2*s.* 9*d.* was to be paid to him on or before June 30, 1878. The remaining £35,000 was to remain as a loan to Ryde and Smith, to be paid off by them by instalments, i.e., by the payment on Jan. 1, 1879, and on each succeeding Jan. 1, of an amount equal to one half of the yearly profits of the business. At the date of the testator's death this £35,000 had been reduced to £32,293 16*s.* 10*d.*, which sum and its realisation then remained subject to the terms of the agreement of Sept. 20, 1877. As the assets of the partnership are said to have included land or buildings (I gather of the partnership in Lancashire and London, for there seems no evidence as to the partnership in America) it is contended that by virtue of cl. 11 of the agreement this £32,293 16*s.* 10*d.* constituted "an interest in land" or "a charge or incumbrance affecting or to affect lands" within the meaning of sect. 3 of the Act of 1736.

I am not satisfied that this contention is established. The agreement of Sept. 20, 1877, is a singular document. The only parties to it, and the only parties bound by it, are Nicol, Ryde and Smith. There is a recital that Nicol and Ryde are partners in the business in Manchester and London, and that Nicol, Ryde and Smith are partners in the business in America. There is a further recital that by an agreement of even date Ryde and Smith are admitting other persons into partnership, and by cl. 8 Ryde and Smith covenant to carry on "the said businesses." Presumably this involves or implies that Smith formerly only a partner in the American business, has become a partner with Ryde in the English business, though there is no recital of that fact, still less any reference to the deed creating such partnership. Counsel for the trustees told us that by a previous report of the registrar (presumably that of May 7, 1880) it was found that three new partners had joined Ryde and Smith at the death of the testator. There is not a scrap of evidence as to the terms of the partnership deed between Ryde, Smith and their three new partners, or whether those terms made the assets of the new partnership subject to the terms of cl. 11 of the agreement of Sept. 20, 1877. One may surmise that it is likely, perhaps even probable, that they did so, but surmise is not proof. And unless they did so I do not see how the agreement of Sept. 20, 1877, could create any charge or incumbrance on land or buildings forming part of the assets of the five new partners. Ryde and Smith are jointly liable, not for half of the yearly profits of the business, but for a sum of money equal to half those yearly profits ; and though cl. 11 purports to give rights as to the assets of the partnership, it is a clause in a contract to which only Nicol, Ryde and Smith are parties. For anything that is proved, the agreement of Sept. 20, 1877, may only impose a personal joint liability upon Ryde and Smith, with the addition by cl. 11 of what purports to be a charge or security upon the assets of the new partnership which is in fact no charge or security at all.

For the Act of 1736 to make it illegal for the trustees to use this £32,293 16*s.* 10*d.* (or its equivalent 64 years later) in payment of the charitable bequest, I think there must be proof, and not merely probability, that that sum constituted "an interest in the land" forming part of the assets of the five new partners, or was secured by "a charge or incumbrance affecting or to affect" the said land. And I think "the said land" must be in England, for I cannot think the Act would apply to land in America. I do not think there is evidence providing a satisfactory, or indeed any, proof of those facts.

One may surely test the point in this way. Suppose the executors in February, 1879, had purported to sell to a purchaser the deceased's interest in the debt of £32,293 16*s.* 10*d.* owing to him from Ryde and Smith, and in their contract of sale had asserted that the debt was secured by a charge or incumbrance upon the assets, including land and buildings in England of the five partners now carrying on "the businesses." Suppose in making out their title to what they were selling they chose, or were able, only to produce the agreement of Sept. 20, 1877. Surely the purchaser could object that they did not thereby make out anything more tangible than a personal debt by Ryde and Smith, and did not make out any effective charge or incumbrance on the assets of the five partners, even though those partners included Ryde and Smith. For these reasons I think the court is in a position to defeat the unrighteous claim of the respondents, based on the Act of 1736 which has long since rotted in its grave, and I would allow this appeal ; but as my brethren feel constrained, I am sure with all possible reluctance, to a different conclusion, the appeal must be dismissed.

I know not whether the chagrin of the appellants may be mitigated or increased by the reflection that, if the testator had made his fortune in Aberdeen and had left his laudable charity to trustees in Manchester, the great-nephews (or great-great-nephews) could not have played this trick to defeat his desires, for by sect. 6, the Act of 1736 is not to apply to Scotland.

I do not think I need go on to examine the question raised by counsel for the appellants, upon the authority of *Re Corcoran* (1), *viz.*, that the nature of the fund should be examined at the death of the widow and not at the death of the testator, since in my view he should succeed for the reasons I have indicated. I only remark that the repeated reference to the legacy of £1,000 to the Aberdeen infirmary does not seem to me to destroy his point, for obviously the widow might have died a week after the testator, and provision for that possibility was provident.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the appellants) ; *The Solicitor for the Duchy of Lancaster* (for the Duchy) ; *Garnett, Tarbet, Peet & Thompson*, Liverpool (for the respondents) ; *Hill, Dickinson & Co.* (for the trustees).

[*Reported by* Gwynedd Lewis, *Barrister-at-Law.*]

RUSSELL *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* RUSSELL.

[Court of Appeal (Scott, Luxmoore and du Parcq, L.JJ.), **July 28, 1944.**]

Income Tax—Dispositions in favour of children—Payments returned to taxpayer—Effective payment under disposition.

The appellant had three children M., D., and L., who at all material times lived with the appellant. On Feb. 14, 1935, the appellant executed a deed in which he covenanted to pay to certain trustees an annuity for each child during the joint lives of himself and such child. The deed was revocable with the consent of one of certain named persons and the interest of each child was to cease on bankruptcy, assignment or charge; on cesser the usual discretionary trusts came into being. By cl. 4 the deed provided that during the minority of any child of the appellant the trustees were, in their absolute discretion, empowered to apply the whole or any part of the annuity for the maintenance, education or benefit of such child or themselves so apply the same or pay the same to the child's parent or guardian without being concerned to see the application thereof, or pay the same to such child personally notwithstanding the child's infancy and should accumulate any surplus in the manner therein mentioned and hold the accumulations in trust for such child absolutely. On Apr. 2, 1935, the appellant paid the trustees the amounts payable under the deed less tax at the appropriate rate, and the trustees paid the sums to the appellant, all the children then being infants. In the following year the same course was followed, except that M. having attained 21 years on July 4, 1935, the part of the annuity due to M. referable to that part of the year after July 4 was paid to M. who then paid it to the appellant. On Apr. 2, 1937, the appellant executed another deed whereby he covenanted to pay to the same trustees a further annuity for M. This deed was otherwise subject to the same trusts and terms as the first deed. The same course was adopted in the payment of the annuities as previously. On Oct. 28, 1938, the appellant executed a deed whereby he in effect released the power of revocation in the first deed. On the payment of the annuities the same course was followed as previously. Additional assessments to sur-tax were made on the respondent in respect of the annuities payable under the three deeds on the ground that there had been no effective payments. The appellant claimed to have the additional assessments in respect of the following annuities discharged; the annuities payable for the years 1934-35 and 1935-36 under the first deed; the two annuities payable to M. in 1936-37 under the first and second deeds; in respect of the annuity payable to M. in 1937-38 in respect of the first deed; and in respect of the annuities payable to M. and D. in the year 1938-39 under the third deed. It was found as a fact that the deeds were *bona fide* and not covinous; that the payments made by the trustees to the appellant were made in the exercise of their discretion under the deeds; that the payment by M. and D. to the appellant were made on an express agreement that he should take care of the money for them:—

Held: the payments made by the appellant in respect of the annuities were effective payments.

Decision of Macnaghten, J., ([1942] 2 All E.R. 551) *reversed.*

[**EDITORIAL NOTE.** It seems only right that the revenue authorities should be in a position to insist upon proof of the application of large sums such as those here considered in accordance with the terms of the deed of trust. On the other hand, a parent or guardian, especially where a person under age is living with him under the same roof, might have considerable, if not insuperable, difficulties in apportioning his expenditure. Indeed, in some cases, which were considered in *Re Rogers*, p. 1, *ante*, the court will not order a parent or guardian to account for sums to be applied in maintenance and education. In the judgment herein it is stated that the infant could compel the parent to account. It may be that this case is distinguishable from *Re Rogers* (*supra*), but the doctrine has been stated in very general terms. The position of the annuitant of full age is clearly distinguishable, both on the facts and the law, and the necessity for effective payment must be carefully considered by those entering into deeds of the type here considered.

AS TO ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 266, 270, paras. 535-539; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-576f.]

Cases referred to:

(1) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 28 Digest 30, *153*; 77 L.J.K.B. 834; 99 L.T. 39; *sub nom. Stanley* v. *Gramophone & Typewriter, Ltd.*, 5 Tax Cas. 358.

(2) *Royal Choral Society* v. *Inland Revenue Comrs.*, [1943] 2 All E.R. 101.

APPEAL by the taxpayer and cross-appeal by the Inland Revenue Commissioners from a decision of MACNAGHTEN, J., reported [1942] 2 All E.R., at p. 551. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J.

Wynn Parry, K.C., and *Terence Donovan* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the Commissioners of Inland Revenue.

LUXMOORE, L.J. [delivering the judgment of the court]: Additional assessments to sur-tax were made on Joseph William Russell, hereinafter called the appellant, for the four tax years from Apr. 6, 1934, to Apr. 5, 1938, in the respective sums of £4,500, £4,500, £3,000 and £6,048, and an assessment in the sum of £12,241 for the year 1938-39.

These various assessments were made in part in respect of sums claimed to have been paid for the benefit of his children under three deeds dated respectively Feb. 14, 1935, Apr. 2, 1935, and Oct. 28, 1938. The appellant appealed against all these various assessments to the Commissioners for the Special Purposes of Income Tax (hereinafter called the Special Commissioners); they heard the appeal on Mar. 13, 1940. The Commissioners of Inland Revenue (hereinafter called the respondents) contended that there had been no effective payment by the appellant of any sums under any of the three deeds and no effective charge on his income in any of the material years. The Special Commissioners decided that the sums in question were not deductible by the appellant except in so far as they represented reasonable sums applied by him for the education, maintenance and benefit of the children and they left it to the parties to agree the figures on this basis and they directed that, in the event of failure so to do, the appeal should be further heard on Nov. 8, 1940. It was agreed between the parties that the only relevant years in this connection were the tax years 1934-35, and 1935-36. The Special Commissioners fixed the amounts to be allowed for education, maintenance and benefit for these two years at £1,600 and £1,400 respectively, and, in the result, the Special Commissioners adjusted the additional assessments by reducing the assessment for 1934-35 to £2,000 and for 1935-36 to £3,100, while the two remaining additional assessments and the assessments for the year 1938-39 were confirmed.

Both the appellant and the respondents were dissatisfied with the decision of the Special Commissioners and required them to state a case for the opinion of the High Court pursuant to the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149. Two cases were stated in due course and they came on for hearing before MACNAGHTEN, J., on July 28 and 29, 1942. After hearing argument, MACNAGHTEN, J., reserved his judgment. On Oct. 5, 1942, he dismissed the appeal of the appellant and allowed the appeal of the respondents. The appellant has appealed to this court from both these decisions. The appeals came before this court on Mar. 1, 1943, when, by reason of the form of the case stated, and the absence in it of any definite statement of what were the findings of fact made by the Special Commissioners, the case in each appeal was ordered to be remitted to the Special Commissioners for them to inform this court:

> . . . what are the findings of fact upon the evidence already before them on which they based their conclusion that there were no effective payments by the appellant whereby his annual income was diminished in the years of assessment in question.

The order in each case contained a direction that the parties were to be at liberty to restore the case to the list for hearing "some time during the present Hilary Sittings if possible," *i.e.*, during the Hilary Sittings, 1943.

In obedience to that order, the Special Commissioners stated a supplemental case on May 4, 1943, but, for some reason for which no adequate explanation was forthcoming, the appeals were not restored to the list until much later, with the result that they did not come on for further hearing until July 18, 1944, that is, after the lapse of an interval of nearly sixteen months from the first hearing.

The original case stated in para. 3 what purported to be the history of the case. In the following three paragraphs, *viz.*, paras. 4, 5 and 6, the Special Commissioners set out a summary of the evidence of the witnesses for the appellant and the respondents. Apart from what was stated in the four paragraphs referred to, there was no paragraph setting out the findings of fact of the Special Commissioners, and it was left to the tribunal to spell out such findings A from the paragraphs in question. This is no part of the duty of the tribunal. It is, we think, essential that the Special Commissioners, when stating a case, should put their findings in clear and unambiguous terms. These findings must necessarily be based on the evidence submitted by both sides which must be considered and weighed and accepted or rejected by the Special Commissioners.

If the point of law which the Special Commissioners desire to raise is whether there is any evidence to justify what purport to be findings of fact, it may be B necessary to set out the evidence on which they base those findings: see *Gramophone & Typewriter, Ltd.* v. *Stanley* (1), especially *per* FLETCHER MOULTON, L.J., at p. 102. Where, as here, the question is whether, as a matter of law, the Special Commissioners could properly come to their conclusion on the facts found, it is, we think, improper to insert in the stated case a summary of the evidence given by each witness, at any rate without a statement as to what C part of it has been accepted or rejected: see *Royal Choral Society* v. *Inland Revenue Comrs.* (2), *per* LORD GREENE, M.R., at p. 103, and *per* DU PARCQ, L.J., at p. 108.

We think it right to call attention to this matter because the Special Commissioners have fallen into the same error in the supplemental case stated in pursuance of the order of the Court of Appeal of Mar. 1, 1943. In para. 1 of the supplemental case they state that: D

> . . . para. 3 of the case stated sets out the facts and documents all of which were proved or admitted before us.

Two further paragraphs follow, the first of which refers to paras. 4, 5 and 6 of the case stated, and says that these paragraphs:

> . . . contain a summary of the evidence given before us in supplement of the aforesaid facts and documents, the whole of which we accepted. E

In view of the discrepancies between the evidence of the various witnesses we, at the request of the parties, and in order to save further expense and delay, proceeded on the footing that the whole of the material facts were stated in para. 3 of the case stated.

The material facts are as follows. The appellant had three children, *viz.*, Michael, born on July 4, 1914, Duncan, born on Sept. 1, 1916, and Lorna, born F on May 23, 1922. During the whole of the five tax years material to be considered, these three children lived with the appellant at his home in Hertfordshire. The appellant was a wealthy man. On Feb. 14, 1935, he executed the first of the three deeds which it is material to consider in connection with these appeals. This deed, which is dated Feb. 14, 1935, and is hereinafter referred to as the first deed, provided for the payment by the appellant to the trustees named in the deed of an annuity of £1,500 for each child during the joint lives G of the appellant and such child. The deed was expressed to be revocable with the consent of one of certain named persons. The interest of each child under the deed ceased on bankruptcy, assignment or charge, and was not in fact absolute as stated in the case and by MACNAGHTEN, J. On cesser the usual discretionary trusts to be found in what are commonly called protected interests came into being. By cl. 4 of the deed, the trustees were empowered, during the minority of any child of the appellant, to apply: H

> . . . the whole or such part as they shall in their absolute discretion think fit of the annuity hereinbefore directed to be held in trust for such child for or towards his or her maintenance, education or benefit, or may either themselves so apply the same or may pay the same to his or her parent or guardian without being concerned to see to the application thereof, or may pay the same or any part thereof to such child personally notwithstanding his or her infancy and shall accumulate any surplus . . .

in the manner therein mentioned, and should hold the accumulations in trust for such child absolutely. The trustees of the deed were two gentlemen who were partners in the firm of solicitors acting for the appellant. The appellant on Apr. 2, 1935, duly paid the solicitors for the trustees a cheque for £3,487 10*s*., being the amount payable under the deed for the current year, *viz.*, £4,500 less income tax at the appropriate rate. The Special Commissioners have found that the trustees, in exercise of their discretion under cl. 4 of the deed, paid this sum to the appellant, all three children being then infants.

In the following tax year the same course was followed, but Michael attained his majority on July 4, 1935 and, therefore, cl. 4 did not apply to that part of the annuity referable to that part of the year after July 4. The appellant told Michael about the money and suggested to him that he (the appellant) should take care of it for him, and Michael agreed. On Apr. 2, 1937, the second deed was executed. Under it the appellant covenanted with the same trustees to pay during the joint lives of himself and his son Michael a further annuity of £1,500. The trusts on which this annuity was to be held were for Michael, subject to cesser on bankruptcy, assignment or charge, when trusts similar in all respects to those contained in the first deed in the similar events were to come into operation. This deed, like the first, was revocable with the consent of one of several named persons.

On Apr. 2, 1937, the appellant paid to the trustees the sum of £4,575, being the sum of £6,000 less income tax at the appropriate rate ; £2,287 10*s*. of this sum represented the two annuities of £1,500 each under the first deed in favour of Duncan and Lorna, both of whom were still infants, and the remaining £2,287 10*s*. represented the two annuities of £1,500 each to which Michael was entitled under the first and second deeds. It was admitted that no claim could be made in respect of Duncan and Lorna's annuities during the year, owing to the provisions of the Finance Act, 1936, s. 21, and the claim to deduction from his sur-tax liability for this period was limited to Michael's two annuities. A cheque for £2,287 10*s*. was sent by the trustees to Michael. Michael indorsed this cheque and handed it to the appellant, who agreed to take care of it for him.

In 1937-38 the appellant paid to the trustees the sum of £4,500, being the £6,000 payable under the first and second deeds less the appropriate tax. No claim was made in respect of the two sums of £1,500 representing Duncan and Lorna's annuities owing to the provisions of the Finance Act, 1936, s. 21. Nor was any claim made in respect of the annuity payable to the trustees under the second deed by reason of the provisions of the Finance Act, 1938, s. 38, but a claim was made in respect of the annuity of £1,500 in which Michael was interested under the first deed as the appellant had availed himself of the provisions of the Finance Act, 1938, Sched. 3, Pt. II, para. 1 (*c*), by the execution on Oct. 28, 1938, of a deed (hereinafter called the third deed) whereby he, with the necessary consent, revoked the first deed and covenanted with the same persons who were trustees of the first and second deeds to pay during the periods therein mentioned two annuities of £1,500. One of these annuities was to be held in trust for Michael and the other for Duncan, who had attained his majority on Sept. 1, 1937 ; each trust is subject to determination in similar events to those already referred to in the first and second deeds, and, after determination, there are the usual discretionary trusts to be found in the case of protected interests. In these circumstances, the claim in respect of the year 1937-38 was limited to the £1,500 paid to Michael under the first deed. This sum was paid to Michael and handed over by him to the appellant to keep for him as in the case of the earlier payments.

In the year 1938-39 the appellant paid to the trustees the sum of £2,175, being the total of the two annuities payable under the third deed less income tax. Cheques for £1,087 10*s*. each were paid to Michael and Duncan who respectively indorsed the cheques and handed them to the appellant on the same terms as before mentioned, Duncan as well as Michael asking the appellant to keep the sums in question for them respectively. The claim by the appellant in this year is limited to the £3,000 representing these two annuities.

The appellant has accounted for approximately £1,000 to each of his sons, the substantial part of these sums being represented by land purchased by the appellant and conveyed to Michael and Duncan respectively.

It is to be observed that in no case is the validity of either of the three deeds challenged. Each is held to be a genuine deed and is admitted not to be a covinous transaction. Further, it is admitted that the trustees, when purporting to exercise discretions vested in them by either of the deeds, did so in fact, and the Special Commissioners have so found. MACNAGHTEN, J., in upholding the decision of the Special Commissioners on the appellant's appeal, stated the facts at length and expressed the opinion that :

> . . . in view of the fact that the deed was executed by the taxpayer in expectation that the trustees would exercise their discretion in his favour and the trustees, being aware of his expectation, repaid the annuities to him and thereby freed themselves from any obligation to see what he did with the money, the Special Commissioners ought to have held that by the exchange of cheques the taxpayer made no effective payment of the annuities or of any part thereof and that his income suffered no diminution thereby.

So far as the payments to Michael and Duncan were concerned, MACNAGHTEN, J., expressed his opinion that the trustees had no duty to perform under the relevant deeds, except to hand on to Michael and Duncan what they received from the appellant. In so doing, MACNAGHTEN, J., appears to have overlooked the important fact that the respective interests of Michael and Duncan were not absolute but ceased on bankruptcy, assignment or charge, when discretionary trusts affecting the annuities would come into existence.

It is true that, in respect of moneys paid by the trustees to the appellant during the minority of any beneficiary, the trustees were exonerated from seeing to their application, but this exoneration did not affect the appellant ; as guardian of the infants he was under legal liability to apply the money for the benefit of the infants and could be compelled, if he failed so to apply it, to account, either at the suit of the infants by their next friend, or by the infants respectively when they attained majority.

There being no attack on the genuineness or *bona fides* of the deeds and the commissioners having found that : (*a*) the trustees made all the payments to the appellant for which they were responsible in the exercise of the powers conferred on them by the deeds, and (*b*) the moneys paid by the trustees to Michael and Duncan were handed over by Michael and Duncan respectively to the appellant on an express agreement that he would take care of such moneys for them respectively, it was not, in our judgment, open to MACNAGHTEN, J., to come to the conclusion he did. In our opinion, on the findings of the commissioners only one result is possible in law, and MACNAGHTEN, J., ought to have held that the appellant was right in his contentions, and to have discharged the additional assessments in respect of the first two years wholly and to have reduced (*a*) the additional assessment for the year 1936-37 by £3,000 ; (*b*) the additional assessment for the year 1937-38 by £1,500 ; and (*c*) the assessment for the year 1938-39 by £3,000.

It follows that, in our judgment, the appeal of the appellant must be allowed with costs here and below. It follows that the question raised by the appeal of the respondents does not, in fact, arise. Indeed, it was admitted both here and below that there was no room for the distinction made by the Special Commissioners in respect of sums actually spent by the appellant on the maintenance and education and for the benefit of the infants, and that the appeal against that decision must stand or fall according to whether the appellant succeeded or failed in his appeal. The respondents should pay the appellant's costs of their appeal.

Appeal allowed with costs. Cross-appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Sedgwick, Turner, Sworder & Wilson*, Watford (for the appellant) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MARINE INSURANCE CO., LTD. *v.* GRIMMER.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Morton, J.), **July 17, 1944.**]

Insurance—Marine insurance—Re-insurance—Named ships "and/or steamers held covered at premiums to be arranged"—Cargo in fact carried by another ship which was lost at date of re-insurance—Whether policy effective to cover loss.

The respondents were the primary insurers, under permanent open covers issued year by year, against marine and war-risks of all sugar sent from a factory in Jamaica. It was presumed that a certain cargo of sugar sent from this factory would be loaded on a certain ship and the respondents at first re-insured part of the risk with the appellant as shipped on that vessel. Thinking that this presumption was perhaps unjustified the slip was amended by the addition of the words "and/or steamers held covered at premiums to be arranged." The cargo was not in fact loaded on the named ship but on another which at the date of the amendment had been sunk unknown to either parties but known at Lloyds. It was contended on behalf of the appellant (i) that the subject-matter of the re-insurance was not sufficiently identified to put the appellant on the risk; (ii) that the words "and/or steamers" only applied to goods which were "shut out" from the named ship and that to have been so "shut out" there must have been intended a "link" between the carrying ship and the named ship; that belief or expectation on the part of the respondents that the goods would be going by or were in fact loaded in the named ship was insufficient to create such a "link"; that nothing short of intention on the part of the shipper to send the goods by the named ship was enough and that no such intention was present; alternatively, that, if the expectation of the respondent was sufficient "link", that expectation must be based on reasonable grounds, which did not exist; alternatively, the respondents' right to treat another steamer as the carrying steamer could not be exercised after that ship had been lost, notwithstanding ignorance of the fact and (iii) that the re-insurance policy could not be retrospective to a time earlier than the date of the slip, at which date the carrying ship had been lost and, therefore, the re-insurance had never come into operation:—

HELD: (i) the true construction of the words "and/or steamers" was that it was open to the re-insured to leave the name of the carrying ship unstated till a loss took place or the risk ran off; or that the re-insured was to declare it within a reasonable time after ascertaining it.

(ii) the subject-matter of the re-insurance was the risk that the re-insured were running of a possible liability to pay a loss to the insured; and the risk was sufficiently identified in the slip.

(iii) a re-insurance is retrospective to the date of the loading of the goods upon the carrying ship.

(iv) the premium payable in respect of the re-insurance was that payable on the footing that, at the date when the slip was initialled, nobody knew of the loss of the ship, and was at the rate ruling at the date of sailing for ships in the same class as that of the ship in which the sugar was actually loaded.

Decision of ATKINSON, J. ([1944] 1 All E.R. 353) *affirmed.*

[**EDITORIAL NOTE.** The object of re-insurance is to protect the insurer against the risk he insures and such insurance would be nugatory in many cases unless it dated back to the time when the insurer was first "on risk." It is not an insurance from the time when the slip is issued but is retrospective to the commencement of the insurer's risk. In the uncertainties of war, it is often impossible to name the ship on which a cargo will be shipped and the proper construction of the words "and/or steamers," the usual addition to cover such an uncertainty, is very important. It gives the insured the right to name the ship right up to the time of the loss or later if he has not at that time ascertained on what ship the cargo has been loaded.

AS TO DESIGNATION OF SHIP, see HALSBURY, Hailsham Edn., Vol. 18, pp. 211, 212, para. 280; and FOR CASES, see DIGEST, Vol. 29, pp. 94, 95, Nos. 520-523.]

Cases referred to:

(1) *Paddock* v. *Franklin Insurance Co.* (1831), 11 Pick. 227.

(2) *Insurance Co.* v. *Folsom* (1873), 18 Wallace 237.

(3) *Barr* v. *Gibson* (1838), 3 M. & W. 390 ; 41 Digest 170, *107* ; 1 Horn. & H. 70 ; 7 L.J.Ex. 124.

(4) *Sutherland* v. *Pratt* (1843), 11 M. & W. 296 ; 29 Digest 102, *597* ; 2 Dowl. N. S. 813 ; 12 L.J.Ex. 235.

(5) *Bradford* v. *Symondson* (1881), 7 Q.B.D. 456 ; 29 Digest 75, *346* ; 50 L.J.Q.B. 582 ; 45 L.T. 364.

(6) *Kewley* v. *Ryan* (1794), 2 Hy. Bl. 343 ; 29 Digest 100, *577*.

Appeal by the defendant from a decision of Atkinson, J., dated Feb. 8, 1944, and reported in [1944] 1 All E.R., at p. 353, where the facts are set out.

Patrick Devlin and *S. K. Cunningham* for the appellant.

A. J. Hodgson and *H. M. Pratt* for the respondents.

Scott, L.J. [delivering the judgment of the court] : This is an appeal by a single underwriter against a judgment of Atkinson, J., in favour of the respondent company (to whom we will refer as the respondents) who were claiming payment of his proportionate part for a total loss of sugar re-insured by them at Lloyds against war risks for £20,000 on a voyage from Jamaica to United States American ports on the Atlantic sea-board for transportation thence to Canada ; the other underwriters on the risk agreeing as usual to be bound. We will, therefore, refer to them as the appellants.

The policy, on Lloyds' printed form, was issued on July 17, 1942, giving effect to two slips, the first for £14,200 which had been initialled as to £2,000 on June 2 and for the rest on June 3, and the second for £5,800, initialled on June 3. As completed these two slips contained usual voyage particulars, followed by the phrase, "as orig." meaning "as stated in the reinsured's original insurance." The description of the carrying ship reads : "Cavelier and/or steamers and conces as orig. H.C.", the whole, in my opinion, meaning "in the Cavelier and/or other steamer or steamers and conveyances as original ; held covered at a premium to be arranged if the carrying steamer is not the Cavelier." The words "as original" apply to the whole of the clause.

What the appropriate premium would be if the sugar should prove not to be in the Cavelier is in dispute—the appellants contending that it is 100 per cent. of the loss payable, and the respondents that it should be the same premium as was ruling for ships of the same class as the Cavelier, as the steamer into which the sugar had in fact been shipped was of the same insurance class as the Cavelier. With that controversy we will deal at the end of this judgment.

That ship was the Western Head, and she had in fact been torpedoed and sunk on June 1. Neither the re-insured nor the re-insurer knew till after the slips had been initialled that the sugar in question was on board her. No question of misrepresentation or non-disclosure arose, everything being done in perfect good faith ; but the appellants contend that the description of the risk in the policy, which of course followed that in the slips, did not cover the sugar in question laden in the Western Head. Atkinson, J., said that it did. We agree with him.

The respondents were primary insurers of all sugar from a factory in Jamaica owned by the Gray's Inn Sugar Refinery, Ltd., against both marine and war risks, under permanent open covers issued year by year, the respondents being under obligation to accept all declarations and the Gray's Inn company being under obligation to declare all their shipments.

A £50,000 parcel of Gray's Inn sugar—some 3,000 tons—had been shipped under this cover, and it was this risk for which, as soon as they knew of it, the respondents sought re-insurance at Lloyds. It is thus plain that the subject-matter of the re-insurance was not the sugar itself, but the respondents' own risk under their insurance of the Gray's Inn company in respect of the sugar. Their own insurance had in fact attached from an earlier time than shipment, but the voyage risk which they decided to re-insure was only from the loading on board the carrying ship.

Having regard to the arguments addressed to us on behalf of Lloyds' underwriters it is very important to remember these two facts—firstly, that the subject-matter which the respondents were endeavouring to re-insure against war risks was simply and solely the risk they were already running of a contingent liability to pay a loss on their own original insurance of the Gray's Inn company, and secondly, that their own risk had already attached automatically as from the moment of the loading on board the carrying ship. The respondents did not in fact get news of the shipment till after the sugar had been afloat for three or four days.

Directly or indirectly at least one of the arguments advanced before us seems to me necessarily to involve reliance on an insurance fallacy, namely, that the re-insurance only attached from the date of the slip—June 3—with the corollary that as the Western Head was at the bottom of the sea on June 1 the re-insurance never came into operation. Even if the policy sued on had been an original insurance effected by the shippers of the sugar, it is indisputable that on its true interpretation it would have operated retrospectively to the loading of the insured goods upon the carrying ship. That is inherent in every voyage policy in the old Lloyds' form (now scheduled to the Act). The words "lost or not lost" are in our opinion mere repetition of what the policy means without them; but they serve to emphasise the nature of the contract; and they have been in the ordinary English policy since at least 1613, see Gow on Marine Insurance, 5th Edn., p. 33; and equally in the ordinary American policy since the 18th century.

The retrospective character of a voyage policy, even without the words "lost or not lost" is recognised by Arnould, sect. 13; by Phillips ,4th Edn., Vol. 1, chap. XI, p. 519; and see the cases there cited; *Paddock* v. *Franklin* (1); *Insurance Co.* v. *Folsom* (2); by Dour, Vol. 2, Lecture IX, sect. 5, citing *Barr* v. *Gibson* (3). The principle is also recognised in *Sutherland* v. *Pratt* (4), per Parke, B., at. pp. 311, 312; and in *Bradford* v. *Symondson* (5), where see especially the argument of counsel for the plaintiff at p. 459 and the whole judgment of Brett, L.J.

The litigation is very possibly attributable to certain complications in the facts of the case, which arose as a matter of history out of other insurance arrangements in which the respondents were interested as insurers. It is necessary to state them in detail.

The respondents had a local agency in Kingston, Jamaica, conducted by one Verity, through which insurance business came to them. That agency did not deal with the Gray's Inn company's insurances, which were arranged through the firm of Henckell de Buisson & Co., their general managers in London; but the agency did effect other insurances in Jamaica—for instance with Bryden & Evelyn, Ltd., sugar merchants in Kingston; and in May, 1942, it effected insurances on behalf of the respondents in respect of three sugar shipments, identified in the cables by their approximate values and the names of the ships in which they were shipped: (i) £11,500, shipped by Bryden & Evelyn, Ltd., in the Western Head, which sailed on May 27, but was torpedoed; (ii) £26,000, from the same shippers, in the S.S. Cathcart, which sailed on May 29, and arrived safely; (iii) £23,000, same shippers, in the S.S. Cavelier, which sailed on June 2, and arrived safely. For security reasons on account of enemy activities the censorship control at the time in question required senders of cables from Jamaica to the United Kingdom giving information of shipments to cable the details and probable sailing date of a shipment without stating the name of the carrying steamer, and to put the name in a separate and later cable; and that rule was duly observed by the respondents' Jamaica agency in regard to all three of the above shipments. With the £50,000 shipment by the Gray's Inn factory on the Western Head the agency had no concern, and there was in fact considerable delay before the news of the shipment reached the respondents in London; and it was that delay which caused all the trouble.

The dates of despatch and receipt of the three agency cables and the expected sailing dates have some importance in view of the contentions of the appellants. The £11,500 parcel was the first one to be communicated; that was by a cable of May 22, received on May 24, giving May 26 as the expected sailing date; it was followed by a cable of May 23 naming the Western Head, also received on May 24. The next was the £26,000 parcel for which the first cable was despatched on May 27 and received on May 28, sailing date May 29; followed by a cable of May 28, received on May 29, naming the S.S. Cathcart. Then came the £23,000 parcel; first cable despatched on May 29, received on June 1, sailing date "about the 30th" (in the cable the value was £21,500 but it was subsequently increased to £23,000); followed by a cable of May 30 naming the Cavelier, received on June 1.

In all these three cases the cables were sent by the respondents' own agency in Kingston. In the meantime a cable had been despatched to Czarnikow & Co., the Gray's Inn company's sugar brokers in London, by the latter's own agent in Jamaica reporting the shipment of the 3,000 tons of Gray's Inn sugar, with no sailing date; it was received at their office at 9.30 a.m., on Saturday, May 29.

On the same day Czarnikow wrote a letter to Henckell du Buisson reporting the receipt of the cable and adding: "We will advise you the steamer's name in due course, meantime we await your formal declaration." On Tuesday, June 1 (but not before, the delay being, we think, due to war-time dislocation of the business of Henckell du Buisson) a Mr. Norton Breton of their import department wrote to the respondents a letter reporting the advice of a shipment of about £50,000 "by an unnamed steamer"; and adding that Czarnikow & Co., Ltd., of Montreal would be "issuing certificates against the above in due course"—that is, against the respondents' floating cover, which we have mentioned.

That letter did not reach the respondents till the middle of the morning of Wednesday, June 2. McCay, the assistant manager, at once put it before Darby, the manager and underwriter. A senior clerk assistant in the underwriting department, called Kerr, was told to get the name of the steamer from Breton. He telephoned accordingly mentioning that the respondents had had a telegram (which he had happened to see) about another shipment, with the name of the Cavelier on it.

Between them they came to the conclusion that the "unnamed steamer" was probably the Cavelier, and Kerr thereupon wrote that name in ink on Breton's letter and gave the letter back to McCay in the afternoon. The respondents had a large re-insurance cover with the Standard underwriting group for 50 per cent. of the respondents' cargo risk, not exceeding £20,000.

On receiving the letter back McCay pencilled on it the figures of that re-insurance amounting to £20,000, leaving his company with £30,000; to this he added 50 per cent. of the Kingston agency risk of £23,000 known to be on the Cavelier, against which the respondents had a 50 per cent. protective cover with the London Assurance group, making the company's commitments £41,500 in all, in respect of which they were not at the moment re-insured.

They had available for re-insurance a floating cover for £30,000, excess of £3,000, against war risks only with or through Hartley Cooper & Co., the insurance brokers in London. But Darby did not think it expedient to use up the whole of the respondents' remaining open cover. They had to carry the £3,000 under the Hartley Cooper excess cover of £30,000; they still had the 50 per cent. of the Kingston agency parcel of £23,000 known to be in the Cavelier—that is, £11,500; and, therefore instead of using up the whole of Hartley Cooper's open cover of £27,000, they thought it wiser to take out a "special" re-insurance for £20,000, that is, a wholly new re-insurance outside their existing re-insurance covers; and they accordingly instructed Hartley Cooper & Co. forthwith to effect it.

McCay after receiving back the Breton letter of June 1 with the word Cavelier written on it in ink by Kerr, had himself also spoken to Breton with a view to making sure about the shipment being in the Cavelier. There was in the oral evidence below some variation of recollection as to the precise language used in the two conversations, but we have no reason for disagreeing with the conclusion of Atkinson, J., that there was sufficient material to justify the respondents in believing that the 3,000 tons parcel of Gray's Inn sugar was in all probability coming by the Cavelier. The very fact that McCay allowed the risk to be shown at Lloyds with only the name Cavelier is conclusive in our minds that he did believe the Gray's Inn sugar to be in that ship. That this belief was rational is shown not only by the opinion expressed by Breton, but also by a comparison of the sailing dates in May of the three steamers—the Western Head, Cathcart and Cavelier, as stated in the Verity cables, namely, May 26, 29, and "about" May 30. It was natural enough that having had no information about the sailing date for the 3,000 tons of Gray's Inn sugar McCay should infer that it was coming in the last of those three steamers; the more so as Breton's letter gave no news on that point, although it spoke of the "shipment" as if it had been made; and further, because the Cavelier was a regular carrier of Gray's Inn sugar to Canada, as explained by Breton.

In the watches of the night of June 2, however, the absence of certainty about the Cavelier disturbed McCay's mind and he told Hartley Cooper to add "and/or other steamers." ATKINSON, J., believed him and so do we. Taylor of Hartley Cooper & Co., accordingly obtained the consent of the leading underwriter, who had signed the day before, to the addition; and then himself wrote on the slip those words with "as orig." and "H.C."; that is, "as per original insurance" and "held covered." During the day he got the slip underwritten up to £14,000 on the premium footing of "the original net rate and deductions as per M.I. Co.'s cover" as on the day before.

On June 3, on a second slip, he completed the £20,000 but at a slightly higher premium, namely, 7½ per cent. net (which was the rate of the original), but without deductions. At 9 a.m. on the morning of June 3 Breton, of Henckell du Buisson received a night letter telegram from the manager of the Gray's Inn factory, which had been despatched on June 1, simply giving quantities with no other particulars. At 1 p.m. on the same day Czarnikow & Co., received a cable from Hankey, their own agent in Jamaica, giving the name of two ships Moyra and Western Head and other matter not relevant.

Each of these two names was understood by Czarnikow & Co. to constitute the second part of its appropriate antecedent message of shipment. The name Moyra related to a shipment which has nothing to do with the present appeal (as a matter of fact it related to the first shipment mentioned in the shipment cable received on May 29). The name Western Head, however, at once told Czarnikow & Co. that it was the "unnamed ship" carrying the 3,000 tons parcel mentioned in the shipment cable received by them on Saturday, May 29: see Brackley's evidence. Czarnikow & Co. did not then know of the loss of the Western Head.

We have now stated, we think, all the facts material to the decision of the appeal. The questions we have to decide depend on the proper interpretation of the policy. In the court below the appellants' vain endeavour to prove the customary meaning alleged in the defence failed, as in our opinion it was bound to. The respondents as plaintiffs can hardly be blamed for asking inadmissible questions about the meaning of the policy, when tempted to do so in order to meet the plea of customary meaning; but in the result much time was wasted in listening to wholly inadmissible expressions of opinion by the witnesses on both sides about the meaning of phrases in Lloyds' policy which have been settled law since LORD MANSFIELD's time. The arguments of counsel for the appellants were, we think, much influenced by these expressions of opinion by witnesses about the meaning of the policy.

In analysis we think they amounted to the following submissions: (i) A general one that the subject-matter of the re-insurance was never sufficiently identified, either in the policy or in fact, to put the appellants on the risk. (ii) That the words "and/or steamers" only applied to goods which were "shut out" from the named ship, namely, the Cavelier; and that to have been so "shut out" there must have been intended what one witness called "a link" between any other steamer and the Cavelier; that expectation or belief on the part of the re-insurance that the goods would be going by or were in fact loaded in the Cavelier was insufficient to create such a link; that nothing short of intention on the part of the shipper to send the goods by the Cavelier was enough, and, finally that that was admittedly absent in the present case; (iii) Alternatively to (ii) that, if the expectation of the reinsured be sufficient "link", that expectation must be based on reasonable grounds—which he contended did not exist in the present case: (iv) in the further alternative to (ii) that the re-insured's right, if any, to treat "another" steamer as the carrying ship, could not be exercised after that ship had been lost, even although "exercised in complete ignorance of the loss and in perfect good faith": and (v) (the general contention, to which we have already referred) that no policy, even a re-insurance policy, is retrospective to a time earlier than the slip.

This last contention was not put forward in this naked form, but was, we think, inherent in his whole argument and, as we have already said, it is a fallacy.

Even in an original voyage policy in statutory form, and, therefore, containing no special words to exclude retrospective operation, it would be a fallacy; but much more so in a re-insurance policy, covering the original insurer's own risk under the policy he has underwritten. The re-insurance must cover the insurer's own risk from the very moment when it first attached ; otherwise the very object of the re-insurance would often be wholly defeated.

We will now deal with the appellant's arguments *seriatiam.* (i) The words "Cavelier" "and/or steamers" in the slip plainly refer to the words of Lloyds' policy :

> . . . lost or not lost at and from Jamaica to . . . upon . . . goods . . . on the good ship . . . from the loading thereof on board the said ship as above.

If the words in the policy had been simply "steamer or steamers," we should A
have held on the pure question of construction, that it would have meant one of two things : (*a*) that it was open to the re-insured to leave the name of the carrying ship unstated till a loss took place or the risk ran off : or (*b*) that he was to declare it within a reasonable time after ascertaining it : for present purposes it does not matter which is the right interpretation. The addition of the name Cavelier leaves the above interpretation unaffected from any grammatical point of view : and, there being no customary meaning, the grammatical B
interpretation must stand. That there may have been motives in the mind of the reinsured for naming a ship, or in the mind of the re-insurers for wanting a name is immaterial. No evidence, apart from the issue of customary meaning, was admissible. *Kewley* v. *Ryan* (6) is an illustration of an original voyage policy on goods "as interest should appear in ship or ships" ; and disposes of this argument. C

(ii) This contention was equally erroneous as a matter of pure interpretation, and in the absence of proved customary meaning must be rejected. The notion of the "link" is irrelevant. It might well be that in the rather jumpy state of the war-risk market at that time, if the respondents had given a ship's name without having any reason for it, other than the object of inducing the underwriters to look more favourably on the slip that was being shown round, the non-disclosure of the complete absence of reason for the name would have been D
fatal. But that issue does not arise. The respondents obviously did believe in the probability of the Cavelier being the carrier.

(iii) What we have already said disposes we think of this argument. We can see no justification for introducing an issue of fact about "reasonable grounds" for their expectation that the sugar was coming by the Cavelier. The issue of reasonable grounds might (with other evidence and a plea of non-disclosure) conceivably have justified investigation into the reasons of the E
re-insured ; but on the question of construction of the policy it is irrelevant. As it is thus not in issue, we do not discuss the question.

(iv) This is covered by what we have already said—the policy was necessarily retrospective and so was the slip. It must have been obvious to those who initialled the slip that the Marine Insurance Co. were re-insuring a risk they were already on—an easily identifiable risk : and if Lloyds asked no question F
when the words "and/or steamers" were added to the name Cavelier, they accepted that description as enough to identify the subject-matter, namely, the real and actually existing risk against which the Marine Insurance Company wanted its special cover.

The only other issue is the counter-claim for 100 per cent. premium. That is in our opinion unarguable. If the subject-matter was the re-insurance risk and if that risk was adequately described in the policy, as we have held it G
was, the appellants were bound to accept as premium the fair rate settled by Lloyds classification at the time for the Western Head on the footing that at the time of the slip nobody knew anything about her loss. On the evidence that would have been the same rate as for the Cavelier.

A concession was made in the court below by the respondents, without any admission of obligation to make it, that the £23,000 parcel on the Cavelier should be treated as within the policy. This was a voluntary and we think very generous H
concession, but the result is that the claim for which judgment will be entered is on that footing, that is, for about 66 per cent. of the full claim for total loss.

The appeal must be dismissed with costs.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : *William A. Crump & Son* (for the appellant) ; *Ince, Roscoe, Wilson & Glover* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ASSOCIATED INSULATION PRODUCTS, LTD. *v.* H. GOLDER (H.M. INSPECTOR OF TAXES).

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Uthwatt, J.), **July 24, 1944.**]

Income Tax—Dividends—Dividends of foreign corporation—Dividend payable four years after declaration—Whether shareholders assessable in year of declaration or in year of payment.

The appellant company was the beneficial owner of a number of shares in a corporation formed under the laws of the United States of America. On Dec. 15, 1936, the American corporation declared a dividend but by a further resolution provided that the distribution of the dividend should be in the form of a certificate of indebtedness to the shareholders payable on Jan. 1, 1940, with interest thereon at a fixed rate until payment. The appellant company contended that it was assessable to income tax in respect of this dividend in the year in which the dividend was declared :—

HELD : the company was assessable in respect of the dividend in the year in which it was actually paid.

Decision of MACNAGHTEN, J. ([1944] 1 All E.R. 533) *affirmed.*

[**EDITORIAL NOTE.** The fact that interest is payable upon the sum secured by the dividend note tends to give the sum payable under the note a capital flavour, but this question has to be decided on all the facts. Taking all the facts into account, the Court of Appeal have held that the company had done nothing to capitalise the amount of the dividend but had merely deferred the payment.

AS TO INCOME ARISING FROM SECURITIES AND POSSESSIONS OUT OF THE UNITED KINGDOM, see HALSBURY, Hailsham Edn., Vol. 17, pp. 189-202, paras. 390-417 ; and FOR CASES, see DIGEST, Vol. 28, pp. 77-81, Nos. 422-450.]

Cases referred to :

*(1) *Cross* v. *London and Provincial Trust, Ltd.*, [1938] 1 K.B. 792 ; [1938] 1 All E.R. 428 ; Digest Supp. ; 107 L.J.K.B. 423 ; 158 L.T. 217 ; 21 Tax Cas. 705.

(2) *Inland Revenue Comrs.* v. *Blott, Inland Revenue Comrs.* v. *Greenwood*, [1921] 2 A.C. 171 ; 28 Digest 107, *663* ; 90 L.J.K.B. 1028 ; 125 L.T. 497 ; 8 Tax Cas. 101.

(3) *Inland Revenue Comrs.* v. *Fisher's Executors*, [1926] A.C. 395 ; 28 Digest 107, *664* ; 94 L.J.K.B. 310 ; 132 L.T. 278.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., given on Apr. 3, 1944, and reported [1944] 1 All E.R. 533, where the facts are fully stated.

Cyril King, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Reginald P. Hills* (*L. MacLaren* with them) for the respondent.

SCOTT, L.J. : MACNAGHTEN, J., has stated the facts sufficiently for our purposes. The only question which I think calls for any consideration is what was the substantial effect of the double resolution of the American company passed on Dec. 15, 1936, and of the similar one passed on Dec. 20, 1937. If those resolutions provided in reality for a distribution by way of dividend not of money but of money's worth, the income tax due in respect of it under case V would be not on the money figure of interest payable on each share, but on the market value of the certificates on the date of their distribution multiplied by the number of shares held. If, on the other hand, the reality of the transaction was the declaration of a money dividend payable not presently, but only on a future date, namely, Jan. 1, 1940, then it follows that till the due date arrived and payment was in fact received by the respondent company as shareholder, no income arose from its foreign possessions.

On the whole I think the latter is the true view of what was done. The first half of the double resolution expresses the real intention rather than the second. The certificates seem to me to have been intended as a consolation for postponement of payment, which would on the one hand assure a reasonable rate of interest during postponement, and on the other give some of the advantages of a security for an existing debt, *debitum in praesenti* though only *solvendum in futuro :* for they would have some—perhaps a high—market value.

I have had the advantage of reading the judgments of DU PARCQ, L.J., and UTHWATT, J., and agree with them, although I have expressed my reasons a little differently. The appeal will be dismissed with costs.

du Parcq, L.J.: In my opinion, Macnaghten, J., was right on both points. The first contention of the appellants is not supported by the facts. It seems to me to be plain that the corporation, as the Crown contended, "elected to distribute income as income." The appellants' second contention raises a question which might have given me some difficulty had I not the guidance of the decision of this court in *Cross* v. *L. & P. Trust, Ltd.* (1). The Finance Act, 1938, s. 25, deprived that decision of much of its practical importance, but I agree with Macnaghten, J., in regarding it as directly in point here. He was bound to follow it, and so, in my opinion, are we.

I cannot accept the suggestion put forward by the appellants that the decision in *Cross's* case (1) turned on the fact that the promise made under the funding plan was substituted for an earlier promise to pay interest. On the contrary, this court seems to me to have decided as it did, not because of, but rather in spite of, the fact that a new promise had been substituted for the earlier one. The Crown, as I read the report of the argument, was seeking to rely on that fact. The argument was that the old debt had gone, and that the bondholder had taken something marketable in its place. "The interest," it was said, "is discharged and money's worth takes its place." The argument for the subject was that a repeated promise to pay is no more equivalent to payment than the original promise. Promises are not payment. This latter argument prevailed and it was held that, when all was said, the funding bond then in question was "nothing but a promise to pay at a future date the interest in respect of which default has been made": see the judgment of Sir Wilfrid Greene, M.R., at p. 800 ([1938] 1 All E.R., at p. 433). If the words "in respect of which default has been made" are omitted from that statement, the logic of the proposition and the principle which it states are alike unaffected. To my mind, it is clear from the judgment of Sir Wilfrid Greene, M.R., read as a whole, that a post-dated cheque, or a promissory note, or a promise in the form of the "negotiable instrument" (as it is called) which we have before us in the present case, can never be regarded as "income arising from securities out of the United Kingdom" or (to quote the words now applicable to the case) as "income arising from possessions out of the United Kingdom." They are money's worth, no doubt, but they are not income.

In my judgment, the present case is indistinguishable in principle from *Cross's* case (1). The appellants' contention must, therefore, fail, and the appeal should be dismissed with costs.

Uthwatt, J.: I agree. The contention of the Crown is that, in the circumstances stated in the case, taxable income arose to the company and that it arose when the certificates were redeemed. The contentions of the company are: first, that, on each occasion the corporation had resolved not to distribute a fund of profits but to retain it as capital, and that any distribution was a distribution of capital; and, second, that, if the first contention is wrong, income arose to the company not when payment was made under the certificates, but when the certificates were issued. If the company are right in this contention the value of the certificates at the date of their issue would come into computation for tax purposes as income from foreign possessions received in the year of issue and that tax would be assessable accordingly.

As regards the first contention of the appellants, the court in the absence of any relevant evidence as to American law upon the point, is bound to assume that, as a matter of the general law affecting corporations incorporated in the United States of America, it is open to the American corporation, as it is to a company incorporated under the British Companies Acts, to capitalise its profits and make a distribution among its stockholders so that the benefits accorded to the stockholders are received by them as capital, and that to achieve that object no action by the corporation is necessary beyond those which are requisite in the case of a British company.

It is clear from *Blott's* case (2), and *Fisher's* case (3), that it is for the company which proposes to make a distribution to decide whether or not the distribution is to take the form of a capital distribution or an income distribution and to translate its decision into action. Its decision so translated into action is conclusive. The action taken by the company considered in relation to the surrounding circumstances is the decisive matter, but any statement made by the company as regards the distribution is relevant and must be taken into account, though a statement which does not correspond with the reality of the distribution in fact made is of little, if any, value. The company may paint the picture but not decide that it is a masterpiece. The substance of the transaction is to be looked at and its nature ascertained by the court. Further, in my opinion, the burden of proving that the transaction intended and made, when considered in the light of the surrounding circumstances, is in truth a capital distribution lies upon those who assert it.

The form of the transaction has already been stated. As regards the surrounding circumstances, no help is gained from the statements as to the law of the United States of America contained in the case. The question whether the asset received is income within the meaning of a particular Federal Taxing Act is irrelevant for the purposes of any point before the court, and the opinion of the Federal fiscal authorities upon the transaction is in an English court of no value in law. Mr. Pearl gave certain evidence upon the effect of the transaction according to the law of the United States of America, but the case does not state whether or not that evidence was accepted by the Commissioners. I, accordingly, attach no weight to any of the evidence relating to the position according to the law of the United States of America, nor do I express any opinion as to the extent to which that law, if adequately proved, might be relevant.

The material surrounding circumstances as found by the Commissioners are (i) that the corporation while having a fund of profits available for distribution had not the necessary cash in hand and were unwilling to borrow and that this was the reason for the issue of the certificates ; (ii) that while neither resolution used the word "dividend," the circular which accompanied the second distribution records that the directors in their resolution relating to it "had declared a dividend of 16 per cent.", and states that "the distribution of 16 per cent. is not to be paid in cash but to be in the form of scrip . . . which is in the form of a certificate of indebtedness" ; (iii) the accounts of the corporation refer to the two distributions as "dividends" and to the latter distribution as a dividend paid ; debit the total amount of their "surplus" and enter the amount payable under the certificates on the liabilities side of the balance sheet along with current indebtedness, but do not treat the sum in terms as loan capital.

To my mind the proper inference is that a distribution of profits as such was intended and made. The substance of the transaction, in my opinion, was the declaration of an ordinary dividend attracted by the stock, such dividend being payable at a future date, and the stockholders' rights in respect of the dividend being for convenience stated in a document which crystallised the position and made their rights conveniently marketable. Taking that view of the transaction, the first point taken by the company fails and upon the second point it follows that upon the authority of *Cross's* case (1) taxable income did not arise to the stockholders before the due date for payment under the certificates.

Appeal dismissed with costs.

Solicitors : *Clifford-Turner & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BEASLEY *v.* BURBERRYS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon, L.J., and Vaisey, J.), **July 18, 1944.**]

County Courts—Jurisdiction—Cause of action arising wholly or in part in the district—Parcel posted in London—Not registered—Parcel lost—Jurisdiction of court at Bakewell—County Court Rules, 1936, *Ord.* 2, *r.* 1 (1) (*b*).

The appellants carry on business in London. An agent of the appellants in Manchester sold a coat to the respondent who lived at Bakewell, in Derbyshire. The coat needed certain alterations and at the agent's suggestion it was sent by the respondent to the appellants in London. He despatched it by registered post. The appellants were unable to effect the alterations and they despatched the coat to the respondent at Bakewell by ordinary post. The coat never reached the respondent, who then commenced proceedings in the Bakewell County Court for damages. He alleged that the cause of action arose wholly or partly within the jurisdiction of that court :—

Held : the breach of contract, if any, in this case was a breach of an implied contract to take ordinary care in despatching the coat and was committed in London. The cause of action did not arise wholly or in part within the jurisdiction of the Bakewell Court and proceedings could not be commenced there.

[**EDITORIAL NOTE.** The decision herein is of importance to firms having business with a number of persons in widely scattered districts and conducted from central offices in some large town. It is highly inconvenient to have to send witnesses away from their work, and very naturally such companies prefer that such proceedings should be taken within reasonable distance of their central offices. It is not, of course, suggested that such companies are entitled to any special privilege or consideration, but, as the law stands and in the circumstances of this case, it is shown that the customer is not entitled to commence proceedings in the county court of his district.

As to District in which Cause of Action Wholly or In Part Arose, see HALSBURY, Hailsham Edn., Vol. 8, pp. 188-193, paras. 294-304 ; and for Cases, see DIGEST, Vol. 13, pp. 460-464, Nos. 109-141.]

Appeal by the defendants from a decision of His Honour Judge Willes, sitting at the Bakewell County Court. The report is solely concerned with a preliminary objection by the defendants that the cause of action did not arise wholly or in part within the district of the Bakewell County Court. The facts are fully stated in the judgment of Lord Greene, M.R.

B. Stenham for the appellants.

The respondent was not represented.

Lord Greene, M.R. : The respondent sought to recover damages from the appellant company in these circumstances. He had purchased a Burberry coat in June, 1941, from a Manchester firm who were the agents of the appellants. Subsequently he wished to have alterations made, and at the suggestion of those agents he sent the coat to the appellants at their London address in July, 1943, by registered post, and asked them to make the necessary alterations. They said they were unable to do so and despatched the coat to the plaintiff by ordinary post, but it never arrived. The respondent claimed the return of the coat, and in the particulars of his claim he claimed as damages a sum equal to the cost of a new coat and other sums in respect of other items of damages, but I do not think these details matter very much.

The action appears to be one arising out of an alleged contract of bailment with respect to the coat, but the judgment of the learned judge, which was given with very great care, was one which dealt with a preliminary point taken on behalf of the defendants namely that he, as county court judge sitting at Bakewell, had no jurisdiction to try the action because the alleged cause of action did not arise wholly or in part within the district of that court. The county court judge had to consider whether the alleged cause of action arose wholly or in part within his jurisdiction within the meaning of C.C.R., Ord. 2, r. 1, para. (1) (*b*). The relevant part of that paragraph provides that except where otherwise provided, an action may be commenced :

> (*b*) Subject to the succeeding paragraphs of this Rule, in the court for the district in the cause of action wholly or in part arose.

Under para. (5) of that rule it is provided that the plaintiff, where he desires to commence an action by virtue of para. (1) (*b*) of the rules, shall file a praecipe in the required form stating the facts upon which he relies as giving the court jurisdiction under the rule. This procedure the plaintiff carried out.

The only materials which the judge had in order to decide the question whether the cause of action arose wholly or partly within the jurisdiction of his court were the allegations made by the respondent in his particulars of claim and in the praecipe, and I sympathise with him in the task which he had in extracting any cause of action out of those documents. The relevant portions of the particulars of claim are as follows :

> When in due course he wished to have the necessary alterations made to enable him to wear it, at the suggestion of the defendant company's agents he sent the coat to the defendant company in July, 1943, by registered post and asked them to make the necessary alterations. They said that they were unable to do so and despatched the

coat to the plaintiff by ordinary parcel post, but it did not reach him and has not been found since.

The relevant portion of the praecipe filed by the plaintiff is as follows:

> What are the facts upon which the plaintiff relies as showing that the cause of action arose wholly or in part in the district of the court? The coat in question was sent to the defendant company for alteration and should have been returned to the plaintiff at Bakewell within the district of this court. The defendant company did despatch the coat addressed to the plaintiff at the above address but they did not register the parcel and they state that it was lost in the post.

It will be seen from this praecipe that the plaintiff therein alleged that it was the duty of the defendants to return the coat to him at Bakewell, but that they failed to do so although they did send the coat by post, but did not register the parcel. Now looking at the terms of this allegation it is apparent that it was not alleged that the cause of action wholly or partly arose on the one hand at Manchester where the place of business of the defendants' agents is, or on the other hand in London where the place of business of the defendants is. The allegation is that the cause of action arose at Bakewell on the ground that it was there that the coat ought to have been delivered and that, therefore, the court of that place had the appropriate jurisdiction. The judge rightly construed the praecipe in that sense, but he should, in my opinion, have approached the matter on the footing of what was alleged in the particulars of claim. Now the matter that was alleged in those particulars was not the failure to deliver the coat back to the plaintiff at Bakewell, but the act of the defendants in despatching the coat by ordinary post, that is to say, the act of putting the coat into the hands of the post office without registering it.

The county court judge says that the facts which were essential to the establishment of the cause of action were the creation of the relationship of bailor and bailee and he asks this question: "Where was the creation of the relationship of bailor and bailee made"? He answers it by saying that the relationship began when the coat was despatched by the plaintiff, and he apparently infers by that answer that the relationship began at Bakewell. In my opinion that answer cannot be accepted, for the coat was despatched from Bakewell by post, and the post office certainly were not the agents of the defendants to receive it. The judge then proceeds to find that the alleged default of the defendants in not delivering the coat back into the hands of the plaintiff at Bakewell was due to their failure to despatch it by registered post. In this he assumes a contract to exist which did not agree with the facts alleged in the particulars for he says:

> It seems to me that the duty of the bailees was to re-deliver the coat to the bailor at his place of residence and until the goods reach the bailor at his residence they are at the bailee's risk.

Now that was not the implied contract alleged in this case. The implied contract in this case was to take ordinary care in despatching the coat back, and the alleged breach of that contract was the despatching of the coat by ordinary post instead of by registered post. That alleged breach was committed in London and not in Bakewell, and, therefore, the cause of action clearly did not arise within the jurisdiction of the Bakewell County Court. The judge should have transferred the case to the Westminster County Court within the jurisdiction of which the alleged breach was committed. The appeal will, therefore, be allowed.

MACKINNON, L.J.: I agree. The plaintiff relied upon a contract which, if it was made, must have been made in London. The alleged contract was the bailment of a Burberry coat, and the alleged breach of that contract could only have been made in London. The cause of action, therefore, could have only arisen in London.

VAISEY, J.: I agree.

Appeal allowed.

Solicitors: *S. F. Miller, Mathews & Co.* (for the appellants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BARCLAYS BANK, LTD. AND OTHERS *v.* ATTORNEY-GENERAL (ON BEHALF OF HIS MAJESTY).

[House of Lords (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan, Lord Wright and Lord Simonds), **June 19, 20, July 27, 1944.**]

Estate Duty—Property passing on death—Policies of assurance—Policies transferred to trustees—Separate fund provided for payment of premiums—Appointment—Death of assured—Whether policies kept up for donee's benefit—Customs and Inland Revenue Act, 1881 (*c.* 12), *s.* 38—*Customs and Inland Revenue Act*, 1889 (*c.* 7), *s.* 11—*Finance Act*, 1894 (*c.* 30), *s.* 2 (1) (*c*).

A settlor transferred to trustees two assurance policies on his own life and certain shares. The trustees were to use the income of the shares and any accumulation thereof to pay the premiums on the policies and to hold the balance, whether capital or interest, and including the policy moneys, as he should by deed or will appoint. An appointment was made by deed dated May 15, 1930, under which the investments were divided into two categories. Those in the first category, which formed the absolute fund, were to be held in trust for the settlor's elder son absolutely, but were liable to be resorted to, if necessary, for the payment of the premiums. The investments in the second category were to be resorted to in the first place for payment of the premiums and subject to this the income of these investments, called the retained fund, was to be paid to the elder son during his life, and then to his issue and in default of issue to the younger son, Mark. On the same day the elder son assigned his newly created absolute interest and his life interest to the trustees. Subject to the premiums on the two policies, those interests were then settled on the elder son for life, to provide an annuity not exceeding £1,500 and subject thereto on the elder son, his wife and issue and certain other relatives. The settlor was not given any beneficial interest of any description in the trust property. The settlor died on Sept. 5, 1934, and on his death £78,675 was paid to the trustees in respect of the policies of assurance. The Crown contended that estate duty was payable in respect of this sum under the Finance Act, 1894, s. 2 (1) (*c*), by reference to the Customs and Inland Revenue Act, 1889, s. 11, by which duty is payable on all property passing on death, including policies wholly kept up by the insured for the benefit of a donee. The trustees contended that the policies were not wholly kept up by the settlor for the benefit of a donee:—

Held: the policies were not kept up by the deceased because in May, 1930, he had completely divested himself of all interest in and all control over the fund out of which the premiums were paid.

Decision of the Court of Appeal (Scott and MacKinnon, L.JJ., Luxmoore, L.J., *dissenting*, [1943] 2 All E.R. 123) *reversed.*

[**EDITORIAL NOTE.** The House of Lords have held that a policy is kept up by paying the premiums. A fund may be set aside for payment of the premiums, but, in the present case, the trusts of the fund set aside went far beyond the payment of the premiums and, since the policies were assigned to the trustees, it is held that the deceased has divested himself of all control over the policies and the fund out of which the premiums were paid. It should be noted that there was no dispute that the policies were provided by the deceased within sect. 2 (1) (*d*).

As to Policies Kept Up for a Donee, see HALSBURY, Hailsham Edn., Vol. 13, pp. 241, 242, para. 232; and for Cases, see DIGEST, Vol. 21, pp. 15, 16, Nos. 73-80.]

Case referred to:

(1) *Smith* v. *Anderson* (1880), 15 Ch.D. 247; 9 Digest 72, *255*; 50 L.J.Ch. 39; 43 L.T. 329.

Appeal by the executors from a decision of the Court of Appeal (Scott and MacKinnon, L.JJ., Luxmoore, L.J., dissenting), reported [1943] 2 All E.R. 123, where the facts are fully stated. The decision of the Court of Appeal affirmed by a majority that of Wrottesley, J., in [1943] 1 All E.R. 181.

Cyril L. King, K.C., and *Wilfrid M. Hunt* for the appellants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *J. H. Stamp* for the respondents.

Viscount Simon, L.C.: My Lords, I have had the advantage of reading the opinion prepared in this case by my noble and learned friend Lord Macmillan. I agree entirely with that opinion and do not find it necessary to add any words of my own except that I move that the appeal be allowed.

Lord Thankerton [read by Lord Porter]: My Lords, the late Viscount Devonport died on Sept. 5, 1934. On his death the Crown, upon an information brought against the appellants as trustees under a deed of settlement dated Aug. 15, 1922, and a deed of appointment and deed of settlement both dated May 15, 1930, claimed estate duty and succession duty in respect of property comprised in the settlements.

The only question in dispute is whether the estate duty is payable on the footing that two policies on the life of the deceased, under which sums amounting to £78,675 were paid to the appellants upon his death, were "kept up" by him within the meaning of the Customs and Inland Revenue Act, 1889, s. 11 (1), in which case estate duty would be payable on the whole value of the proceeds. The King's Bench Division and the Court of Appeal (Luxmoore, L.J., dissenting) so held. It need only be added that the deceased retained no interest under the settlements, under which he was divested of his interest in the policies, and that, subsequently, the premiums on the policies were paid by the appellants out of the settled funds.

With all respect to the learned judges who have held otherwise, I am clearly of opinion that these policies were not kept up by the deceased after the date of the settlements, and I agree with the opinion of Luxmoore, L.J. The premiums were annual ones, and the crucial date in each year could not arrive until it became necessary to renew the currency of the policies for another year, because of the survival of the assured. Payment of the premium necessary for renewal was made by the appellants, over whom the deceased retained no control, out of settled funds, in which the deceased had no interest, and over which he retained no control. It cannot be maintained that the appellants made such payments as agents of the deceased, and the fact that the funds out of which the payments were met were originally settled by the deceased is not relevant, in my opinion. I agree with the statement by Luxmoore, L.J., at p. 129:

> The funds were no longer the property of the first Viscount. They belonged in equity to the beneficiaries who alone could compel the trustees to carry out the trusts. The payment by the trustees of the premiums was not made by them in any sense as agents for the first Viscount and cannot properly be described as being payments made on the first Viscount's behalf.

I, therefore, agree with the motion proposed by my noble and learned friend on the Woolsack.

Lord Macmillan [read by Lord Goddard]: My Lords, were it not that the Attorney-General has succeeded in obtaining judgments in his favour (with one dissentient) in both courts below, I should have thought that the claim advanced by him was plainly untenable. The question at issue is simple and short; the answer, in my opinion, is equally so.

Stripped of details immaterial to the controversy, the facts are not complicated. The late Viscount Devonport effected two ordinary policies of assurance on his own life with the Royal Insurance Co. In 1922 he executed a family settlement and to the trustees thereby appointed he assigned his two policies. At the same time he transferred to the trustees certain income-yielding investments. The trustees were directed by the settlement to pay the annual premiums on the policies as they fell due out of the income of the trust. Additional investments were subsequently transferred by Viscount Devonport to the trustees, and in 1930 he executed a deed of appointment and a further deed of settlement, whereby he finally completed his arrangements for the destination of the trust assets. The position at Viscount Devonport's death on Sept. 5, 1934, was that at least since 1930 he had been entirely divested of all right and interest whatsoever in the two policies of assurance and the investments held by the trustees. The premiums on the policies were from the institution of the trust paid by the trustees out of trust income as directed and were so paid solely for the benefit of the trust beneficiaries.

Policies of life assurance do not by their nature fit very logically into the scheme of estate duty, which is a duty leviable on property passing on death. They have accordingly been specially dealt with in the legislation. By the joint operation of the Finance Act, 1894, s. 2 (1) (*c*), of the Customs and Inland Revenue Act, 1881, s. 38, and of the Customs and Inland Revenue Act, 1889, s. 11 (1), property passing on the death of a deceased is deemed to include :

> . . . money received under a policy of assurance effected by any person . . . on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

In this way the proceeds of a life policy are rendered in whole or in part liable to estate duty on the death of the assured where the policy has been wholly or partly kept up by him for the benefit of a donee.

The contention of the Attorney-General in the present case was that, although all the premiums on the policies had been paid by the settlement trustees out of trust income since 1922, nevertheless the policies had been throughout that period kept up by Viscount Devonport. He expressly and, in my opinion, rightly declined to support the ground of the judgment in his favour by WROTTESLEY, J., who heard the case in the first instance and took the view that the trustees had paid the premiums either under contract with or as the agents of Viscount Devonport—a misconception of the legal character of a trustee. The Attorney-General's argument was that a policy is none the less kept up by the assured and the premiums none the less paid by him by reason of his having in advance made provision for the payment of the premiums. This argument found favour with SCOTT and MACKINNON, L.JJ., in the Court of Appeal, but was emphatically rejected by LUXMOORE, L.J. In my opinion, LUXMOORE, L.J., was right. To keep up a policy is to pay the premiums thereon as they fall due, and the person who pays the premiums is the person who keeps up the policy. The funds which yielded the income with which the premiums in the present case were paid were no doubt originally provided by Viscount Devonport, but when the premiums were actually paid he had no rights whatever in the income so employed. In no sense can it be said that, when the settlement trustees paid the premiums, it was Viscount Devonport who paid them ; they paid them with their own trust moneys. You cannot make payments out of money with which you have already parted ; you cannot keep up a policy with money which you have already given away.

I should allow the appeal.

LORD WRIGHT [read by LORD PORTER] : My Lords, the appellants, who are the trustees under a deed of settlement dated Aug. 15, 1922, and a deed of appointment and a deed of settlement both dated May 15, 1930, are defendants to an English information claiming estate duty and succession duty, on the death of the first Viscount Devonport which occurred on Sept. 5, 1934. The sole question in this appeal is whether estate duty on certain policies on the life of the deceased, on which sums amounting to £78,675 were paid to the appellants, is exigible under the Finance Act, 1894, s. 2 (1) (*c*), or is exigible under sect. 2 (1) (*d*) of the same Act. The policies had been assigned to the appellants as trustees. The answer depends on whether the policies were "kept up" by the deceased within the meaning of the former provision, or whether the case fell within the latter provision, which applies to an interest provided by the deceased. If the former subsection applies, the Crown is entitled to duty on the whole amount of the policy monies ; if the latter subsection applies, the Crown is only entitled to the charge in respect of the policy moneys limited to the value of an interest therein during the life of the present (the second) Viscount Devonport.

The appellants do not contest that they are liable to the more limited extent, that is, to the extent of the value of the life interest, but they deny that they are chargeable on the full amount of the policy moneys. WROTTESLEY, J., and the Court of Appeal (LUXMOORE, L.J., dissenting) have decided in favour of the Crown. The appellants contest that decision and maintain that the dissenting judgment of LUXMOORE, L.J., is correct and should receive effect.

The Finance Act, 1894, s. 2, provides that property passing on the death of a deceased which is to be subject to death duty is to include (*inter alia*) certain property defined by reference to the Customs and Inland Revenue Act, 1881,

s. 38 (2), as amended by the Customs and Inland Revenue Act, 1889, s. 11. The provision material to this case so incorporated by sect. 2 (1) (*c*) of the Act of 1894 is as follows:

> The charge . . . shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him
> A for such benefit.

These are the material words founded upon by the Crown. With this language must be contrasted the words of sect. 2 (1) (*d*), which imposes the charge on the following property (as being property deemed to pass on the death), namely, "any . . . interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise in the death
B of the deceased." Of the two contrasted subsections, it is the latter which the appellants say fits the position. The settlor, it is said, did indeed provide the interest, but he did so by assigning by means of the voluntary settlement of May 15, 1930, to the original trustees certain securities, the income from which was to constitute a fund out of which the premiums were to be paid, as in fact they were. The income was to be used, so far as necessary, to this end, and there were trusts as to any surplus over. I do not need here to recapitulate in detail the
C terms of the material settlements and the appointment. They are fully analysed by LUXMOORE, L.J., in his judgment. On these dispositions the first Lord Devonport, the settlor, did not himself in the ordinary sense of the word pay the premiums necessary to keep the policies alive. The trustees paid them. I think that "keeping up" a policy according to the ordinary use of language connotes payment of the premiums which is the normal method of keeping up a
D policy. This involves generally periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not apparently contemplate this contingency, but, however that may be, the insertion of the words "in proportion to the premiums paid by him" is necessary to deal with the case where the deceased did not himself wholly keep up the policy but only did so partially. In that case the death duty is to fall on
E the deceased's estate in proportion to the premiums paid by him. The change in expression from "kept up" to "payment of premiums" is necessary to give the basis of apportionment, but at the same time it identifies "paying the premiums" with keeping up the policy. It is not necessary to speculate why this apportionment was provided for. The language of the subsection seems sufficiently plain. It supports the view that when the Act refers to keeping up the policy it means the method of paying the premiums as they fall due.

F The essential question then is whether the first Lord Devonport can be properly said to have kept up the policies after the settlement of Aug. 15, 1922. I agree with LUXMOORE, L.J., that the question must be answered in the negative. In truth, once there was an express trust to provide for payment of the premiums fully constituted in the terms in which it was, the settlor had thenceforth nothing to do with keeping up the policies. That devolved upon the trustees. The
G first Lord Devonport had divested himself of his property in the fund by his voluntary assignment of it to the trustees, to hold upon the trusts declared in the deeds. These trusts included keeping up the policies by paying the premiums. But the settlor did not himself pay them. That was the duty of the trustees under the trusts, subject to which they held the fund. They did not pay the premiums as agents for the settlor; nor did they do so under any covenant or agreement with him, for there is nothing of the sort in the trust
H documents. The settlor could not revoke the trust or terminate the trustees' powers, as he would have been able to do if they had been his agents; nor could he control the way in which they executed the trust, or take steps to enforce it. He was not a beneficiary under the trust: the terms of the trust clearly excluded even any resulting trust in his favour in any contingency, however remote. The ultimate reversion, if it ever became effective, was for charitable objects. As he was not a beneficiary, he could not invoke the powers of the court if he had found that the trustees were not duly performing the trust. The assignment of the fund to the trustees vested in them an absolute property in law, subject

only to the equitable obligation, affecting their conscience, to fulfil the trust under which they held the property, an obligation enforceable only in equity at the suit of the beneficiaries. I have ventured to state these propositions because they seem to negative the reasoning adopted in the courts below, and I may quote a brief passage from the judgment of James, L.J., in *Smith* v. *Anderson* (1), at p. 275 :

> To my mind, the distinction between a director [the same would be generally true of any agent] and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property, and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his *cestuis que trust.*

In the present case not only did the trustees pay the premiums as principals, not as agents for the settlor, but the money out of which they paid them was their own money in law, though in equity it was the money of the beneficiaries. It was not the settlor's money.

The Court of Appeal did not hold that the trustees paid the premiums as agents of the settlor, but all the same they held that the settlor could be held to have paid the money within the meaning of sect. 2 (1) (*c*). Scott, L.J., said, at p. 126 :

> The trust was the means by which Lord Devonport ensured that his purpose of keeping up the policy out of his own pocket for the benefit of the donee (*i.e.*, all the beneficiaries) would be achieved. I can see no practical reason why it should matter whether the donor kept it up directly by himself paying the premium, or indirectly by the machinery of a trust.

In the same way it was contended by counsel for the respondent that it was the settlor who kept up the policies because he created the machinery for keeping them up. The question, it was said, was who in substance performs the act. With the greatest respect, I have found it impossible consistently with the long-established principles relating to trusts in the English system of law, to agree with this reading of the effect of the Act. The phrase " keep up the policies " is no doubt an ordinary expression, but the question is whether, within the meaning of the Act, it is the settlor who has kept them up. I have given the reasons which have led me to the conclusion that it is not true to say that he did so.

I agree that the appeal should be allowed.

Lord Simonds [read by Lord Goddard] : My Lords, I agree in thinking that the order of the Court of Appeal cannot be upheld.

At some date before Aug. 15, 1922, the first Viscount Devonport, whom I will call " the settlor," had effected two policies of insurance on his own life in the sums of £70,000 without profits and £7,000 with profits respectively. The annual premiums on these policies were £3,587 10s. and £132 14s. 2d. The settlor died on Sept. 5, 1934. The aggregate sum of £78,675 then became payable in respect of the policies and was received by the appellants as trustees of certain settlements to which I must presently refer. The question is whether these policies had been wholly " kept up " by the settlor " for the benefit of a donee." If, as is contended by the Attorney-General and as was held by Wrottesley, J., and the majority of the Court of Appeal, Luxmoore, L.J., dissenting, they were so kept up by the settlor, then under the Finance Act, 1894, s. 2 (1) (*c*), estate duty became exigible on the full amount of the policy moneys upon the footing that they were " property which would be required on the death of the deceased to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11." If, on the other hand, as is contended by the appellants, and as was held by Luxmoore, L.J., they were not so kept up, then the Finance Act, 1894, s. 2 (1) (*c*) has no application, but it is conceded by the appellants that the appropriate duty under sect. 2 (1) (*d*) of that Act is exigible.

The policy moneys were, as I have said, received by the appellants as trustees of certain settlements. I do not think it necessary to refer to them in detail. They are fully and accurately stated in the judgment of Luxmoore, L.J. It is sufficient for the purpose of this opinion to say that under and by virtue of three instruments (i) a voluntary settlement made by the settlor on Aug. 15, 1922 ; (ii) a deed of appointment of May 15, 1930 ; and (iii) a supplemental settlement

of the same date made by the settlor's son, then Gerald Chester Kearley, now the second Viscount Devonport, to which the settlor was a party, the appellants or the trustees for the time being of the settlement were at all material times the legal owners of the policies in question, that they at the same time held funds, which the settlor settled by the first of the said settlements, upon the primary trust out of the income thereof to pay the annual premiums on the policies, that the settlor had under the first settlement a special power of appoint-
A ment which he exercised by the deed of May 15, 1930, reserving to himself a power of revocation, which he released by the second settlement of the same date, that the settlor had no beneficial interest whatsoever in the policies or the policy moneys or any other part of the settled funds, which were in fact so settled that there was not even the possibility of a resulting trust in his favour. The annual premiums on the policies, which had before the date of the first settlement been paid by the settlor, were after that date duly paid by the
B trustees out of the income of the settled funds. This short statement, which ignores the somewhat elaborate trusts of the settlements, contains all that is necessary for the exposition of the question that has now to be answered, viz.: were the policies on the life of the settlor, which he assigned by the settlement of Aug. 15, 1922, to the trustees thereof, thereafter kept up by him for the benefit of a donee so that estate duty became exigible in respect of the policy
C moneys under the Finance Act, 1894, s. 2 (1) (*c*)? WROTTESLEY, J., answers this question in the affirmative. His reasoning is summed up in these words, at p. 184:

> . . . the first Lord Devonport filled the role described in the Act, in that he wholly kept up the policies by paying, or what is the equivalent, causing to be paid, duly and punctually, the premiums on them.

So also SCOTT, L.J., who thought that in its context in the subsection the
D expression "keeping up" might be paraphrased as "taking effective steps to prevent the policy lapsing," of which, no doubt, paying the premiums was an essential. So, too, MACKINNON, L.J., who held that the first Lord Devonport kept up the policies in that all the premiums were paid out of trust funds provided for that purpose by him. This contention is put forward compendiously by the Attorney-General in the third of his formal reasons: "Because a policy is none the less kept up by a person because the provision for payment of the
E premiums is made by him in advance."

My Lords, I cannot assent either to the general proposition or to the application of it to this case. It may well be that a person may in certain circumstances be said to keep up a policy though another pays the premiums. Every case must be examined on its merits. Much will depend on the relation in which the one person stands to the other. But to me it seems plain that according to
F the ordinary use of language, which in the absence of some compelling context I must suppose Parliament to have intended, a person cannot be said to keep up a policy merely because he provided a fund out of which the premiums were intended to be and were in fact paid. If, as each premium becomes payable, it lies with him to say whether or not it shall be paid, if, to take the simplest case, the hand that pays is the hand of his agent acting according to his direction, I should have no difficulty in saying that he keeps up the policy. But equally,
G where the payment is made by a trustee, whose duty and right it is to pay whether the settlor wills it or not, it is not he but the trustee who pays the premiums and keeps up the policy. This appears to me more emphatically to be the case when, as here, the settlor has not even a right to intervene and require the trustee to perform his trust. With the greatest deference to those who have thought otherwise, I do not think that any assistance is to be derived from the fact that the expression "keep up" in relation to a policy of assurance
H is not a term of legal art. I agree that it is not a term of legal art, but it is, I think, the most appropriate expression in our language to describe the doing of those acts which will prevent a policy lapsing. I see nothing vague or popular in the expression. The question is who keeps up the policy, who does those acts which prevent the policy lapsing, who in fact pays the premiums? I see no justification for ascribing those acts to a settlor who neither does them himself nor is competent to direct their performance. I do not base my opinion upon the juxtaposition of the words "premiums paid by him" to the words "kept up." For it is by the payment of premiums that a policy is ordinarily

kept up. My opinion would be the same if the subsection ended with the word "assignee."

The conclusion to which I have come as a matter of interpretation of the relevant words of the section does not need to be justified by any consideration of the general scheme of taxation for estate duty purposes. I doubt whether in any case it would be justifiable to do so, for it is well recognised that policies of insurance are a kind of property having peculiar characteristics and requiring special provision. But it may at least be said that there is nothing incongruous in policy moneys, like any other form of property, not being liable to estate duty under sect. 2 (1) (*c*) of the Act, if the deceased, having parted out and out both with the policies and with a fund provided by him for keeping them up and reserved to himself no interest whatever in either property, then survives for the requisite period.

I would allow the appeal.

Appeal allowed.

Solicitors: *Waterhouse & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* DAIMLER CO. LTD.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Uthwatt, J)., **July 10, 1944.**]

Emergency Legislation—Landlord and tenant—War damage—Disclaimer—Notice of disclaimer served one year after damage but ante-dated for purposes of repayment of rent—Validity—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 4, 5, 8—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (*c.* 41), *s.* 13.

On July 22, 1938, the respondent company leased certain premises to the Air Ministry at a total rent payable in advance for the whole of the term of 7 years. In November, 1940, the whole of the premises were rendered "unfit by reason of war damage." On Nov. 7, 1941, the Air Ministry wrote to the respondent company asking for a repayment of the appropriate part of the rent as from Nov. 14, 1940, and enclosing what was called a "formal notice of disclaimer." The notice was headed: "Landlord and Tenant (War Damage) Act, 1939. Landlord and Tenant (War Damage) (Amendment) Act, 1941." The notice disclaimed the lease dated July 22, 1938, "as from Nov. 14, 1940." It was contended on behalf of the company that the disclaimer was vitiated by reason of the words "as from Nov. 14, 1940," since it amounted to a claim for a return of more rent than the Air Ministry was entitled to under the provisions of the Landlord and Tenant (War Damage) Acts:—

HELD: there was a clear unambiguous notice of disclaimer which was not vitiated by the irrelevant and nugatory words with regard to the date on which the disclaimer would take effect and the lease would be deemed to be surrendered.

[**EDITORIAL NOTE.** The operation of the notice being settled by the statute, the words therein relating to the date from which it was operative were of no effect and are treated as surplusage. Being mere surplusage, they do not affect the validity of the notice.

FOR THE LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939, ss. 4, 5, 8, and THE LANDLORD AND TENANT (WAR DAMAGE) (AMENDMENT) ACT, 1941, s. 13, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 987-991, Vol. 34, pp. 170, 171.]

APPEAL by the Attorney-General from a decision of STABLE, J., dated Oct. 27, 1943. The facts are fully set out in the judgment of SCOTT, L.J.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*) for the appellant.

H. Wynn-Parry, K.C., and *J. A. Reid* for the respondents.

SCOTT, L.J.: This appeal raises the question of the effect of the Landlord and Tenant (War Damage) Act, 1939, s. 4, in relation to a notice to disclaim given under that section. The parties are the Air Ministry on the one hand and the Daimler Co., Ltd., on the other. I say " the parties " because nominally it is an information in the name of His Majesty's Attorney-General, but, in fact it was the Air Ministry who were concerned.

On July 22, 1938, the Daimler Co., who were the owners of some works described in a lease to which I will refer, gave a lease of those works to the Secretary of State for Air. That lease says :

> The lessors hereby demise unto the lessee all those factories workshops . . . to hold . . . for the term of seven years from Mar. 25, 1937, PAYING therefor a total rent of £50,000 for the whole of the said term the whole of such rent having been paid by the lessee to the lessors on or before the execution hereof.

As we know, on the outbreak of war several Acts were passed through all stages by Parliament to deal with anticipated war conditions. One of them was the Landlord and Tenant (War Damage) Act, 1939, which received the Royal Assent on Sept. 1, 1939. That Act, as we all know, is designed expressly for the purpose of doing what is fair as between landlord and tenant in the event of damage by enemy action to the premises occupied by the tenant under a tenancy or lease.

Sect. 4 of the Act is headed : " Disclaimer and Retention of Leases. Notices affecting leaseholds." Sect. 4 (1) provides :

> (1) Where the land comprised in a lease is unfit by reason of war damage, the following provisions of this section shall have effect, whether the lease was made before or after the commencement of this Act. (2) The tenant may serve on the landlord either —(*a*) a notice (hereafter in this Act referred to as a " notice of disclaimer ") stating that he elects to disclaim the lease ; or (*b*) a notice (hereafter in this Act referred to as a " notice of retention ") stating that he elects to retain the lease on the terms hereafter specified in this Act.

It will be observed that the notice of disclaimer has not in itself to contain any intimation other than the fact of disclaimer, that is to say, that the lessee or tenant has taken that action under the option given to him by the Act, whereas in the case of a notice of retention the notice has to state that the tenant retains the lease on the terms specified in the Act which may amend or which do amend the terms of the lease in certain respects.

Thereupon, under subsect. (3) it is provided :

> The landlord may, if no such notice has been served by the tenant, serve upon the tenant a notice (hereafter in this Act referred to as a " notice to elect ") . . .

Subsect. (5) provides :

> Where a notice of disclaimer is served (whether in pursuance of a notice to elect or not) the landlord may, within the period allowed under this Act, serve upon the tenant a notice (hereafter in this Act referred to as a " notice to avoid disclaimer ") requiring the tenant to retain the lease on the terms hereafter specified in this Act.

That notice cannot be served by the tenant unless the land comprised in the lease is unfit for use by reason of war damage.

Under the definition section of the Act " land " covers everything in the present case and " war damage " is interpreted and the word " unfit " by reason of war damage is also interpreted.

It is common ground on both sides that those conditions precedent to the right to disclaim obtained in the present case. The premises were unfit and they were unfit by reason of enemy action in October and November, 1940. On the latter date the whole of the premises and factory were rendered unusable except for certain offices and it is common ground that the premises became as a whole unfit, so as to entitle the tenants to elect to disclaim the lease.

A year later, on Aug. 7, 1941, the Landlord and Tenant (War Damage) (Amendment) Act was passed. It was passed *inter alia* again in order to do something which seemed to the legislature fair as between landlord and tenant, which was not sufficiently covered or not at all covered, by the earlier Act, namely that, in the event of rent having been paid in advance, when the notice of disclaimer was subsequently given under the Act of 1939 the tenant should have a right to a certain repayment of prepaid rent. That is under sect. 13 of the later Act which says :

> Where—(*a*) any lease is deemed to have been surrendered by virtue of sect. 8 of the principal Act (which relates to the effect of a notice of disclaimer) ; or (*b*) the rent

payable under any lease ceases to be payable for any period by virtue of sects. 10 or 11 of the principal Act (which relate to the effect of a notice of retention and a notice to avoid disclaimer respectively), or, in the case of a short tenancy to which sect. 1 of this Act applies, by virtue of that section ; the rent payable in respect of the period during which the surrender takes effect or the rent ceases to be payable as aforesaid shall be apportionable, whether the rent under the lease is payable in advance or otherwise, and any rent paid by the tenant in respect of that period in excess of the amount apportionable . . .

and the appropriate proportion shall be recoverable by the tenant.

Under sect. 8 of the earlier Act the effect of the notice of disclaimer is dealt with. Sect. 8 (2) provides that the following provisions of this section shall have effect :

> (2) As from the date when the notice of disclaimer was served (*a*) the lease disclaimed shall be deemed to have been surrendered . . .

That is all that it is necessary to read from the relevant legislation.

On the occurrence of damage in the late autumn of 1940 letters passed, and a letter on Dec. 16, 1940, from the Daimler Co. to the representative of the Air Ministry said : " As you are aware the whole place with the exception of the office building is a total loss."

Nothing further happened and the Air Ministry did not take any action in regard to the matter until Sept. 24, 1941, when the Daimler Co., after interviews, wrote this letter :

> This will confirm the interview which took place between us on Monday last, 22nd inst., at your office, and during which it was arranged that you should send us your official disclaimer in respect of the lease of the Sandy Lane premises, Coventry, which disclaimer I presume will have to be made out on the official form. This will then enable us to deal with the unexpired portion of the lease. I do not think the date of the disclaimer is material, and although this question of disclaimer was not discussed between us until my visit to your office, I believe just before Christmas, 1940, I am aware that at my request no action was taken by you in this matter subsequent to my visit. Whilst it is, of course, a fact that you did not disclaim within the requisite 30 days in accordance with my remarks aforesaid, I do not think this is material.

On Oct. 29, 1941, there is a further letter referring, I think, to the amendment Act which received the Royal Assent on Aug. 7, 1941 :

> I understand that under recent legislation it will be possible for us to disclaim on the Sandy Lane lease, and if you will, therefore, let me have your disclaimer, I can then in turn make mine [they being themselves lessee from the higher lessor] which I think will dispose of the whole matter, so far as we are both concerned—except, of course, with regard to the question of rent paid in advance.

That was answered by a letter from Captain Davies saying that he was writing again in the course of a few days.

On Nov. 7, 1941, the representative of the Air Ministry, writing on behalf of the Director of Lands and Requisitioning, wrote :

> In accordance with your letter of the 29th ultimo, FE/WD, addressed to Captain Davies, a formal notice of disclaimer of the department's lease is sent herewith to become effective as from Nov. 14, 1940, the date on which the premises were rendered incapable of further use by war damage. As you are aware, the annual rent payable for the premises was, at the request of your company, paid in one sum of £50,000. I am, therefore, to request that the company will refund to the Air Ministry the appropriate part of the sum of £50,000 applicable to the period Nov. 14, 1940, to Mar. 25, 1944.

It is quite clear there that the gentleman writing that letter was under a misapprehension as to the effect of the legislation in certain respects because under the amendment Act the past payment of prepaid rent runs only from the date of the notice of disclaimer.

The notice enclosed is headed : " Landlord and Tenant (War Damage) Act, 1939. Landlord and Tenant (War Damage) (Amendment) Act, 1941." It is addressed to : " The Secretary, The Daimler Co., Ltd., Coventry," and it says :

> On behalf of the Secretary of State for Air I hereby give you notice to disclaim the lease dated July 22, 1938, as from Nov. 14, 1940.

It is signed by the Director of Lands and Requisitioning. Below that, typed on the original letter are the words : " I acknowledge receipt of this notice." Quite obviously that was added in the anticipation that the Daimler Co. would sign that acknowledgment of receipt of the notice as a notice of disclaimer under the Act. It is very probable that a carbon copy was sent with the letter to be returned so signed but whether a carbon copy was or was not sent nothing was returned.

The next thing that happened was that on Jan. 8, 1942, which is two months later, nothing having been done, said or written by the Daimler Co. in the meantime, the Director of Lands and Requisitioning again writes :

> I am directed to refer to your letter of Oct. 29 last, FE/WD, and to an Air Ministry letter of Nov. 7 last, giving formal notice of the Air Ministry to disclaim the lease dated July 22, 1938, between the company and the Air Ministry as from Nov. 14, 1940, the date on which the premises were rendered incapable of further use by war damage. I am to request that you will now refund to the Air Ministry the appropriate part of the rent of £50,000 applicable to the period Nov. 14, 1940, to Mar. 24, 1944.

The question that we have to decide is what is the effect of the notice served by the Air Ministry on Dec. 17, by itself or as included in the letter which enclosed it so that the two documents should be read together as a notice.

One fact, which to my mind is quite clear, is that the Air Ministry did give notice of their disclaimer of the lease. Under the statute that was an act called for if they desired to obtain the benefit of the statute and that act was in fact done by that letter and its enclosed notice.

It is argued on behalf of the landlords, the Daimler Co., that the addition of the words " as from Nov., 14 1940," vitiates the act of disclaimer.

The only way in which that argument can be successfully advanced is if, on its proper interpretation in the light of the surrounding circumstances and of the previous correspondence, it is the duty of the court to construe those words as making the notice of disclaimer conditional and not unconditional, and turning it from an act of disclaimer pursuant to the statute, which is only an act, to an intimation of an offer to disclaim on condition of receipt of payment from a date anterior to that from which, as a matter of fact, the amendment Act authorises repayment.

In my view it would be wholly wrong so to treat it and had that been its natural meaning I think that we may feel assured that there would have been an answer to it. Instead one gets the notice of disclaimer and a silence of two whole months before the Air Ministry write back saying quite clearly that they did not interpret the letter as an offer of some conditional arrangement, but as a definite statement re-affirming what they had done on Nov. 7, 1941. They, in that letter, repeat what I think was implied in their earlier letter, namely a request that you will now refund to the Air Ministry the appropriate part of the rent of £50,000 applicable to the period, Nov. 14, 1940, to Mar. 25, 1944.

There is nothing further after that until May 21, 1942, when the Daimler Co. write :

> Adverting to your letter of Jan. 8 last, I have now been advised that you are not entitled to a refund of any portion of the rent of £50,000 in respect of the lease of Sandy Lane premises granted to the Secretary of State for Air on July 22, 1938.

Then they refer to a case, which, in my view, does not justify that proposition of law.

In those circumstances both parties understood quite clearly that the lease had been disclaimed and I think that the proper interpretation of the notice itself is that it was a notice of disclaimer to which certain surplus words were added which had no effect at all.

We have been referred to one or two cases. I personally do not think it necessary to refer to them because a case of this kind must depend upon the documents and circumstances of the individual case.

The appeal is allowed with costs here and below.

du Parcq, L.J. : I agree. Put shortly, the question to be answered is : Did the tenants on Nov. 7, 1941, serve on the landlord a notice stating that they elected to disclaim the lease ? It is clear that such a notice need not be in any particular form of words, and I read the document in question as a clear statement of an election to disclaim the lease. I do not doubt that, until somebody suggested the ingenious point which succeeded before Stable, J., everyone who had seen it interpreted it as a clear statement of such an election.

When a tenant heads a letter: "Landlord and Tenant (War Damage) Act, 1939," he must be assumed—although I agree that the assumption is, in point of fact, not necessarily an accurate one—to know what is in the Act. Similarly I think that the landlord who receives the notice—although counsel for the respondents says that it is too heavy a burden to put on him—must be taken to know what is in the Act. This may be very hard on landlords and tenants but I think it is only common sense to say that landlords and tenants should acquaint themselves with an Act which so vitally concerns their interests.

Those words at the head of the document clearly indicate that it must be construed as an election to disclaim. It is clear also that if a tenant chooses to add the statement that he wished to ante-date his disclaimer, while there is nothing to prevent his doing so, he gains nothing by doing it. Such a statement is nugatory. It has no effect at all. It has no effect because the date of the election to disclaim in itself matters nothing. What is important is the date of service of the notice.

Supposing that a tenant, having made up his mind to disclaim, were to write on a piece of paper on, let us say, Jan. 1: "I hereby give notice that I elect to disclaim as from to-day" and supposing that he omitted to serve it for a week or a month, I have not the faintest doubt that it would be a perfectly good notice of the election and that the fact of his having put in a date prior to the date of service would not make the notice a nullity. It would be a good notice, and it would be necessary to look at the Act to ascertain its effect.

When one looks at the Act one finds two things. First, that as from the date when the notice to disclaim is served (not dated, but served) the lease disclaimed shall be deemed to have been surrendered. The second thing one finds is that an application may be made under sect. 9 (2), to the court to modify the operation of the earlier section by varying the date, so that it is always within the bounds of possibility that the court when applied to may say that the disclaimer is to be deemed to operate as a surrender, not from the date of its service but from some later date, or even from some earlier date.

Therefore the words with regard to the date, if, as I think, this is a clear notice of an election to disclaim, are entirely irrelevant and nugatory. Their effect is nothing, and the effect of the Act is, for practical purposes, to wipe them out. You can leave them there if you like but they have no effect at all. Anybody who reads the Act—and these particular sections are not difficult to understand—will see at once that they have no effect at all.

For these reasons I think, with all respect to STABLE, J., that he took too technical a view of the matter and I agree that the appeal must be allowed.

UTHWATT, J.: I agree. Under the Act the tenant has the right to choose between serving a notice of disclaimer or electing to retain. If he serves a notice of disclaimer all the consequences are automatic. The date from which it operates, the powers of the court in regard to the notice and the right of the landlord if he thinks fit to serve a counter notice, all result from the fact that a notice of disclaimer has been served. There is, therefore, no occasion for him in his notice to refer to any date or to try to attempt to attach any consequences to his notice.

I agree that the only question is whether, upon the true construction of this letter and its true effect, it operated as a notice to the landlord that the tenant was in fact making a choice.

To my mind the matter is unarguable. A person reading that letter in good faith could come to only one conclusion. A person reading it in bad faith could come to only one conclusion. A person reading it in bad faith could not pretend that he came to a different conclusion. The conclusion in each of those three cases would be that this man is electing to disclaim and this man does not know his law. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Treasury Solicitor* (for the appellant); *Andrew, Purves, Sutton & Creery*, agents for *R. A. Rotherham & Co.*, Coventry (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HILL *v.* HARLAND AND WOLFF, LTD.

[COURT OF APPEAL (Lord Greene, M.R., and du Parcq, L.J.), **June 27, 1944.**]

Practice -Security for costs—Appeal -Common law action by workman against employer—Workman unable to give security—Effect, if order made, on right to workmen's compensation—Whether order made—R.S.C., Ord. 58, *r.* 15.

The appellant was the plaintiff in a common law action for damages for personal injuries against his employer. The action had been dismissed and the respondents in due course applied for security for costs of the appeal. Since the plaintiff intended to appeal, no application was or could be made in the court of first instance for an assessment of workmen's compensation. It was shown upon the application that, if an order for security of costs was made, the appellant would be unable to comply with it and thus, since the appeal would be ineffective, he would not be in a position to apply to the Court of Appeal for an assessment of workmen's compensation :—

HELD : in the circumstances the Court of Appeal would make no order for security of costs.

[**EDITORIAL NOTE.** The court will not in the ordinary way make an order which deprives a litigant of a vested right. In the present case the appellant would be entitled in any event to compensation under the Workmen's Compensation Acts and he should not be deprived of this by the court making an order with which he could not possibly comply. At the same time, it is apprehended that this is a matter which is within the discretion of the court.

As TO SECURITY FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 26, p. 119, para. 237 ; and FOR CASES, see DIGEST, Practice, pp. 808-812, Nos. 3704-3748.]

APPLICATION for security for the costs of an appeal. In an action for damages for personal injuries by the plaintiff workman against the defendants, his employers, judgment was given for the defendants. Since the plaintiff desired to appeal, no application was made on the hearing for the assessment of workmen's compensation. It appeared from the affidavit in support of the application that the appellant was without visible means.

R. Stewart Horner for the applicants.

M. Turner-Samuels for the respondent to the application.

LORD GREENE, M.R. : In this application the defendants apply that this court may order security for costs of the appeal by the plaintiff. The evidence in support of the defendants' application states that the plaintiff is without any visible means whatever and that, should the appeal be decided in the defendants' favour, the plaintiff will be unable to pay the costs of the respondents. Counsel for the plaintiff admits that the plaintiff has no visible means but says that, if an order for security for costs is made by this court for even a small sum, the result would be that the plaintiff would be unable to find such amount of security, with the consequence that his appeal would be ineffective. He further submits that the further result of that would be that the appeal having gone, the workman would be deprived of the right to apply to the Court of Appeal to assess such amount of compensation as might be due to the plaintiff in the event of his appeal not succeeding. The defendants admit that the plaintiff would, if he failed in his appeal, be entitled to compensation under the Workmen's Compensation Act, 1925, in a sum of at least £250. The right to make such an application for the assessment of compensation can now only be exercised in the Court of Appeal, because the plaintiff intending to appeal, did not apply for such assessment to the trial judge. If he had done so, his right to appeal would have gone, since that application would have been an election to accept compensation and would have precluded him from proceeding with his appeal on the basis of a claim for damages at common law. The court does not consider it would be right in these circumstances to make an order for security for costs of the appeal, and the costs of the application will be costs in the appeal.

DU PARCQ, L.J. : I agree.

Application refused.

Solicitors : *Carpenters,* agents for *Laces,* Liverpool (for the applicants) ; *J. H. Milner & Son,* agents for *Silverman & Livermore,* Liverpool (for the respondent to the application).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

R. *v.* DUNCAN AND OTHERS.

[Court of Criminal Appeal (Viscount Caldecote, L.C.J., Oliver and Birkett, JJ.), **June 19, 1944.**]

Criminal Law—Witchcraft—Pretence to exercise conjuration of spirits—Witchcraft Act, 1735 (*c.* 5), *s.* 4.

Criminal Law—Evidence—Demonstration of spiritualistic powers—Admissibility.

The appellants were charged with conspiring to pretend to exercise conjuration contrary to the Witchcraft Act, 1735, s. 4. The case for the prosecution was that the seance was an elaborate fraud. The defence asked that the principal defendant might demonstrate her powers to the jury and further contended that conjuration of spirits in sect. 4 of the Act of 1735 referred to evil spirits only :—

Held : (i) the application to demonstrate the defendant's powers to the jury was rightly refused.

(ii) sect. 4 of the Act of 1735 is not limited to conjuration of evil spirits only.

[**EDITORIAL NOTE.** The practical importance of this decision lies in the refusal of the application to demonstrate the powers of the medium. Whilst such a request may seem at first sight reasonable, it is shown to be subject to so many practical difficulties and to be more likely to produce confusion rather than decision, that it is held to have been rightly rejected in the exercise of the discretion of the court by the trial judge.

As to Witchcraft, see HALSBURY, Hailsham Edn., Vol. 9, p. 566, para. 957 ; and for Cases, see DIGEST, Vol. 15, pp. 1074-1076, Nos. 12,160-12,171.]

Appeals against conviction on an indictment alleging a conspiracy to contravene the Witchcraft Act, 1735, s. 4. The particulars of offence alleged that the four appellants :

> Conspired together and with other persons unknown to pretend to exercise or use a kind of conjuration to wit that through the agency of the said Helen Duncan spirits of deceased persons should appear to be present in fact in such place as the said Helen Duncan then was and that the said spirits were communicating with living persons then and there present.

Only the main grounds of appeal are here reported. The facts are stated in the judgment of the court.

C. E. Loseley and *T. Simpson Pedler* for the appellants.

John Maude, K.C., and *Henry Elam* for the Crown.

Viscount Caldecote, L.C.J. [delivering the judgment of the court] : The appellant Duncan is a professional medium, who was engaged at a substantial fee to give a series of seances in a registered church or temple, as it was called, at 30, Copnor Road, Portsmouth, maintained by the appellant Homer over a chemist's shop which he had kept for many years. The appellant Jones, known as Mrs. Homer, lived with him and had done so for some 25 years. The appellant Brown assisted Duncan and acted as her booking agent.

The evidence for the prosecution was concerned with dates in December, 1943, and January, 1944, but principally with two dates, Jan. 14 and Jan. 19, 1944. Evidence was given for the prosecution of the happenings on these dates at the church, and of the parts played by the appellants. After certain preliminaries, Duncan dressed in black was seated in a chair behind a curtain in a corner of the room. Homer and Jones sat near the front. The light was dim, being confined to a single red lamp at the back of the room. Duncan produced her spirit guide, who was called Albert, and he would say that he had a message for a person in a particular chair. Then, when the person indicated called out, there would appear in the dim light what was said to be the form of someone who claimed to be a friend or relative of one of those present. In some cases the material form was said to be that of a bird or an animal, such as a parrot or cat.

The case for the prosecution was that the whole performance was an elaborate pretence, a fraudulent performance, a mere imposition on human credulity. This was sought to be established by evidence of messages going to the wrong seat owing to a change of occupant taking place by a mistake unknown to any of the appellants ; to messages purporting to come from relatives who had never existed ; to the attempted seizure by a witness of a substance said to be ectoplasm emanating from Duncan, but which felt like cheesecloth, and which did not return to her as ectoplasm from a materialisation medium was said to do, but was caught away by someone among the congregation; to the fact that on one important occasion (Jan. 19) Duncan was said not to be seated in the chair behind the curtain, but to be standing between the curtain pushing a piece of white cloth down her front to the ground, a cloth which appeared to be a very flimsy substance like "butter muslin"; that on the same occasion when the lights were afterwards turned on, Duncan was found to be stooping down putting on her shoes, as though for some purpose she had been barefooted at some time during the sitting.

It is clear from this short recital, which is not intended to be complete or exhaustive, that there was evidence for the jury, which, if believed, would be evidence of a pretence that the so-called materialisations which were in fact produced by means of fraudulent devices and apparatus, were of a different nature altogether.

Homer, alone of the appellants, gave evidence, and 44 other witnesses gave evidence for the defence. The witnesses for the defence who were present on the material dates, particularly Jan. 14 and Jan. 19, gave evidence denying that there were any elements of pretence or deception. The evidence was given in great detail on all the matters alleged by the prosecution to be fraudulent or indeed suspicious. The jury had before them, therefore, in great fullness the evidence on both sides as to the facts, and had before them with equal fullness the submissions of counsel upon these facts. In addition to the witnesses called for the defence who were present at the sittings which were made the subject of the indictment, the defence called no less than 26 witnesses who were not present, but who gave evidence about Mrs. Duncan's performances as a medium over a long period of years, expressing their belief in her genuineness and informing the jury of the mysteries of the spirit world, the nature of ectoplasm, and a variety of matters of that kind.

We find it a little difficult to see on what principle that evidence was admitted in this case. The relevant period was the period covered by the indictment. The relevant inquiry was whether the appellants had conspired, as alleged on these dates, to pass off a sham on their audience, and whether the appellant Duncan had taken part in the alleged conspiracy. To examine what took place on other occasions scarcely seems relevant to the charge. The Recorder no doubt was anxious that in an unusual case some latitude should be given, and permitted the evidence to be called, but had he excluded it, we do not think complaint could properly have been made. Indeed, we think it would have been rightly excluded.

Complaint is made that the Recorder wrongly rejected evidence offered by the appellant Duncan purporting to demonstrate and prove that at all material times she was a materialisation medium and to disprove the allegations made against her. In the course of the argument in this court the counsel for the appellants conceded that it was a matter for the discretion of the Recorder whether to allow such a demonstration to be given or not. The difficulty of arranging such a demonstration satisfactory in all its details to both sides is obvious. To mention only one matter: if in the course of the demonstration ectoplasm was to be alleged to emanate from the medium, would the jury be allowed to handle it, or to do anything to verify the appearance? Or would the jury have to be content with what they could see in a dim light such as was provided on the occasions in question? A host of similar difficulties can be seen both from the point of view of the prosecution and of the defence.

It seems clear to us that no such demonstration, even if the circumstances in which it should take place could be agreed, and whatever it purported to show, could be conclusive on the only issue which the jury had to try, and indeed might well confuse the jury, or operate to the great disadvantage of the appellants. We think the Recorder exercised his discretion wisely in this case, and we may add that he was fortified in what he did by the answer of the jury to the question he asked them as to whether they wished to see such a demonstration. No reasonable ground of complaint can be sustained on this point.

The point taken in the first three grounds of appeal was that there was no evidence of any acts by the appellants constituting an offence under the Witchcraft Act, 1735, and that the Recorder wrongly directed the jury that a pretence to hold conversation with spirits of deceased persons constituted an offence under that Act. The argument was that the proper direction would have been to tell the jury that only a pretence to hold conversation with wicked and evil spirits was forbidden by sect. 4 of the Act of 1735. In the course of an interesting and elaborate argument counsel for the appellants cited the authorities who had written on the word "conjuration" before 1735, and quoted from some of the dictionaries published after 1735.

The conspiracy of which the appellants were found guilty was a conspiracy to contravene the Witchcraft Act, 1735, s. 4, and the material words in count A
1 of the indictment were:

> To pretend to exercise or use a kind of conjuration to wit that through the agency of the said Helen Duncan spirits of deceased persons should appear to be present in fact in such place as the said Helen Duncan then was in, and that the said spirits were communicating with living persons then and there present.

To "pretend to exercise or use any kind of . . . conjuration" are the words of the statute, 9 Geo. II, c. 5, s. 4, and it is important to look at the history of this B
matter. I may begin with the statute 33 Hen. VIII, c. 8, which uses the words "conjuration of spirits" with no reference to evil spirits at all. That Act was repealed by a statute of Edw. VI, which in turn was followed by the statute 5, Eliz., c. 16. This last statute, before speaking of the repeal of the statute of 33 Hen. VIII by the statute 1 Edw. VI, c. 12, speaks of "the wicked offences of conjurations and invocations of evil spirits" which were made felonies by the statute of Henry, whereas the words "evil spirits" do not C
occur in the statute of Henry VIII at all. That statute merely speaks of the practice of "invocations and conjurations of spirits." The next statute dealing with this matter was the statute of 1 Jac. I, c. 12, which speaks of the "conjuration of any evil and wicked spirit." The statute was a characteristic example of the attitude of James I to this practice. Finally, the statute of 9 Geo. II, c. 5, s. 4, after repealing the statute of James, speaks of "conjuration" without D
reference to spirits, or evil and wicked spirits, but simply "any kind of conjuration."

The point submitted by counsel for the appellants is that the word "conjuration" in the statute of George II has only one meaning, and that meaning has been well defined and crystallised in law. He says it bears the meaning in the language of Cowell's Interpreter (a publication of 1672) as contained in the following passage: "It is especially used for such as have personal conference E
with the Devil or Evil Spirits." He cited from the third part of Coke's Institutes, Hawkin's Pleas of the Crown and many dictionaries, but the definition I have quoted contains the main point of his submission. We must be allowed to doubt whether Cowell's Interpreter possesses the authority claimed for it by counsel for the appellants, and we certainly do not think that this meaning or interpretation is to be given to the words "any kind of conjuration" in 9 Geo. II, c. 5: indeed, the express alteration from the statute F
of James I which is being repealed, and the use of the words "any kind of conjuration" without reference to spirits, evil or otherwise, would seem to indicate the contrary. In the sixteenth and seventeenth centuries the word "conjuration" was commonly used with reference to traffic with spirits. In those centuries the minds of men were greatly concerned with the evils which they believed arose from such conference, and as a result of the teaching of the church, G
based possibly upon passages in the Bible, all such spirits were regarded as, and were apt to be described as, evil spirits. Conjuration of these evil spirits was an offence, it was said, against God and religion and was usually linked with witchcraft, enchantment, invocation and sorcery, the punishment for which, as for heresy, was burning in early times.

"Conjuration" was not a word which was to be taken to mean only "conjuration of evil and wicked spirits." That was an express meaning given to H
it by the inclusion of the words in the statutes where such words appear. The Oxford English Dictionary gives examples of its use in different ages right down to modern times. Coke's Institutes, Third Part, associate the word "conjuration" with invocation and seem to suggest that the two words have the same meaning. The learned author quotes the case of King Saul from the First Book of Chronicles: "So Saul died for his transgression and also for asking counsel of one that had a familiar spirit to inquire of it and inquired not of the Lord."

We do not think that the words "any kind of conjuration" in the statute 9 Geo. II, c. 5, can be limited in the way counsel suggests. In the first place it is to be observed that the offence described in the statute is the pretence to exercise or use "any kind of conjuration" Secondly, it appears plain that with the abolition of the felonies of witchcraft, sorcery, enchantment or conjuration, the minds of men were making an advance. These things were no longer believed in, but the statute of George II did not go the length of allowing anyone A to make the pretence of engaging in converse with spirits, not being evil spirits. Such a distinction would raise an issue of fact incapable of determination and based on no intelligible principle of law or religion.

In our judgment, the words of the section with which we are concerned in this case are all-important. What was aimed at, as shown by the language of the statute itself, was that ignorant persons should not be deluded or defrauded by the *pretence* to exercise or use any kind of conjuration. The reference to B "evil spirits" is omitted, and the words "any kind of" were added, and in our opinion these words are wide enough to cover the conspiracy alleged, which the jury have found to be proved in this case.

It was repeatedly emphasised at the trial by the Recorder, and must be emphasised here again, that the only matter to be decided by the jury was whether there was a pretence or not. The prosecution did not seek to prove that spirits of deceased persons could not be called forth or materialised or embodied in a C particular form. Their task was much more limited and prosaic; it was to prove, if they could, that the appellants had been guilty of conspiring to pretend that they could do these things, and, therefore, of conspiring to pretend that they could exercise a kind of conjuration to do these things. That was the case made by the prosecution to the jury, and the jury must be taken to have accepted the evidence for the prosecution when they found the appellants guilty of D the conspiracy charged.

Appeals dismissed.

Solicitors: *G. A. Elkin* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

E

CAPITAL AND COUNTIES PROPERTIES, LTD. *v.* BUTLER.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **June 23, 1944.**]

Landlord and Tenant—Rent restriction—Letting at less than standard rent— F *No clause allowing deduction from standard rent—Right of landlord to increase rent to standard rent.*

The appellant company, in Aug., 1940, let premises to the respondent for one year at a rent of £95 per annum with an option to continue the tenancy at the rent of £95 per annum until the cessation of hostilities and thereafter at a rent of £114 per annum. The standard rent of the G premises was £120 per annum. In April, 1943, the appellant company by notice duly increased the rent to the standard rent with the permitted increases. The respondent contended that the case was governed by the decision in the *Bryanston* case (1) and that the increase was bad in law:—

HELD: the letting being at a rent below the standard rent with no provision for deduction by the tenant, there was nothing in law to prevent the landlord increasing the rent to the standard rent and, in addition, H the permitted increases.

[**EDITORIAL NOTE.** The Court of Appeal have distinguished this case from the *Bryanston* case (1) and have held that it is completely covered by the decision in *Phillips* v. *Copping* (2), and have followed the latter decision. The Court of Appeal did not in the *Bryanston* case (1) intend to throw any doubt upon *Phillips* v. *Copping* (2), for that was not only a decision of the Court of Appeal by which they were bound, but had been before two members of the Court of Appeal sitting in the Divisional Court who had expressed views to the same effect though they held that they were bound by authority to decide otherwise. *Phillips* v. *Copping* (2) is, therefore, a very strong authority and completely covers the facts here. The decision in the *Bryanston* case (1) is explained by the fact that in that case the letting reserved the standard rent and the reddendum included a provision for reduction. Such a provision, it was held, was one of the terms incorporated by the statute into the statutory tenancy.

As to Terms Incorporated in Statutory Tenancy, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and for Cases, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255.]

Cases referred to:

*(1) *Bryanston Properties Co., Ltd.* v. *Edwards* [1944] 1 K.B. 32; [1943] 2 All E.R. 646.

*(2) *Phillips* v. *Copping*, [1935] 1 K.B. 15; Digest Supp.; 104 L.J.K.B. 78; 152 L.T. 175.

Appeal by the landlords from a decision of His Honour Judge Drucquer sitting at the Brentford County Court and given on Mar. 23, 1944.

M. Turner-Samuels for the appellants.

J. Platts Mills for the respondents.

Lord Greene, M.R.: By an agreement dated Aug. 6, 1940, the appellants let to the respondent a house for one year at the yearly rent of £95. The agreement contained this clause:

> It is further agreed that should the tenant wish to continue the tenancy hereby created he shall have the option of doing so subject to one month's notice on either side at the rental of £95 per annum until the cessation of hostilities and thereafter at £114 per annum.

On Apr. 7, 1943, the landlords served on the tenant a notice that the rent would be increased to £120 per annum, which was the standard rent, together with the permitted increases. The company's letter stated that, if the tenant wished to remain in possession, he would have to pay the increased rent. This the tenant refused to do and the landlords brought these proceedings to recover the difference between the agreed rent, which had been paid, and the increased rent. The county court judge dismissed the claim.

The county court judge based his decision on the *Bryanston* case (1), by which he felt that he was bound, and held that the provision relating to the rent payable until the cessation of hostilities was imported into the statutory tenancy. In the *Bryanston* case (1) the rent reserved by the lease was the standard rent of the premises and the landlords agreed to allow a deduction by the tenant of £85 per annum. That was a special term of the tenancy and it was held to be one which was applicable to the statutory tenancy. In *Phillips* v. *Copping* (2) the premises were let at £47 10*s.* per annum with an option for a further 3 years' tenancy at £55 per annum. The standard rent of the premises in that case was £65 per annum. The landlord after serving the proper notices increased the rent to the standard rent with the permitted increases and it was held that he was entitled to do so. The court held that there was nothing in the Act which prevented the landlord from raising the rent up to the level of the standard rent.

The real question here is whether this case is governed by the decision in *Phillips* v. *Copping* (2) or by that in the *Bryanston* case (1) and in my opinion it is clear that this case is governed by *Phillips* v. *Copping* (2). The *Bryanston* case (1) was a decision upon its special facts and in deciding it we had no intention of throwing the least doubt on the correctness of the decision in *Phillips* v. *Copping* (2).

The clause reserving the rent in this case does not provide for a deduction from the rent and there is nothing in it which can be incorporated into the statutory tenancy or which prevents the landlords from increasing the rent to any extent permitted by the Acts. There is no ground whatever for distinguishing this case from *Phillips* v. *Copping* (2) and that decision clearly covers this case.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I agree.

Appeal allowed.

Solicitors: *Kerly, Sons & Karuth* (for the appellants); *S. Seifert & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

THOMAS KAY STUART SIDEY *v.* PERPETUAL TRUSTEES ESTATE AND AGENCY CO. OF NEW ZEALAND, LTD. AND ANOTHER.

[PRIVY COUNCIL (Viscount Simon, L.C., Lord Thankerton, Lord Wright, Lord Porter and Lord Simonds), **June 7, July 5, 1944.**]

Privy Council—New Zealand—Wills—Construction—Gift to surviving descendants on death of last survivor of testator's children—Gift divisible per stirpes—Whether children or grandchildren to be the stirpes.

After providing for the payment of certain annuities, a testator gave his residuary estate to trustees upon trust on the death of the survivor of his four children to divide the same amongst his then surviving descendants "in such manner that the same shall be divisible *per stirpes* among the children grandchildren and remoter issue of such of my children as shall have left issue." Of the testator's four children, one died without issue and the last survivor died in 1941. At that date the testator's descendants consisted of (*a*) the appellant, the only child of a deceased son; (*b*) 4 children of another deceased son; and (*c*) 3 children of a deceased daughter and the child of a deceased child of the said daughter. Each of these descendants was of full age. It was contended by the appellant that the testator's own children should be taken as the *stirpes* for the purpose of the stirpital division and that the distribution should be primarily in thirds. On behalf of the second respondent, another grandchild (who appeared in a representative capacity), it was contended that the natural construction of a gift to persons *per stirpes* was that the stocks of descent should be found among the takers and not the ancestors and, therefore, the testator's grandchildren should be taken as the *stirpes* and the distribution should be in ninths:—

HELD: on the true construction of the will, and especially having regard to the fact that the clause directing the stirpital division among the testator's descendants opened and ended with references to the testator's own children, these children formed the stocks of descent. The estate, therefore, became divisible upon the death of the survivor of the children into 3 equal parts.

[**EDITORIAL NOTE.** The determination of the persons forming the stocks from which the *stirpes* are to spring is a matter of construction in each particular case. It has been generally assumed that these persons are to be found among the takers under the disposition and not the ancestors of such takers. That, however, is not a principle of construction but a *prima facie* proposition which may be displaced by considering the will as a whole.

AS TO DETERMINATION OF STOCKS WHERE DISTRIBUTION PER STIRPES, see HALSBURY, Hailsham Edn., Vol. 34, p. 359, para. 405; and FOR CASES, see DIGEST, Vol. 44, p. 998, Nos. 8557-8561.]

Cases referred to:

*(1) *Robinson* v. *Shepherd* (1863), 4 De G.J. & Sm. 129; 44 Digest 998, *8557*; 9 L.T. 527.

(2) *Re Wilson, Parker* v. *Winder* (1883), 24 Ch.D. 664; 44 Digest 998, *8559*; 53 L.J.Ch. 130.

(3) *Re Dering, Neall* v. *Beale* (1911), 105 L.T. 404; 44 Digest 998, *8560*.

(4) *Re Alexander, Alexander* v. *Alexander*, [1919] 1 Ch. 371; 44 Digest 998, *8561*; 88 L.J.Ch. 242; 120 L.T. 692.

(5) *Gibson* v. *Fisher* (1867), L.R. 5 Eq. 51; 44 Digest 998, *8554*; 37 L.J.Ch. 67.

APPEAL by a grandson, who contended that each child should be taken as a *stirps*, from an order of the Court of Appeal of New Zealand. The facts are fully set out in the judgment of the Board delivered by LORD SIMONDS.

J. Neville Gray, K.C., and *C. V. Rawlence* for the appellant.

Harold Christie, K.C., and *J. A. Reid* for the respondent grandchild.

Lord Meston for the Perpetual Trustees Estate and Agency Company of New Zealand, Ltd.

LORD SIMONDS: This appeal raises a question as to the true construction of the will of John Sidey, who died in 1915. By his will which was dated Nov. 18, 1911, the testator after making a specific devise and certain specific and pecuniary bequests, including an annuity of £1,000 to his wife during her life, appointed his two sons Thomas Kay Sidey and Arthur Murray Sidey and his two daughters Jessie Ann Adam and Eliza Johanna Jolly executors and trustees thereof, and gave his real and personal estate not thereby otherwise disposed of to his trustees on trust for conversion and investment. He then directed his trustees to stand possessed of the whole of his residuary estate and the investments representing the same upon the following trusts (the paragraphic form and numbering of which were not in the original will but have been adopted for the sake of convenience):

21. After providing for the annuity hereinbefore given to my wife for her life all legacies and other outgoings directed by this my will to be paid in trust to pay the income thereof as follows that is to say:

22. To each of my two grand-daughters (the daughters of my said daughter Jessie Ann) I give an annuity of £100 for her life.

23. To each of my two said daughters Jessie Ann and Eliza Johanna and after their deaths respectively to their issue equally amongst them I give an annuity of £500.

24. To my said son Arthur Murray Sidey and after his death to his issue equally amongst them I give an annuity of £1,200.

25. And to my son Thomas Kay Sidey and after his death to his issue equally amongst them I give the whole of the remaining income of my said trust estate year by year after paying thereout the respective annuities or yearly payments above specified.

26. And from and after the death of the last survivor of my said four children I declare that the said several annuities or yearly payments to my said children and their issue shall cease and determine (except the annuities of £100 each to my two grand-daughters).

27. And from and after the death of the last survivor of my said four children as aforesaid I give devise and bequeath the whole of my residuary estate real and personal to and amongst my then surviving descendants in such manner that the same shall be divisible *per stirpes* among the children grandchildren and remoter issue of such of my children as shall have left issue.

28. And I declare that during the minority of any of the issue who may take a benefit hereunder it shall be lawful for my trustees to pay the presumptive share or so much of it as they shall think requisite of such child to his or her parent or guardian or to the person for the time being having the actual custody of such child without the calling upon such parent or person for any account of the expenditure thereof or otherwise to apply the same for the benefit of such child in such manner as they or he in their or his absolute discretion shall think fit.

29. And I further declare that in such case whenever there are two or more of such children of one of my children or of his or her issue then my trustees shall not be bound to divide such income but may similarly pay or apply the same or any part thereof generally to such parent or guardian or for the benefit of such children.

30. And I further declare that no grandchild or remoter issue of mine shall take a vested share in the income or capital of my estate until being a male he shall have attained the age of 21 years or being a female she shall have attained that age or married under that age.

31. And I further declare that such part of the presumptive shares of any of my issue as shall not be paid or applied during his or her minority for the benefit of any of my grandchildren or remoter issue shall be accumulated as income for his or her benefit until he or she shall attain the age of 21 years or being a female attain that age or marry and if he or she shall not live to obtain a vested interest therein the same shall be added to the capital shares of his or her brothers and sisters if any and if he or she shall have no brother or sister the same shall be added to the capital of my trust estate.

The testator appears to have had four children only, namely, the two sons and two daughters named in his will. Of these the last survivor was his daughter Jessie Ann Adam who died on June 3, 1941. At this date, therefore, the capital of the testator's residuary estate became distributable under cl. 27 of his will. At the same date the position of the testator's family so far as is material to this appeal was as follows: (i) The son Thomas Kay Sidey had one child only, namely, the appellant Thomas Kay Stuart Sidey, who was of full age; (ii) the son Arthur Murray Sidey had four children, namely, the respondent Lorna Murray Lewin and three others, all of them living and of full age; (iii) the daughter Jessie Ann Adam had three children living and of full age and another son who died long since leaving one child then living and of full age; (iv) the daughter Eliza Johanna Jolly had no child.

From this recital it will appear that, if, as the appellant contends, the testator's own children are to be taken as the *stirpes* for the purpose of the stirpital division of the residuary estate, which is directed by cl. 27 of the will, the distribution will be primarily in thirds, of which the appellant will take one-third, the four children of Arthur Murray Sidey will between them take another third, and the three surviving children of Jessie Ann Adam and the child of her deceased child will between them take the remaining third: if, on the other hand, as is contended by the respondent, Lorna Murray Lewin (who was appointed in these proceedings to represent all those descendants of the testator whose interest was the same as her own), the grandchildren of the testator are to be A taken as the *stirpes* for the purpose of such division, then the distribution will be in ninths, each of the eight surviving grandchildren taking one-ninth and the great-grandchild representing the *stirps* of the deceased grandchild taking the remaining ninth. It is the latter view which has commended itself to the Court of Appeal in New Zealand by a majority of four judges to one, NORTHCROFT, J., dissenting from the opinion of MYERS, C.J., and BLAIR, KENNEDY and CALLAN, JJ.

B Their Lordships upon a consideration of the whole of the relevant provisions of this will have come to the conclusion that the view of NORTHCROFT, J., is to be preferred. It does not appear to them that the authorities, to which reference will be made later, afford any real guidance upon the construction of the will now under consideration. They cannot accept the suggestion made in the argument of this appeal that there is any rule of construction which C requires a stirpital division to begin at one generation rather than another. In every case the result must depend upon the language that is used and the context in which it is used.

In the will now under review the testator by cll. 22-26 inclusive dealt with the income of his residuary estate until the death of the last survivor of his four children, making separate provision during that period for each child and the issue of each child. By cl. 27 he provided for the distribution of the D capital of the estate; to this clause further reference will be made. By cll. 28-31 the testator made further provisions which appear to be mainly, if not entirely, referable to the disposition made by cl. 27, and, though too much weight should not be given to clauses which are of an ancillary character, the language of cl. 31 in particular is favourable to the view that the stirpital division should proceed upon the footing that the testator's own children were the *stirpes*. Cl. 30 having, by way of limitation or qualification of cl. 27, provided E that no grandchild or remoter issue should take a vested share in the income or capital of the estate until being a male he had attained the age of 21 years or being a female attained that age or married, provision is made by the latter part of cl. 31 for the event of such a person not attaining a vested interest. If the stirpital division was based on each grandchild being a *stirps*, it would be consistent that upon a grandchild failing to attain a vested interest, the F share of that grandchild should go over to the other *stirpes*, *i.e.*, to the other grandchildren or their representatives. But cl. 31 does not so provide; on the contrary, it provides that the share of a grandchild failing to attain a vested interest is to be added to the capital shares of his or her brothers or sisters, if any. This is precisely the provision to be expected if the testator's own children constituted the *stirpes*: for, if the children of a child represent one *stirps* and take one share between them, the share of one of them dying without G attaining a vested interest would naturally go to his brothers or sisters.

It is, however, primarily on the language of cl. 27 itself that the question must be determined. Its opening words cannot be wholly disregarded. The event for which the testator now provides is the death of the last survivor of his four children, for whom and their issue he had previously made separate provision out of income. Upon this event happening he gives the whole of his residuary estate:

> H . . . to and amongst my then surviving descendants in such manner that the same shall be divisible *per stirpes* amongst the children grandchildren and remoter issue of such of my children as shall have left issue.

As this clause opens with a reference to the testator's four children, so it ends with a reference to such of his children as shall have left issue. This framework suggests that for the testator each child established the *stirps* for which he was making provision. The class of beneficiaries is "my then living descendants": some assistance again may be derived from the use of the word "my." There seems no reason why a testator, providing for his own descendants living at a certain time but intending them to take not *per capita*, but *per stirpes*, should pass over the generation of his own children and direct not that each of their families should take an equal share of his estate between them, but that each of his grandchildren or their families should take an equal share. Then come the decisive words. The testator's estate is to be divided amongst his then surviving descendants :

> . . . in such manner that the same shall be divisible *per stirpes* among the children grandchildren and remoter issue of such of my children as shall have left issue. A

But for this provision the estate would presumably have been divisible among all the testator's living descendants *per capita*, every member of every generation taking an equal share. The effect of this provision is two-fold. In the first place, as is conceded by both sides on this appeal, it qualifies the generality of the expression "my then surviving descendants," and operates to preclude a remoter descendant from taking in competition with his own living ancestor so that in a particular line, for example, a great-grandchild could take no share B if his parent, being a grandchild of the testator, was living at the date of distribution. But in the second place it operates or may operate to alter the proportions in which the participating descendants share in the estate. For the provision demands that the division should be not according to the number of *capita*, but according to the number of *stirpes* and, as the present case illustrates, the participating descendants may take in different proportions according C to the generation which is determined to be the *stirps*. Thus it becomes necessary to determine in this case whether the testator's own children, who have issue living at the date of distribution, or his grandchildren, themselves living or having issue living at that date, form the *stirpes* for the purpose of the prescribed stirpital division. The argument in favour of the latter view which appears to have been decisive in the Court of Appeal and has been urged with much force before their Lordships is that the natural construction of a gift to persons D *per stirpes* is that the stocks of descent shall be found among the takers and not among their ancestors. It has been contended that this has been accepted as a principle of construction since the decision of LORD WESTBURY, L.C., in *Robinson* v. *Shepherd* (1), and this consideration has largely influenced the decision of MYERS, C.J., and the other judges forming the majority of the Court of Appeal. It is the fact that in the case cited LORD WESTBURY, L.C., upon the language of the will under consideration came to the conclusion that legatees E who themselves participated were to be regarded as forming the *stirpes* and that this line of reasoning commended itself to NORTH, J., in *Re Wilson, Parker* v. *Winder* (2), and to WARRINGTON, J., in *Re Dering, Neall* v. *Beale* (3), upon the construction of wills which appeared to those judges to be similar to that under review in *Robinson* v. *Shepherd* (1). In *Re Alexander* (4), SARGANT, J., felt himself constrained to follow the same line of reasoning and to reach a F similar result, though his inclination and preference were for the view expressed by LORD ROMILLY, M.R., in *Gibson* v. *Fisher* (5). Their Lordships do not think it necessary to question the correctness of any of the decisions to which reference has been made, but they cannot elevate the reasoning which led to such decisions into a rule of construction. There appears to them on principle to be no reason why in the construction of a gift *per stirpes* the stocks should be found among the takers and not among their ancestors. In the simplest case, where a gift G is made to a number of persons of different stocks but of the same generation *per stirpes* and not *per capita*, it is manifest that the stocks are to be found not in the takers but in the ancestors, and this result is reached not by the displacement of any *prima facie* rule of construction but by the consideration of the language of the gift without any predilection. The language of the will under appeal is to be approached in the same way.

Reference has already been made to the scheme of the will and to the indica- H tions to be found in the clauses which precede and follow cl. 27. That clause, as has also been observed, opens and ends with references to the testator's own children. It is the final reference which affords the clearest indication of the testator's intention. If the division had been directed "*per stirpes* among the children of such of my children as shall have left issue" it could not have been doubted that the testator's own children leaving issue formed the *stirpes*. Or again, if the division had been directed "*per stirpes* between the issue of such of my children as shall have left issue" the same conclusion would be reached: for the *stirpes* are directly associated with the children who have left issue and there would appear to be no reason why any particular remoter generation should form the *stirps*, if a child of the testator does not. So also, if the issue are written out at length as "the children, grandchildren or remoter issue of such of my children as shall have left issue." The introduction of the remoter generations into the gift by way of explanation of the words "my then surviving descendants" is for the purpose of substituting such remoter generations for earlier generations of which there are no living representatives. The framework of the gift remains one in which the final reference is always to the testator's own children who have left issue surviving at the relevant date. It is in their Lordships' view these children who form the stocks of descent. This construction of cl. 27 is entirely consistent, as no other construction is consistent, with the provisions of cll. 30 and 31. The testator's estate accordingly became divisible upon the death of the survivor of his children into three equal parts and those three parts will be distributable in the manner already indicated, *i.e.*, the appellant will take one-third, the four children of Arthur Murray Sidey will take another third between them, and the three surviving children of Jessie Ann Adam and the child of her deceased child will take the remaining third between them. The costs as between solicitor and client of each party of this appeal will be paid out of the estate. Their Lordships will humbly advise His Majesty that the appeal ought to be allowed accordingly.

Appeal allowed.

Solicitors: *Sandilands & Co.* (for the appellant); *Stibbard, Gibson & Co.* (for the respondents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

R. *v.* THOMAS MICHAEL TREACY.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Asquith, JJ.), **July 11, 1944.**]

Criminal Law—Evidence—Cross-examination—Murder—Evidence of forgery to show motive introduced in cross-examination—Cross-examination to inadmissible statement by accused.

The appellant was charged with the murder of Kathleen Cornish. At the trial counsel for the prosecution put in evidence the following statement, made by the prisoner when in a state of serious ill health to a police officer, as to the reason why he left the locality in which the killing occurred, which took place on the day on which the appellant was due to appear in a local court on a charge of larceny: ". . . I was not going to face those charges because of something that had happened in the past coming out as I had been told it might not be avoided. The same thing as I am being questioned about now, the murder of Kathleen Cornish." During the cross-examination of the appellant counsel for the prosecution put to the appellant two obviously forged documents which had been found in the appellant's possession. These documents were not made exhibits, nor were they proved in any way, and their existence was not known to counsel for the defence. Counsel for the prosecution suggested that the letters were forged for the purpose of deceiving the murdered girl, although there was no evidence that the girl had ever seen the documents. The appellant was also cross-examined upon answers he had made in an inadmissible statement and those answers were contrasted with certain answers he had made in the witness box. On appeal it was contended on behalf of the appellant (i) that the statement should not have been admitted as it referred to a previous killing with which the appellant had been charged and (ii) that the cross-examination of the appellant was improper and prejudicial:—

HELD: (i) the jury could not have inferred from the statement in question made by the appellant that it had any reference to a previous killing. The statement was admissible.

(ii) the forged documents were not relevant, and should not have been put to the witness.

(iii) the cross-examination of the appellant to a statement by the prisoner, which was itself inadmissible, was improper.

[**EDITORIAL NOTE.** It is prerequisite of all evidence that it must be relevant to the issue being tried. Although greater latitude may be allowed in cross-examination than in evidence in chief, yet all questions asked must be relevant to the issue. In the present case the documents sought to be made the subject of cross-examination were admittedly not relevant to the charge being investigated and, therefore, were not a proper subject of cross-examination.

As to Relevant Facts in Criminal Cases, see HALSBURY, Hailsham Edn., Vol. 9, pp. 183-188, paras. 267-270 ; and for Cases, see DIGEST, Vol. 14, pp. 366-379, Nos. 3875-3992.]

Appeal from a conviction for murder. The facts are fully set out in the judgment of the court delivered by Humphreys, J.

Cecil Havers, K.C., and *J. C. Llewellyn* for the appellant.

Sir Charles Doughty, K.C., and *R. H. Blundell* for the Crown.

Humphreys, J. : This is an appeal from a conviction for murder at the Chelmsford Assizes after a trial before Wrottesley, J. The appellant was convicted of the murder of a girl of 20 years of age, a munition worker, and apparently a girl of very respectable family. The prisoner himself was somewhat older than the girl : his age was about 27.

The case was one which depended upon circumstantial evidence. There was no actual eye-witness of the killing. The issue, and the only issue, at the trial was : Was it proved beyond reasonable doubt that the accused man was the person who murdered Miss Cornish ? That somebody murdered her was beyond doubt. It was also beyond question that she was murdered in the early morning of Mar. 17, within a few minutes of 6 a.m. in the morning, just as it was getting light.

She and the appellant had known each other for some months, and were lovers. They were talking of getting married. He, in fact, was a married man already, but there was evidence that his wife had left him, had gone off with another man, had had a child by that other man, and that he was either actually suing for a divorce, or taking steps with a view to obtaining a divorce. The girl knew that he was a married man. That evidence was given quite clearly by the mother of the appellant, who knew the girl and that the girl and her son were very fond of one another. They used to meet during the last week of the girl's life very frequently, and one further fact that perhaps should be mentioned is that the father of the murdered girl was very much averse to her association with the appellant.

Upon Friday, Mar. 17, that girl left her father's house at Westcliffe-on-Sea at about 5.30 a.m. She did as she was used to do, took a bus to Southend Station, and there she intended to catch a train due to leave at 6.1 a.m. for Chelmsford, where she worked at a factory. On Mar. 17 the appellant met her, they travelled in that bus to Southend Station together, and the bus arrived, according to all accounts, at the station at about 5.50 a.m. They were seen shortly after that, the pair of them, walking arm in arm.

The girl's object in going to the station was obviously to catch that 6 a.m. train to Chelmsford. The man, according to his story, did not intend to go to Chelmsford on that day. On other days he had been to Chelmsford with her by that train, but on that day he had no intention of going to Chelmsford ; and the fact is that the girl, having taken the trouble to arrive at the station at 5.50 a.m. with a view to catching that train, instead of going into the station and waiting on the platform, went off with the appellant, and they were seen by two witnesses at a place which is a little distance from there known as Stonemason's Yard. No person could be found who had seen that girl alive after that.

Shortly after 6 a.m. her dead body was found on a path, again not a great distance away from Stonemason's Yard, which made it pretty clear that after being seen by those witnesses, she had walked along a path known as Prittlewell Path, had got to a level crossing, and just beyond that had been murdered by someone. She was murdered by a person who had with him or her—obviously more likely "him"—a knife with a rather long, thin blade. That had been driven into her, and she had probably died instantaneously as the result of her lung and one of the main vessels of the heart being pierced. The appellant was seen within 10 minutes of 6 a.m., at a cafe, again close to Stonemason's Yard and he was there having some tea, and showed no signs of being in any unusual state of mind. After that the appellant disappeared. We know from the statement which he subsequently made, and about which there is no dispute, more or less what he did. He went for a walk. He got into an unused bungalow by breaking a window and spent most of the day there, and then at night he caught a train which took him up to London. When he was in London, he bought a large quantity of aspirins, as he himself admitted, to take his own life. He said that his object in leaving Southend on that day and not returning, as he did not intend to return, was that he had been charged a week or two before with larceny. He was on bail, and on that Mar. 17 he ought to have been in Southend at the police court surrendering to his bail and being tried on a charge of larceny. He had no intention of being so tried, and in London he tried to get work which would enable him to stay away from Southend and, as he hoped, would prevent his being found. It follows that the prosecution were in a position to say that it was extremely probable that he left Southend on that morning because he had committed this murder. He himself said: No, he had nothing to do with the murder; that he had gone to London in order to escape from his trial for larceny, and there he had seen in a newspaper an account of the finding of the body of the girl whom he loved and it was that which so upset him that he decided to take his own life since he could not live without her. That was his statement.

Those facts show that he was the last person who was seen with this girl and was with her within quite a few minutes of her murder close to the place where she was murdered. Whatever the explanation may be which he attempted to give of it, he fled for it and tried to hide himself in London, and when he was eventually giving an explanation, as he did in the witness box, of his movements on that morning, he told a story which may be said to be so unlikely as to be almost, if not quite, incredible. He said that this girl, having got to the station with the obvious intention of catching her train, suddenly said to him that she was going to meet her friend Dora. He said he walked with her to meet Dora, and they walked down to a street called Milton Street, which would lead them to the beginning of that Prittlewell Path where eventually the girl was found. He said:

> We got as far as an A.R.P. shelter or warden's post in Bradley Street, and then as we had not met her friend we walked back to the station again.

That stroll, which was all it was, did not begin until after 5.50 a.m. By 6 a.m. that girl had got some distance away from there and had been killed and her dead body found, and, therefore, the story which was told by the appellant was one which any jury might well say was incredible. The case, speaking of it as a case of circumstantial evidence, may be said to have been an extremely strong one from the point of view of two out of the three elements which have often been said by judges to be the usual elements to look for in a case of circumstantial evidence, opportunity, interest and conduct. Obviously the appellant had opportunity, such opportunity as was not open, according to the evidence, to any other person who could be suggested. His conduct was conduct which a jury might well think was the conduct of a guilty man, and his explanation, which was part of his conduct, was the explanation of a man who was telling a lie.

The one thing lacking was what has been described as interest, sometimes referred to as motive. Of that there was no evidence, and, if there was a weakness in the case for the prosecution, it was that they had no evidence to offer and no suggestion to make—and none was made in the opening of the case or in the course of the case for the prosecution—as to why this man in love with this girl should have suddenly killed her on that morning. There was not a shred of evidence to suggest a quarrel. There was no struggle. There was just nothing which would account to any person who desired to have it explained to him why the prisoner had murdered the girl.

It is common knowledge nowadays not only to lawyers but probably to most laymen that on a charge of murder it is not necessary for the prosecution to adduce any evidence as to why the murder was committed. The prosecution is there to establish, if they can, by evidence, that it was committed and by the accused person. Why he did it is a matter which they are not called upon to prove at all, and it may well be—I cannot say more—that, if the case had been left there, this man would have been convicted by the jury, as he in fact was after certain other incidents had taken place to which it is necessary to refer. A But no one could suggest, and certainly counsel for the appellant has not suggested here for a moment that there was not a *prima facie* case upon which a jury could, if they chose, find this man guilty of that horrible murder.

It is said that certain documents were admitted in evidence which were wholly and totally inadmissible in evidence. If that be true, that is one of the grounds which the Criminal Appeal Act, 1907, sect. 4, provides as a ground for quashing the conviction. It is further said that there was cross-examination administered B to the appellant when he went into the witness box which was improper and prejudicial.

The first matter arises upon a statement which came to be made in these circumstances. The appellant, having spent the Saturday and Sunday in London, came back. When exactly he took the aspirins we do not know, but when he arrived by train at Rochford, a place about 4 or 5 miles from C Southend, in the early morning, somewhere about 1.30 a.m., he was in a very bad state indeed. He had obviously taken a large number of aspirins, which made him a very sick man. He walked into the police station and there made a statement in this way: He had in his hand a copy of a newspaper, giving an account of the finding of the body of this girl, Miss Cornish. He pointed to his mouth and made it plain that he was not in a condition to speak, but indicated that he wished to make a statement. He was then given paper D and pen, and he proceeded to write out in his own handwriting a statement which became an exhibit in the case. It was quite properly put in as an exhibit in the police court, and it is in two parts. It is a disjointed sort of document, as might be expected from a man in the condition in which he was. It begins:

> I slept in shelter in London. [Then in reference to a letter which had been found E upon him] That letter is from the girl concerned. I cannot give any more information than is already known . . . I can't talk: haven't been able to since yesterday: since I read the paper. I was very upset about Kathy [as he called her] the girl who I was engaged to. Friday I last saw her 5.40 a.m.

Then he seems to have collapsed for a time but subsequently made another statement, that is to say he went on writing, and he wrote: F

> Nothing unusual, I had told her I was not going to court that morning as I was going to London and I was not going to face those charges because of something that had happened in past coming out as I had been told it might not be avoided. The same thing as I am being questioned about now the murder of Kathleen Cornish.

I am allowed to say on behalf of my Lord and ASQUITH, J., that having read that statement they took exactly the same view of it as I did myself, and we G may compare ourselves to three members of a jury. It never occurred to any of us that the last words in that statement might have reference to some previous killing of somebody or other or of any previous conviction of the man who was making the statement for any such crime. Such an idea never occurred to us at all. It seemed that the statement was rather nonsense, because it speaks of being questioned about the same thing "as I am being questioned about now the murder of Kathleen Cornish." It seemed to be nonsense, because he H could not have been questioned some time ago about the murder of Kathleen Cornish who had only died the day before.

We have been told to-day that the prosecution knew, that what he undoubtedly referred to in that statement was that he had been charged with a somewhat similar murder of a girl some years ago, and had been convicted of manslaughter. That was entirely unknown to the jury, and whatever risks the prosecution may have run in putting in that statement without cutting out those last words, in point of fact no harm was done in this trial because we are satisfied that no member of the jury is the least likely to have taken the view that those ambiguous words, spoken by a man desperately ill, meant or had any reference to some previous conviction of himself for such a crime as manslaughter. Therefore, objection to the statement was properly overruled by WROTTESLEY, J., who admitted it and, as a ground of appeal, that must fail.

The next ground of appeal is this: The prosecution concluded their case with the same evidence which they had given at the police court; they proved the facts which I have stated, and that one statement of the accused and no more. The evidence having been given, and the prosecution having closed their case, the appellant elected to give evidence, as he was entitled to do, and in examination-in-chief stated his case, which was the perfectly simple one, true or untrue:

> I last saw the girl when I left her at the station, our second visit that morning to the station, waiting to catch her train. I went away and went into the Blue Bird café, where I had some coffee. That is the last I saw of her, and that is all I know about it. I am not guilty; I had nothing to do with her death.

He was cross-examined and, quite early in the cross-examination two remarkable documents were put to him by counsel for the prosecution. They are typed. One is headed " St. Thomas Hospital, Paddington." It does not want more to show it is a concocted document, because St. Thomas' Hospital is not in Paddington, as everybody knows. It says:

> Dear Sir, *Re* your inquiries of Mrs. M. S. Treacy she died here from injuries received in a road accident in January, I remain yours sincerely, [then an undecipherable scribble] Medical Superintendent.

It is a ridiculous document which would not deceive any educated person for a moment, because the spelling is wrong, and the whole wording of the thing indicates that it never came from any medical superintendent at all. It is undated.

The other document is this:

> Dear Sir, Your wife died in Paddington Hospital St. Thomas the result of a road accident. This information was given by Mr. Bott, 70, Stafford Road, Kilburn, W.6, also by the medical superintendent of the hospital concerned. She died last January 25. I remain yours sincerely [and then follows a signature].

Those documents had in fact been taken by the police from a drawer in the appellant's room. They were, therefore, technically documents found on him or in his possession on his being charged with this crime and as such, *prima facie*, would be admissible in evidence against him. That does not mean that it would be right that they should be given in evidence against him; they might be, for instance, such documents as a ticket-of-leave or something of that kind, which would show that the man was an old convict and therefore they could not be used against him. But they might conceivably have some reference to the case, and, therefore, *prima facie*, it may be said, were admissible in evidence against him without any evidence about them as to where they came from. They were either relevant to prove something in this case or they were not. If they were relevant to prove any part of the case for the prosecution, the duty of the prosecution we state unhesitatingly and as clearly as may be, was plain beyond question. Their duty was to produce them by the hand of the officer who found them, to give any evidence which the prosecution had as to where they came from, how they came into existence and how they got into the possession of the accused.

We are told that the prosecution had in fact evidence as to where they had been typed, and on what machine they had been typed; it was a machine to which at some time the accused had access, or at all events was used in the place where he worked. If that course had been adopted, they would then have become exhibits in the case. They would have been open for the inspection and examination of those who appeared for the accused. Nothing of that sort was done. It is not disputed in this case that what was done with them was that the prosecution just kept them up their sleeve; they decided not to put them in. No reference was made to them at the police court. No reference was made to them at the trial, and the case for the prosecution was concluded without a word having been said, and counsel for the accused man, who was on his trial for murder, was in fact totally unaware of the existence of such documents, and, therefore, of course, totally unable to deal with them if they were suddenly produced, and quite without instructions as to what was the explanation.

It was in those circumstances that they were produced by counsel for the prosecution and put to the prisoner during cross-examination. The question A that was put was:

> For what purpose did you type or cause to be typed these two letters? [Letters handed to the witness]. Just read them.
>
> Wrottesley, J., [who, of course, had no copies of them and knew nothing about them —they were not exhibits]: *Q.*—Are they letters? *A.*—Yes.
>
> *Q.* [Counsel for the Crown]—You understand my question? *A.*—Yes. B
>
> *Q.*—Then will you answer it? *A.*—They were just sent to me; I did not have them typed.
>
> *Q.*—By whom were they sent? *A.*—I could not say.
>
> *Q.* [Wrottesley, J.]—You said you did not type those letters? *A.*—That is right.
>
> *Q.* [Counsel for the Crown]—I do not want to suggest you typed them yourself, but were you aware that they were typed? *A.*—No, they came to me through the post.
>
> *Q.*—I suggest to you that they were typed on a typewriter which was used in your place of employment, in the officers' mess where you were last employed; is that so? C

We say beyond any question at all that, if that question was going to be put, it ought to have been prefaced by the proof that they were typed in the officers' mess; then this man would have been able to answer, and his counsel would have been able to deal with such an accusation. There was no evidence from beginning to end, that they were typed in the officers' mess, or anything else about them. The prisoner's answer was: D

> They might have been, but I do not know; they came to me through the post.

Then counsel for the defence not unnaturally began to ask about these things having up to that time assumed they were letters in the hand of his client, which, of course, he could not object to being produced, and Wrottesley, J., asked the prosecution: E

> *Q.*—What is the suggestion? *A.*—The suggestion is that these letters were used by him for the purpose of persuading this girl that his wife was dead.

That was no doubt a perfectly correct statement by counsel, but it was a very unfortunate thing to say in the hearing of the jury, because there was no evidence to support it. It was not proposed to give any evidence to support it. There was one person who might have given such evidence, and that was F the mother of the accused, who often saw this girl. No question was ever put to her about that, and there was not a rag of evidence from beginning to end that the girl ever saw those letters. The evidence of the accused as to these documents stood unchallenged.

Then there was a discussion as to whether, these letters being found in his possession, they were relevant to any issue which the jury had to try, and the matter was put in this way by counsel for the prosecution: G

> I can tell my friend what is the relevance of them. It is to show the motive he had for killing this girl, that is all. I am going to suggest to the jury that he knew on that Friday morning that the girl would have no more to do with him when she knew the truth, and that is why he killed her.

That was understood at that time by those who heard counsel as referring to the fact that the man was a married man; but that was not what H counsel had in mind. He had quite a different meaning at the back of his mind, as he has told us. These letters were then read. The two letters amount to this: They are two forgeries found in the possession of a man who is being tried for murder, and they are produced as forgeries. How were they relevant? It seems to us that the prosecution were in this difficulty: Either they were relevant or they were not. If they were relevant, as I have already said, they ought to have been proved in the proper way as part of the case for the prosecution. The prosecution have no right to pick out such evidence as they think right to give to a jury in a criminal case. They have no right of that sort at all. Their duty is to put before the jury every fact that is relevant to the issue being tried by them and known to the prosecution and to prove it, whether in fact it helps the accused or is against him. That is the duty of the prosecution. But, if they were irrelevant, and one must assume that the prosecution regarded them as irrelevant because they made no attempt to prove them, in spite of the suggestion of counsel that they prove a motive, then they never ought to have been referred to, because anything more damaging to a man on his trial for one crime than the production of a couple of obvious forgeries having nothing to do with the case in question, but found on him, coupled with the suggestion : "I suggest you showed those to the girl with whose murder you are charged," is impossible to conceive.

There the matter rested, and nothing more was heard about it so far as evidence was concerned. Nobody was ever called to show where these documents came from. Certainly no attempt was made to show that the girl ever saw them. Finally, when the matter came to the summing up, Wrottesley, J., who may well have been puzzled about some of the aspects of this case, made this observation to the jury—it is the last observation before he told the jury to retire and consider their verdict :

> There is one other point that I am not sure I mentioned to you. The accused man denied having concocted these letters about the death of his wife, and he said they came to him by post. That, of course, is his evidence. You will look at the originals, which I will hand to you, and you will remember his denial that he had nothing to do with them. You will bear in mind that undoubtedly his mother, who was called on behalf of the Crown, did say that the girl knew some time before her death that he had been married.

Those documents, with those observations, were handed to the jury. How were they relevant ? In our view, they were utterly irrelevant in this case. They did not tend to prove motive for this murder, and they constituted a most unfortunate piece of highly prejudicial evidence, one would say unwittingly admitted by Wrottesley, J., who had not the whole matter before him, as it would have been if they had been proved at the police court and he had been able to read the depositions.

So much for those documents. The matter does not rest there. There was another document that was put in after strenuous opposition by the counsel for the appellant who, in our opinion, was perfectly right in his objection to it. It appears that this man made no less than four separate statements at different times. They were taken from him by the police. I have referred to one. There were two others, which have not been referred to in this case, except that they were two statements which he made, which apparently were never produced by the prosecution and, we may assume, were totally irrelevant. As to the fourth statement, what happened was this: At 1.30 a.m. on Mar. 19, the appellant came to the Rochford Police Station, and made the statement to which I have referred. Then a doctor was sent for. He obviously required medical attention, and he was taken away to the hospital, but before he left for the hospital he was seen by another police officer. That officer told him in terms that he appeared to be the person for whom they were looking, and that he would be detained at that station on the charge of murdering that girl. That happened somewhere about 1.35 a.m. in the morning. At 3 a.m., or so in the morning, there came another police officer. That police officer said, and his word may be taken, although it seems odd, that he had no idea that this man had been charged with murder, and was being actually detained at the police station on that charge. He himself had come from Southend, because he had heard on the telephone that day that this particular person ought to have surrendered to his bail at the Southend Police Station, and there was a warrant out for his arrest; and he came to tell him he was going to hold him, if necessary, upon that warrant upon charges of larceny. That was his business, and he said he did not know that that man was already under arrest on the charge of murder. In our view, it makes no difference whether he knew or not ; the fact was that the accused was detained upon the charge of murder, and whoever was the senior officer at that police station ought to have seen that, being under arrest upon a charge of murder, no question was put to that man about that murder, more particularly in view of the state in which he was, for he was still unable to talk although he could write.

What was done was that he was cross-examined by this second police officer, who wrote questions, to which the accused wrote answers, and we have before us a long sheet—three sides of paper—with the questions written by the officer and the answers written by the appellant, and some of those answers, it was suggested, did not quite tally with the statement. I am not sure whether they did or not, but they were contrasted at all events with the statement A which he had made when he first went into the police station.

That document was thought by the prosecution to be of use from their point of view, and they tendered it in evidence at the police court. The magistrates, as we think, well-advised, came to the conclusion that, seeing that the man was at the time when that cross-examination was administered to him in custody on a charge of murder, they ought not to admit that statement, and they refused to allow it to go in. The prosecution apparently accepted that position, and B nothing more was heard of that statement until after the case for the prosecution was closed. No attempt was made to get WROTTESLEY, J., to admit that statement and no one heard anything about the statement until this man was in the witness box. Then he was cross-examined by counsel for the Crown upon those answers, and those answers were contrasted with the answers that he had been giving on that day in the witness box in the hearing of the jury. C

I say with regard to that statement, as I said with regard to the two previous documents: either it was admissible in evidence or it was not. Counsel for the Crown did not think that he could have put in that statement against the appellant in the circumstances, seeing that the charge was one of murder. The statement, therefore, must be taken to be one that is inadmissible. But counsel for the Crown took the view:

> When this man had made some statement in the witness box as to his movements D on that morning which in my view did not agree with the statements which he had made in those inadmissible written answers to questions, I was entitled to put those to him.

We entirely disagree. In our view, a statement made by a prisoner under arrest is either admissible or it is not admissible. If it is admissible, the proper course for the prosecution is to prove it, give it in evidence, let the statement E if it is in writing be made an exhibit, so that everybody knows what it is and everybody can inquire into it and do what they think right about it. If it is not admissible, nothing more ought to be heard of it, and it is quite a mistake to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person in cross-examination. It is quite a mistake, and in our view that is another instance, an unfortunate instance, of what happened in this case without, as I have said, and I repeat it because F I mean it, the slightest desire on the part of anybody to be otherwise than fair to the man who was on his trial.

Having regard to those unfortunate matters which took place, we have formed the opinion that this trial was profoundly unsatisfactory. We have had to consider what is our duty in the matter and, without discussing the case further, it is sufficient to say that we have felt it to be our duty to say that it was so G unsatisfactory that we cannot do other than say that this conviction must be quashed and the appeal allowed.

Appeal allowed. Conviction quashed.

Solicitors: *Director of Public Prosecutions* (for the Crown); *Registrar of the Court of Criminal Appeal* (for the appellant).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

OSTIME (H.M. INSPECTOR OF TAXES) *v.* PONTYPRIDD AND RHONDDA JOINT WATER BOARD.

[COURT OF APPEAL (Scott, du Parcq, L.JJ., and Uthwatt, J.), **July 24, 1944.**]

Income Tax—Trade receipt—Sums received by water board under precepts issued to constituent authorities—Sums provided out of general rate—Whether trade receipt—Income Tax Act, 1918 (c. 40), *Sched. D, Case* 1.

Income Tax—Trade expenses—Sums paid by water board to body of which it is constituent member—Sums part of price payable for water supplied to board's own consumers—Whether allowable as deductions—Income Tax Act, 1918 (c. 40), *Sched. D, Case* 1.

The respondent board was a joint water board which was authorised by statute to supply water direct to consumers in the districts of its 2 constituent authorities and to sell water in bulk to the water undertakings in 2 more districts. In the event of an estimated deficit in its net revenue for any year the board was authorised to issue precepts to its 2 constituent authorities apportioning between them the sum needed to meet the deficit and requiring them to pay out of their general rate funds the amounts so apportioned. In the event of either authority making default in payment, the respondent board was empowered to meet the deficiency by itself levying a rate in the district of such authority. The respondent board itself was required year by year to pay an amount similarly apportioned to it under precept to the T.F. board of which it was a constituent authority and from which it purchased in bulk some of the water from which it supplied its own consumers. It was contended for the Crown that, in the computation of the profits of the board for the purposes of income tax, the amounts received under precepts and the amounts paid under precepts should be included as trading receipts and trading expenses respectively, or, alternatively, that, if the receipts under precepts were not to be included, then the sums paid by the board pursuant to the precepts issued to it ought also to be excluded from computation :—

HELD : (i) moneys received by the board under precepts formed part of its income within the meaning of the Income Tax Acts.

(ii) money paid by the board under precepts was an expense incurred in earning its income.

Decision of MACNAGHTEN, J. ([1944] 1 All E.R. 185) *reversed on the first point.*

[**EDITORIAL NOTE.** This case considers the interesting argument that a joint water board is in a similar position to a co-operative society and is therefore not subject to income tax. The peculiar position of a co-operative society was based on the fact that in the result it made no profit because any profit shown to be made was returnable as bonus to the members. The machinery by which this joint water board was financed is shown to be quite different in principle from this and there is no such mutuality as would prevent a charge to tax.

AS TO PROFITS ARISING FROM A SUPPLY OF WATER, see HALSBURY, Hailsham Edn., Vol. 17, p. 105, para. 199 ; and FOR CASES, see DIGEST, Vol. 28, p. 21.]

Cases referred to :

*(1) *Re Glasgow Corpn. Waterworks* (1875), 1 Tax Cas. 28 ; 28 Digest 21, *107 o.*
(2) *Municipal Mutual Insurance, Ltd.* v. *Hills* (1932), 16 Tax Cas. 430 ; Digest Supp. ; 147 L.T. 62.
(3) *Glasgow Corpn. Water Comrs.* v. *Miller* (*Surveyor of Taxes*) (1886), 2 Tax Cas. 131 ; 28 Digest 21, *107 m.*
(4) *Harris* v. *Irvine Corpn.* (1900), 4 Tax Cas. 221 ; 28 Digest 21, *107 n* ; 65 J.P. 663.
(5) *Humber Conservancy Board* v. *Bater*, [1914] 3 K.B. 449 ; 28 Digest 9, *37* ; 83 L.J.K.B. 1745 ; 111 L.T. 856 ; 6 Tax Cas. 555.
(6) *Inland Revenue Comrs.* v. *Forth Conservancy Board*, [1931] A.C. 540 ; 16 Tax Cas. 103 ; Digest Supp. ; 100 L.J.P.C. 193 ; 145 L.T. 121.

APPEAL by the Crown from a decision of MACNAGHTEN, J., dated Dec. 20, 1943, and reported [1944] 1 All E.R. 185. The facts are fully set out in the judgment of SCOTT, L.J.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), and *Leon MacLaren* (for *Reginald P. Hills*) for the appellant.

J. Millard Tucker, K.C., and *L. C. Graham-Dixon* (for *Terence Donovan*) for the respondents.

Scott, L.J.: The respondent board carries on a water undertaking in Wales and was assessed to income tax under Sched. D, case 1, for the year 1939-40 in the sum of £10,000. On appeal to the commissioners the assessment was set aside; and an appeal from their order was dismissed by Macnaghten, J. The Crown has appealed. There are two issues before us. The first and main question is whether moneys received by the board from its two constituent bodies, the Pontypridd Urban District Council and the Rhondda Urban District Council, pursuant to a precept served upon each of them by the board under its statutory powers, formed part of its income within the meaning of the Income Tax Acts. The second question is whether moneys paid by the board to another statutory water undertaking, the Taf Fechan Water Supply Board, for water supplied by it in bulk to the respondent board, constituted expenditure incurred by the board in the earning of its taxable income. To appreciate the real significance of the two questions, particularly of the main one, it is necessary to state the history and constitution of the board. Before 1910 the larger part of the present board's undertaking was owned and carried on by the Pontypridd Waterworks Co. under various private Acts of Parliament passed between 1864 and 1909. That company supplied water to the inhabitants in its neighbourhood. In 1910 the urban district councils of Pontypridd and Rhondda promoted an Act which transferred the company's undertakings to their control through the medium of the respondent board, set up by the Act and composed of members of the two councils. Before the transfer the company carried on a trade within the Income Tax Acts and was assessable upon its income. The new board succeeded to that position and also admittedly was, and is, carrying on a trade which makes it assessable on such income as it earns.

The special case is fully and clearly stated and there are only certain facts which need to be restated for the purpose of this judgment. In addition to the Taf Fechan supplies the board has resources of its own in its reservoirs fed by natural streams. It delivers water direct to consumers (both domestic and in bulk) over (i) the whole area of the Pontypridd district, and (ii) a part only of the Rhondda district, the larger part of that district being outside its limits of supply. It also delivers "bulk" supplies only in (iii) the rural district of Llantrisant and Llantwit, and (iv) in a part of the Caerphilly urban district. Its domestic supplies are paid for by water rates payable by the individual consumers (Pontypridd and Rhondda Water Act, 1910, ss. 61-66). The bulk supplies are "by measure" and charged at scale prices fixed by the Act (ss. 67-69). The board has the usual ancillary powers, by which it earns certain further small sums. The moneys received by it under precept arise in this way. By sect. 91 of the Act the board is required before Apr. 1 in each year to budget for the ensuing 12 months, and, if on an "estimate" of the probable revenue and expenditure (other than capital expenditure) for that year there is going to be "a deficiency in the net revenue," the board is required to apportion that anticipated deficiency between its two "constituent" district councils in accordance with the relative proportions of the rateable value of the whole of the Pontypridd district and that part of the Rhondda district which lies within the board's limits of supply. For the respective sums so debited to the two councils the board is to issue precepts; which, when duly served, undoubtedly constitute enforceable debts. To put themselves in funds to pay these amounts the two councils are authorised and required to make payment out of their general rate fund and to make a levy (for the purpose of replenishing that fund) as part of their general rate (sect. 91 (4), and subsequent local government legislation). Against the remote possibility of either council failing to pay, the board is itself given power to levy a general rate in the place of the defaulting local authority.

It is this system of payment which is the pretext for the board's contention that money receivable by it in response to a precept is not income within the meaning of the Income Tax Acts. I use the word "pretext," because, in my opinion, the respondent's argument, when analysed, amounts to no more. The financial system imposed by the statute is one which was no doubt adopted by Parliament with due consideration for the convenience of all the customers of whatever kind of the board, who are also ratepayers in one or other of the four parts of the board's area of supply. If what the customers are paying is not enough to cover all the board's expenditure in the current year, the board, in effect, allows credit to the extent of the deficiency; but the board has got to pay its way eventually and on the expiration of the year, the balance, whichever way it may be, is, of course, carried forward to the credit or debit of the ensuing year's account; but if, on the rates of payment of the current year, it appears that there will be a deficit in the ensuing year, the board is both permitted and required by Parliament to increase its net revenue for the ensuing year so as to restore the balance of its accounts by debiting the anticipated deficit then and there to its two constituent authorities. I cannot see room for any argument whatever that this augmentation of its net revenue for the ensuing year produces a receipt in any way different in kind from the rest of the income that the board is going to earn during the ensuing year. It might well be that the whole of the prospective deficit was due to an unexpected increase in the number of unoccupied houses, reducing the money yield of domestic supplies; or it might be that a depression in trade was causing a serious drop in the demand for bulk supplies. In neither case would the level of expenditure fall proportionately to the decrease in receipts, and in either case there would be a need for the board to get in extra revenue in order to balance its accounts; and, whatever the cause of the anticipated deficit, the additional revenue received to cover it would necessarily be the same in kind as the rest of the board's revenue, namely, money received in consideration of water supplied or to be supplied pursuant to the statutory functions of the board. If on taking an account of its revenue and expenditure on income tax principles—that is to say, disallowing prohibited deductions and other expenses which cannot properly be brought into such an account as income-producing expenditure—the result shows a net balance of income over expenditure, the whole of that balance must, in my opinion, be taxable as being the income of the board's trade. It follows that on first principles of income tax law, the board is wrong in its contention that money received on precept is to be excluded from such an account.

It was submitted that the case is concluded in favour of the board by the decision of the Inner House of the Court of Session in *Re Glasgow Corpn. Waterworks* (1), because, although we are not bound by that decision, it has been approved by the House of Lords. That case has not been formally approved in any actual decision of the House; but favourable expressions of opinion have fallen from some noble Lords although they have not all been in its favour. There the Glasgow Corporation were constituted commissioners to carry on a water undertaking previously carried on by a statutory undertaker; and the view taken by the Court of Session was that in substance the ratepayers of Glasgow were supplying themselves; and that of such a mutual enterprise it is impossible to predicate the earning of a profit. It was that analogy which counsel for the board sought to apply here. I think this court should treat that decision as one which we ought to follow if *in pari materia*; but I do not regard it as applicable. In the first place it is conceded that, if the respondent board were to make a profit out of supplying water to the ratepayers of the Pontypridd and Rhondda districts, either for domestic use or by measure, without taking into account any precept money, that profit would be taxable; *a fortiori*, perhaps, if part of the revenue which produced the profit consisted of payments for bulk supplies coming from districts (iii) and (iv), the councils of which are not "constituents" of the board. In the second place the degree of identity between supplier and consumer, which was said to be inherent in the Glasgow position, is absent in the present case. The board is a corporate "person" wholly distinct from the two corporate "persons" which exist in the two urban district councils of Pontypridd and Rhondda. The fact that the board contains members of those two councils, appointed by them, does not constitute identity of the *persona juridica* of the board with that of each of the two local authorities. Some modern corporate bodies have members appointed by the Crown, or a department of State; but the corporation does not thereby take on, in whole or in part, the personality of the Crown or the department.

The exemption of co-operative societies from income tax (apart from recent statutory modification) was not based on any identification in law between the society and its members. The society was a corporation in virtue of its registration under the Industrial and Friendly Societies Acts, and was so treated for all legal purposes, including taxation. The ground of immunity was that no profits and gains resulted; because the cash payments by members to the society for goods received were not final; they were subject to reduction by bonus returns so that the total of the resulting net payments left the society with no surplus over its expenses, and, therefore, no income. A third distinction in the present case from the *Glasgow* case (1) is that the complete identity of consumer and payer, which was alone considered (though not alone present) in the *Glasgow* case (1), is absent. Uthwatt, J., has drawn my attention to an illuminating statement of the principle of such "identity" in the opinion of Lord Macmillan in *Municipal Mutual Insurance* v. *Hills* (2) (a mutual insurance case). At p. 448, Lord Macmillan said:

> The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial.

The difference of the present case is obvious; there are many distinctions.

The respondent board's precept is met by the Rhondda Urban District Council out of a general rate over the whole of its district, the major part of which lies outside the part within the district supplied by the board. The second *Glasgow* case (3) decided that revenue from outside the town was taxable. This distinction was considered also in *Harris* v. *Burgh of Irvine Corpn.* (4), in which, at p. 231, the Lord President said of the *Glasgow* case (1):

> The short ground on which that and other decisions proceeded is that the produce of a tax for a public purpose is not, in the hands of the local authority by which it is levied to be by them administered for the benefit of the ratepayers within their administrative area, in the nature of "profits" at all.

For similar views see also *Humber Conservancy Board* v. *Bater* (5) and *Inland Revenue Comrs.* v. *Forth Conservancy Board* (6), *per* Lord Clyde, Lord President, at p. 111, Lord Buckmaster, at p. 117, Lord Warrington of Clyffe, at p. 122, and Lord Thankerton, at p. 123. It is true that Viscount Dunedin expressed certain regrets about the law as it stands, but what he said does not touch this point. The mutuality of a mutual insurance club to which Scrutton, L.J., as he then was, referred in *Humber Conservancy Board* v. *Bater* (5) is, in my opinion, wholly absent in the present case.

Counsel for the board sought to re-establish his principle of identity or mutuality by contending that each council in raising a rate to meet a precept was acting as agent of the board; but the reverse was the fact. By the precept each council came under a specialty debt to the board, and each had to raise the money needed on its own behalf in order to discharge its debt. For these reasons the main appeal must be allowed.

If the money received by the board on its precepts was a part of its revenue earned by its expenditure, as, in my opinion, it clearly was, it must follow automatically, and, indeed, *a fortiori*, that money expended by it in responding to a statutory precept from the Taf Fechan Board was an expense incurred in the course and for the purpose of earning its income, and, therefore, is a proper debit in its revenue account. Indeed, this point was hardly disputed in argument before us.

It is unnecessary to go into figures as they are not in dispute and can be expressed so far as may be necessary in the order of the court. I have read the draft judgments of du Parcq, L.J., and Uthwatt, J., and agree with them.

The appeal will be allowed with costs here and below, and the questions asked in the special case answered accordingly.

du Parcq, L.J.: If a local authority levies a compulsory water rate in respect of premises within its district, any balance of the proceeds of the rate left in its hands after the necessary expenditure for the year has been made is not subject to tax. The local authority is regarded as representing the ratepayers. It manages the ratepayers' affairs and holds their purse. It is, in the words of Lord Deas in the *Glasgow* case (1), at p. 50, "the mere trustee, hand and instrument of the ratepayers." When the ratepayers pay rates, they are passing money, so to say, from their physical hands to their own metaphorical "hands"; any unexpended balance is no more a profit than is the money which is left in an individual ratepayer's pocket when, having provided himself with cash to be spent for a particular purpose, he is gratified by finding that it has not all gone.

This I take to be the underlying principle of the first *Glasgow* case (1). Counsel for the Crown did not challenge the authority of that decision, and I assume that it is correct. I am of opinion, however, that the principle which it established has no application to the facts of the present case. I have read in advance the judgment of SCOTT, L.J., and also that which is about to be delivered by UTHWATT, J., and I agree with them that this joint water board cannot be said to be the representative of the ratepayers of the Rhondda Urban District Council and the Pontypridd Urban District Council, and that for the reasons which they give the present case is distinguishable from the Scottish decision and must, on general principles and on authority, be decided in favour of the Crown.

I have nothing to add to what has been said by SCOTT, L.J., with regard to the second question raised by the case stated.

I agree that the appeal must be allowed.

UTHWATT, J.: It is conceded by the water board that it is a trading concern and that all its receipts, other than the sums received under precepts made by it on the local authorities in respect of the deficiency levy, are trading receipts. The argument for the exclusion of those sums in the computation of the board's profits for tax purposes is based on the general proposition that the proceeds of rates, as such, are not trading receipts, and on the particular proposition that the sums paid to the board under the precepts represent the proceeds of a rate levied by the board through its representatives—the two local authorities. In support of the particular proposition, reliance is placed upon the fact that the sums paid by the councils are necessarily found out of their general rate fund: that in making the general rate the local authorities take into account the sums for which they have to provide for the purposes of the water board and, indeed, in their rate demands they are required to state not only the amount necessary for that purpose, but the consequent fraction of the general rate represented by that amount. The identity between the amount raisable (being the appropriate part of the general rate) and the amount payable to the board is apparent. The appropriate part of the general rate is levied exclusively for the purposes of the board, and, having regard to the relations between the local authorities and the board, the local authorities should, it is argued, be treated as making the general rate to that extent as representatives of the board and as passing on to the board the sums represented by it.

The accuracy of the general proposition may be accepted, and I propose only to examine the argument that, on the facts of the case, the deficiency payments are in law rates received by the board levied through their representatives.

On some points of detail the facts assumed by the argument are not correct. It is possible, and, indeed, probable, that the local authorities do not in practice in any year succeed in collecting the whole rate levied by them. If that happens the deficiency sums remain payable to the board in full. The short-fall of the appropriate part of the general rate is not carried forward as a debit to be met out of that appropriate part in succeeding years. Something other than a sum equal to the actual proceeds of the appropriate part of the general rate has, in that case, to be paid to the board. Again, as appears from the specimen rate demand, Government grants are received under the Local Government Act, 1929, in aid of local government services generally, and the grants cannot be allocated to any particular service. The result is that the amount of the total rate otherwise demandable is reduced by the amount of this Government grant. For two reasons the supposed identity between the proceeds of the appropriate part of the rate and the sums paid to the board disappears at an early stage. But the argument preferred may, I think, be dealt with on broader grounds.

At the outset it may be pointed out that the provisions of the Rating and Valuation Act, 1925, s. 9, have no application to the case and that the court is not concerned with a case where precepts are made on a poundage basis and the obligation is to account for an amount produced by a rate made pursuant to the precepts.

The first criticism on the board's argument is that the obligation arising under the Pontypridd and Rhondda Water Act, 1910, is not in form or in substance an obligation to make a rate or to account to the water board for any part of a rate. The obligation is to pay sums fixed by the board who in fixing such sums act in accordance with the directions contained in the Act. The circumstance that the local authorities necessarily meet that obligation out of the general rate fund and in part measure the amount of the general rate by reference to that obligation cannot alter the quality of that obligation or the nature of the payments made under it. In no sense are the proceeds of the rate passed on to the board. It was argued that the right of the board under sect. 91 (5) of the Act of 1910 itself to levy a rate in case of default of the deficiency payment being made in full added, even if it did not entirely give, colour to the nature of the payment made under the obligation. I do not accept this argument. In case of failure to pay, the board has other remedies beyond the levying of a rate open to it. The nature of one of several remedies arising on breach of a substantive obligation is no guide to the nature of that obligation. Next, it cannot in my view be said that, in making any part of the general rate, the local authorities act as representatives of the board. The general rate is one rate and the board has no voice in the imposition, quantification or collection of the general rate. A debtor, in placing himself in funds to meet his obligations, does not represent his creditor. Essentially, he is acting for his own account.

Nor, indeed, can it be said that the connection between the board and the local authorities places the local authorities in the position of representatives of the board. A consideration of their formal relations—the circumstance that the members of the board are appointed by, and must be members of, the councils and that the local authorities are, in relation to the board, called the constituent authorities—suggests that, if there be any representation in the matter at all, the board is in general the representative of the local authorities, not that the local authorities are the representatives of the board. This is no reason why the opposite should obtain as regards a rating power possessed by the local authorities. The particular proposition contended for by the board is not, therefore, in my opinion, well founded ; on that footing the argument fails.

The next question is whether the present case is governed by the first *Glasgow* case (1). In that case a private Act, the Glasgow Corporation Waterworks Act, 1855, was passed for the purpose of placing the supply of water to the city of Glasgow and the adjacent places in the hands of commissioners. By sect. 6 of the Act the magistrates and council of the city of Glasgow and their successors for the time being "as representing and for and on behalf of the community of the said city" were appointed commissioners for executing the purposes of the private Act. The commissioners, who were not a corporate body, were required to levy a domestic water rate to be fixed by them and a public water rate (not exceeding a 1*d.* in the £) on property situate within the city limits which constituted the area of compulsory supply. Any excess of income over expenditure (including, in expenditure, contributions to a sinking fund) was to be carried forward to the next year and be applied in reducing the domestic water rate (sect. 92). It was held that the proceeds of the compulsory rate so levied was not liable to be brought into computation for purposes of income tax. The commissioners were, it was said, the hands and instruments of the compulsory ratepayers, who were as regards the compulsory rates in substance assessing themselves. The present case is not, in my opinion, governed by the decision in the *Glasgow* case (1). There is not, in the legislation affecting the board and its undertaking, any such declaration as is found in the Glasgow Corporation Waterworks Act, 1855, s. 6. The deficiency payments here in question are made by the two district councils and not by compulsory ratepayers. If the payments made to the water board be traced back and attributed to the ratepayers, all the ratepayers in the area of the Rhondda Urban District Council are liable to pay the general rate but the major part of that area lies outside the area of compulsory supply, and any balance of receipts over expenditure of the board is to be paid to the constituent councils and is to be carried to the credit of the district fund and general district rates (sect. 92). Mutuality was present in the *Glasgow* case (1), and, in my view, is absent in this case.

For these reasons, I think that the contention of the water board on the first point fails. The sums in question are trading receipts and enter into computation accordingly.

As regards the sums payable under precepts by the Taf Fechan Water Supply

Board, I agree with the conclusion at which MACNAGHTEN, J., arrived, and the reasons given by him.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Smith, Rundell, Dods & Bockett,* agents for *Morgan, Bruce & Nicholas,* Pontypridd (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

AUSTIN v. ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Tucker, J.), **May 26, 1944.**]

Insurance—Motor insurance—Permitted driver—Insurers of permitted driver indemnified driver—Whether entitled to contribution from insurers of owner—Road Traffic Act, 1930 (*c.* 43), *s.* 36 (4).

The plaintiff was driving for pleasure purposes a car in which A. and N. were passengers when the car was involved in an accident, as a result of which N. was injured and A. died. The car belonged to A., and the plaintiff was driving with A.'s permission. Actions in negligence in respect of the accident were brought against the plaintiff by the executrices of A. and by N. In the action by N., the executrices of A. were co-defendants with the present plaintiff. The plaintiff was insured by a company, hereinafter called the Bell, under a policy which covered him while personally driving for pleasure purposes any other private car not belonging to or hired by him. The Bell undertook to conduct the defences to the actions although the Bell denied their liability to the plaintiff under the policy. The Zurich company wrote to the plaintiff informing him that they were interested as having issued a policy to A. The actions were settled and the plaintiff agreed either to assign to the Bell such rights as he might have against the Zurich company, and/or to allow the Bell to proceed in his name against the Zurich company to recover the whole or any part of the sums with which the actions were settled. The Bell thereupon brought an action in the name of the plaintiff against the Zurich claiming that they were subrogated to the plaintiff's rights to be indemnified by the Zurich, in the whole, or as to 50 per cent. of the sums in respect of which the previous actions had been settled, by reason of the terms of an insurance policy issued by the Zurich to A. The Zurich policy contained, *inter alia*, the following provisions: "1 (1) . . . the company will indemnify any person who is driving such motor car on the insured's order or with his permission provided (*a*) that such person is not entitled to indemnity under any other policy; (*b*) that such person shall as though he were the insured observe, fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply. 5. If at the time any claim arises under this policy there is any other existing insurance covering the same loss damage or liability the company shall not be liable except under sect. 6 of this policy to pay or contribute more than its rateable proportion of any loss damage or compensation cost or expense. Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of sect. 1 (1) (*a*) or (2) of this policy." The Bell policy contained the following provisions, *inter alia*: "We undertake to indemnify the assured against . . . all sums which the assured . . . shall become legally liable to pay as compensation, claimants costs and expenses in respect of (*a*) accidental bodily injury . . . to any person . . . this section is extended to indemnify the assured whilst personally driving . . . any other private car . . . for pleasure purposes, in respect of which no indemnity is afforded the assured by any other insurance applying to such car. This extension shall, however, be subject to the exceptions and conditions of this policy which shall then be deemed to apply to such other car. 2. If at the time of the occurrence of any injury . . . loss or damage there shall be any other indemnity or insurance of any nature whatsoever subsisting (whether effected by the assured or any other person) wholly or partly covering the same, the underwriters shall not be liable to pay or contribute towards any such injury loss or damage except in excess of the sum or sums actually recovered or recoverable under such other indemnity or insurance." It was contended on behalf of the Zurich (i) that, if the Bell had settled the previous actions for the plaintiff under their obligation to him under their policy, then the plaintiff's claim to be indemnified had been wholly satisfied and that any claim which he could have against the Zurich was thereby defeated, or, if the Bell had merely made the payments voluntarily without any legal liability, then the right to subrogate had not arisen ; (ii) that by the terms of the two policies read together the only liability to indemnify the plaintiff was to be found in the Bell policy ; (iii) that the plaintiff not being a party to the contract with the Zurich could not sue in his own name ; (iv) that the plaintiff had failed to observe a condition precedent in the Zurich policy by failing to notify the Zurich of an impending prosecution :—

Held : (i) the Bell company had honestly satisfied a claim under their policy and the fact that in so doing they did not admit their liability could not deprive them of their right to be subrogated.

(ii) the Zurich policy contained a liability to indemnify the plaintiff.

(iii) the plaintiff was entitled to sue in his own name by virtue of the Road Traffic Act, 1930, s. 36 (4), and the rule in *Tattersall's* case (5).

(iv) in not notifying the Zurich company of an impending prosecution, the plaintiff had failed to fulfil the condition precedent in the Zurich policy which applied to him by reason of the extension clause. For this reason the defendant company were entitled to judgment.

[**EDITORIAL NOTE.** Although this action is brought in the name of the insured, it is in fact an action between the two insurance companies. It illustrates the far-reaching effect of the extension clauses now almost universal in motor-car policies and, although it has failed upon a minor point, shows how two companies may be interested in one accident.

As to Extension of Protection in Motor-Vehicle Insurance, see HALSBURY, Hailsham Edn., Vol. 18, pp. 558, 559, paras. 901-903 ; and for Cases, see DIGEST, Vol. 29, p. 408, Nos. 3214-3217.]

Cases referred to :

(1) *Page* v. *Scottish Insurance Corpn. Forster* v. *Page* (1929), 98 L.J.K.B. 308 ; Digest Supp. ; 140 L.T. 571.

(2) *King* v. *Victoria Insurance Co.*, [1896] A.C. 250 ; 19 Digest 53, *159* ; 65 L.J.P.C. 38 ; 74 L.T. 206.

(3) *Gale* v. *Motor Union Insurance Co., Ltd.*, *Loyst* v. *General Accident, Fire & Life Assurance Corpn., Ltd.*, [1928] 1 K.B. 359 ; Digest Supp. ; 96 L.J.K.B. 199 ; 138 L.T. 712.

*(4) *Weddell* v. *Road Transport & General Insurance Co., Ltd.*, [1932] 2 K.B. 563 ; Digest Supp. ; 101 L.J.K.B. 620 ; 146 L.T. 162.

*(5) *Tattersall* v. *Drysdale*, [1935] 2 K.B. 174 ; Digest Supp. ; 104 L.J.K.B. 511 ; 153 L.T. 75.

(6) *Merchants & Manufacturers Insurance Co., Ltd.* v. *Hunt & Others*, [1941] 1 K.B. 293 ; [1940] 4 All E.R. 205 ; Digest Supp.

(7) *Re Coleman's Depositories, Ltd.* v. *Life & Health Assurance Assocn.*, [1907] 2 K.B. 798 ; 29 Digest 406, *3200* ; 76 L.J.K.B. 865 ; 97 L.T. 420.

(8) *Digby* v. *General Accident, Fire & Life Assurance Corpn., Ltd.*, [1943] A.C. 121 ; [1942] 2 All E.R. 319.

Action by the insurers of the permitted driver in the name of the permitted driver for contribution from the insurers of the owner. The facts are fully set out in the judgment.

H. D. Samuels, K.C., and *J. Platts Mills* for the plaintiff.

J. W. Morris, K.C., and *P. B. Morle* for the defendants.

Tucker, J. : On May 23, 1938, the plaintiff Austin was driving a Lincoln Zephyr motor car, the property of one Henry Aldridge, when he met with an accident. At the time of the accident Aldridge and one Nicholson were passengers in the car, and they both received injuries. Aldridge died two days later under an anaesthetic administered for the purpose of a surgical operation rendered necessary by his injuries. Austin was driving with Aldridge's permission. Actions were brought against Austin by the executrices of Aldridge and by Nicholson, claiming damages on the ground of the negligent driving of Austin. In Nicholson's action the executrices of Aldridge were co-defendants with Austin. Austin was insured with the Bell Assurance Assocn. (hereafter referred to as " the Bell ") by a policy dated Aug. 19, 1937, issued in respect of his 8 h.p. Ford saloon motor car, and which covered him while personally driving any other private car (not belonging to or hired by him) for pleasure purposes. He called upon the Bell to defend these actions, and they thereupon undertook the conduct thereof. Both actions were settled, that by the executrices of Aldridge for £4,000 and £330 5*s.* 11*d.* costs, and Nicholson's action on the terms of payment of £305 and £167 10*s.* costs to Nicholson and £50 in respect of the costs of Austin's co-defendants. No question arises as to the reasonableness of these settlements. These sums were paid as follows: the £4,000 in the executrices' action was paid into court on June 16, 1939, pursuant to terms of settlement of May 23, 1939, and the taxed costs were paid on Aug. 1, 1939. In Nicholson's action the £305 was paid into court on June 21, 1939, and notice of acceptance was given on the 27th. Nicholson's agreed costs were paid on July 10, 1939, and the £50 in respect of Austin's co-defendants' costs on July 24, 1939. All these payments were made by the Bell with the knowledge and consent of Austin, in discharge of his liabilities consequent on his claim to be indemnified by the Bell under his policy of Aug. 19, 1937.

At the time of settlement of these proceedings Austin signed the following agreement, which was indorsed on his counsel's brief:

> I agree to the below-mentioned terms and I agree either to assign to the Bell Assurance Association such rights as I may have against the Zurich Insurance Co. and/or to allow them in my name to proceed against the said Zurich Insurance Co. to recover the whole or any part of the said sums for the benefit of the said Bell Assurance Association.

In answer to Interrogatory No. 6 administered to the plaintiff by the defendants in this action, the plaintiff swore as follows:

> To the best of my knowledge, information and belief the claims mentioned in paras. 4 and 6 of the statement of claim were satisfied by the Bell Assurance Association. It was their contention that they were not liable to me and not liable on their policy, and I was informed by the representative of the Bell Assurance Association that they satisfied the said claims without prejudice to their contention that I was entitled to be indemnified by the present defendants.

This answer was put in evidence by the defendants.

The Bell now bring this action in the name of Austin, claiming against the defendants (hereinafter referred to as " the Zurich ") that they are subrogated to Austin's rights and that Austin is entitled to be indemnified by the Zurich in whole or as to 50 per cent. in respect of the payments referred to above. There is no mention in the statement of claim of the fact that the action is brought for the benefit of the Bell, but it is common ground that the position in this respect is as stated above.

Austin's claim to be indemnified by the Zurich is based on the terms of a policy of insurance issued to Aldridge by the Zurich dated Apr. 6, 1936, covering the period from Mar. 26, 1936, to Mar. 26, 1937, which had been twice subsequently renewed and was in force on May 23, 1938. This policy covered Aldridge *inter alia* in respect of third party claims arising out of accidents caused by or through or in connection with his Lincoln Zephyr motor car, and extended the cover to any person driving this car with the insured's permission. This extension clause and the extension clause in Austin's policy issued by the Bell are both subject to certain provisos which will require reference hereafter to the precise language thereof.

A number of defences, most of which have been relied upon at the trial, are raised to this claim by the defendants in their pleadings. I refer below only to those matters relied on at the trial; the remainder were expressly abandoned at the Bar.

It was contended that the conditions precedent to the Bell's right to be subrogated have not been satisfied, and *Page* v. *Scottish Insurance Corpn.* (1) was referred to as showing the necessity for strict compliance with all the essential requirements of subrogation, and that failure in this respect can be relied upon by a defendant in an action brought by an insurance company in the name of their insured. It was said that the Bell are in this dilemma. If they have paid Austin under their obligations to him under their policy, his claim to be indemnified has been wholly satisfied, and any claim he could ever have had against the Zurich is thereby defeated. On the other hand, if they have merely made a voluntary payment without any legal liability, in which connection Austin's answer to the 6th interrogatory is relied on, the right to subrogation has not arisen.

Counsel for the defendants concedes that the point on the first horn of the dilemma could not be relied upon by a tortfeasor in answer to an action by an insurance company suing in the name of the injured insured whose claim they had satisfied, nor by someone who has broken his contract in answer to a similar action by an insurance company who have satisfied their insured's loss arising from the breach ; but, he says, different considerations apply in the case of an action by an insurance company in the name of their insured against another party who has contracted to indemnify the insured in respect of the same risk.

No authority was cited for this proposition, but it is true that counsel for the plaintiff was not able to refer to any case in which such a claim had been made. I can see no reason on principle why a contract of indemnity should in this respect be distinguished from any other contract, and I think the absence of authority is probably due to the infrequency of actions between different insurance companies and the fact that in such circumstances the company who has paid in the first instance usually relies on its right to claim contribution.

On the facts of this case I hold that the Bell have honestly satisfied a claim made under the policy issued by them to Austin, and the fact that in so doing they did not admit their liability cannot deprive them of their right to be subrogated. This seems to me to accord with the decision of the Privy Council in *King* v. *Victoria Insurance Co.* (2). I am accordingly of opinion that the Bell is entitled to bring this action in the name of Austin.

The next defence is that by the terms of the two policies read together, the only liability to indemnify Austin is to be found in the Bell policy. The relevant words in the two policies are as follows : The Zurich policy provides by sect. 1 :

> The company will indemnify the insured in the event of accident caused by or through or in connection with any motor car described in the schedule hereto . . . in respect of . . . death or bodily injury to any person . . . In terms of and subject to the limitations of and for the purposes of this section : (1) the company will indemnify any person who is driving such motor car on the insured's order or with his permission provided : (*a*) That such person is not entitled to indemnity under any other policy ; (*b*) That such person shall as though he were the insured observe, fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply.

General condition 5 is as follows :

> If at the time any claim arises under this policy there is any other existing insurance covering the same loss damage or liability the company shall not be liable except under sect. 6 of this policy to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense. Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of sect. 1 (1) (*a*) or (2) of this policy.

The Bell policy contained the following provisions :

> We . . . undertake . . . to indemnify the assured against the risks herein mentioned in connection with the car described in the schedule hereto (hereinafter called " the car ") subject to the terms, provisions, conditions, warranties and exceptions hereinafter mentioned . . . (9) Third party : All sums which the assured . . . shall become legally liable to pay as compensation, claimant's costs and expenses in respect of : (*a*) Accidental bodily injury (fatal or non-fatal) to any person (including passengers), where such injury or damage is caused by, through or in connection with the car. Provided this policy is not issued in the names of joint assured, this section is extended to indemnify the assured whilst personally driving . . . any other private car (not belonging to or hired to the assured) for pleasure purposes, in respect of which no indemnity is afforded the assured by any other insurance applying to such car . . . This extension shall, however, be subject to the exceptions and conditions of this policy which shall then be deemed to apply to such other car.

Condition 2 reads :

> If at the time of the occurrence of any injury . . . loss or damage there shall be any other indemnity or insurance of any nature whatsoever subsisting (whether effected by the assured or any other person) wholly or partly covering the same, the underwriters shall not be liable to pay or contribute towards any such injury loss or damage except in excess of the sum or sums actually recovered or recoverable under such other indemnity or insurance.

The defendants by their counsel argue that the result of this double insurance is to relieve them from liability to Austin, who must look solely to the Bell.

Faced with the problem that, if the Bell successfully adopted the same line, the result would be that Austin would get no indemnity from either company, they say that the only practical way of dealing with such apparently contradictory provisions is to place the whole liability upon the Bell as being the "primary" insurers. It is to be observed that in this case Austin's claim against both companies arises under an "extension" clause in each policy, so that it may be difficult to say which company is the "primary" insurer. It is true, however, that the Bell are the company in direct contractual relationship with Austin whom they accepted as their insured, and for this reason if only one company is to be liable it might, perhaps, be equitable that they should bear the loss. The difficulty in the defendants' way appears, however, to be two-fold: (i) This course, though perhaps practical and fair, does not appear to me to be based on any recognisable principle of construction; (ii) it is contrary to the decisions of ROCHE, J., and ROWLATT, J., in *Gale* v. *Motor Union* (3), and *Weddell* v. *Road Transport* (4), respectively, where in similar circumstances it was held that the result of such double insurance is to impose a proportionate liability on both companies. Counsel for the defendants formally took the point that these cases were wrongly decided, and in any event contended that the present case is distinguishable from *Weddell's* case (4) which is the one most directly in point. He pointed out that in *Weddell's* case (4) the Cornhill, who were in the position of the Bell, had no "rateable proportion" clause in their policy, and that there was a difference in the language of the extension clause in the policy issued by the Road Transport company (who corresponded to the Zurich) which ran as follows:

> . . . the company will at the request of the insured treat as though he were the insured any relative or friend of the insured while driving such motor car for social, domestic or pleasure purposes with the insured's general knowledge and consent . . .

In *Weddell's* case (4), ROWLATT, J., at pp. 567, 568, said:

> It is to be borne in mind that the risk covered by the clause as to a relative or friend is an extension of the scope of the policy. It gives protection to a person other than the assured. So, too, the clause in the Cornhill Company's policy covering the assured when driving a car not belonging to him is an extension of the primary purpose of the policy, which is to cover risks to and in connection with a particular car or cars of the assured mentioned in the schedule. The general purpose of the proviso seems to be to make such extensions operate only as secondary cover, available only in the absence of other insurance regarded as primary, not including, one would suppose, other insurance also of a secondary character. In my judgment it is unreasonable to suppose that it was intended that clauses such as these should cancel each other (by neglecting in each case the proviso in the other policy) with the result that, on the ground in each case that the loss is covered elsewhere, it is covered nowhere. On the contrary the reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold in such cases that both companies are liable, subject of course in both cases to any rateable proportion clause which there may be. In other words, it is true to say that the relative or friend is not "entitled to indemnity under any other policy" within the meaning of the Road Transport policy, and not "afforded" indemnity "by any other insurance" within the meaning of the Cornhill policy, when the other policy negatives liability where there are two policies. At that point the process must cease. If one proceeds to apply the same argument to the other policy and lets that re-act upon the policy under construction, one would reach the absurd result that whichever policy one looks at it is always the other one which is effective.
>
> In these circumstances I come to the conclusion that the Cornhill company (apart from the omission to give the notice) were liable notwithstanding that their policy contained no rateable proportion clause, and I confirm the decision of the arbitrator.

The arbitrator had awarded 50 per cent. against the Road Transport.

Counsel for the plaintiff, while relying strongly upon *Weddell's* case (4), suggested that perhaps the language of the rateable proportion clause in the Bell policy providing that they should be liable for any excess over and above any sum recovered or recoverable under any other policy might entitle him in the present case to recover 100 per cent. against the Zurich instead of the 50 per cent. awarded by ROWLATT, J. In my view, the present case is indistinguishable from *Weddell's* case (4), which does not appear to have been questioned in any court of law, and which I have no doubt has been acted upon in insurance circles for the past 12 years. I therefore follow it. I can see no reason why the considerations which induced ROWLATT, J., to arrive at the conclusion that each company was liable to indemnify the insured to the extent of 50 per cent. of his loss are not equally applicable in the present case. I am accordingly of opinion that, if the plaintiff is entitled to succeed, the judgment in his favour should be limited to 50 per cent. of his total loss, namely one-half of the sum claimed in the statement of claim.

The next point taken by the defendants was that in any event Austin, not being a party to the contract with the Zurich, cannot sue thereon in his own name. It is argued that the Road Traffic Act, 1930, s. 36 (4), only serves to remove any existing statutory obstacle to the enforcement of indemnity for the benefit of persons or classes of persons specified in a policy issued under that section, and confers no right of action not previously existing at common law. This argument is contrary to the decision of GODDARD, J., as he then was, in *Tattersall* v. *Drysdale* (5).

Counsel for the defendants formally took the point to preserve his right to argue in a higher court that this case was wrongly decided. The observations I made above with regard to *Weddell's* case (4) apply equally to *Tattersall's* case (5), and I follow it and reject this contention. The defendants, however, truly point out that *Tattersall's* case (5) was one where the indemnity sought was in respect of a liability required to be covered by the Road Traffic Act, 1930, s. 36, whereas in the present case the liability of the assured was to a passenger in the car, which is not a liability required to be covered by sect. 36 and could have been made the subject of a policy which in no way conformed to the requirements of the Road Traffic Act. It was, accordingly, contended that the Zurich policy, although for some purposes a policy issued under sect. 36, was for the purposes of the present case to be regarded as a policy issued irrespective of that section, and, therefore, *Tattersall's* case (5) does not apply. Sect. 36 (4) of the Act of 1930 is as follows :

> Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.

It is to be observed that the subsection is dealing with the liability of "persons issuing a policy of insurance under this section," and that the words in respect of a liability "required to be covered by a policy issued under" this section are absent. Contrast with this the language of the Road Traffic Act, 1934, s. 10, where such words do occur. The Zurich were "persons issuing a policy of insurance under sect. 36," the policy was issued to Aldridge, and Austin is one of "the persons or classes of persons specified in the policy" in respect of a liability which the policy purported to cover in the case of those persons or classes of persons. In my view, he comes within the express language of the subsection, which is not confined to a liability required to be covered by sect. 36, and is, accordingly, on the authority of *Tattersall's* case (5), entitled to sue the Zurich in his own name.

[His Lordship considered a number of other defences holding that the defendants had not succeeded therein and continued] :

There remains to be considered one of the defences raised, namely, that the plaintiff is disentitled to recover under the Zurich policy by reason of his failure to give notice to the defendants of an impending prosecution. By two informations dated June 22, 1938, Austin was charged with dangerous driving and careless driving on May 23, 1938, when the accident in question occurred. The summonses were returnable on July 20. He was in due course convicted on the charge of careless driving. I am satisfied on the evidence given before me that he gave no notice in writing or otherwise of these impending prosecutions to the defendants, the Zurich company. The Zurich policy provides in sect. 1 (1) (*b*) that the cover shall extend to a person driving with the insured's permission provided that :

> . . . such person shall as though he were the insured observe fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply.

General condition 1 is as follows :

> The insured or his legal personal representatives shall give notice in writing to the London or any branch office of the company as soon as possible after the occurrence of any accident and/or loss and/or damage with full particulars thereof. Every letter claim writ summons and/or process shall be notified or forwarded to the company

immediately on receipt. Notice shall also be given in writing to the company immediately the insured or his legal personal representative shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this policy.

I have already referred above to general condition 7, which makes the observance of the conditions a condition precedent to liability under the policy. In this case Austin had received a letter dated May 28, 1938, from solicitors acting for the Zurich in which he was clearly informed that the Zurich were interested as having issued a policy to Aldridge. Austin must be taken to know that his own policy contained an extension clause, and I think it is common knowledge in these days that motor car insurance policies do very frequently contain such clauses. Austin, if he had been interested in the matter, could no doubt have obtained information with regard to the provisions of the Zurich policy in this respect, and could then have taken steps to comply with the conditions of the policy. The truth is, of course, that he was not thinking of this matter at all, but was quite content to rest on his policy with the Bell. It seems to me wrong to say, as counsel for the plaintiff contends, that on the facts of this case the condition was one with which it was impossible for Austin to comply. I think this case is on this ground clearly distinguishable from *Re Coleman's Depositories, Ltd.* v. *Life and Health Assurance Association* (7), where an accident had occurred and the time for giving notice had expired before the insured received the policy containing the condition relied on. Nor do I think it is possible to say that general condition 1 is a condition which as a matter of construction cannot apply to a person indemnified under the extension clause. The relevant words of sect. 1 (1) (*b*) are :

> . . . subject to the terms, exceptions and conditions of this policy in so far as they can apply.

I think general condition 1 can often be applicable though there may perhaps sometimes be circumstances in which compliance therewith is impossible, in which case *Coleman's Depositories* case (7) would require consideration. I do not think such circumstances exist in the present case. My decision with regard to the applicability of general condition 1 seems to me to be in accordance with the view LORD WRIGHT was expressing at the bottom of p. 140 ([1942] 2 All E.R. at p. 329) in his speech in *Digby* v. *General Accident, Fire & Life Assurance Corpn.* (8). On this ground, and on this ground only, I think the defendants are entitled to judgment.

Judgment for the defendants.

Solicitors : *R. I. Lewis & Co.* (for the plaintiff) ; *A. E. Wyeth & Co.* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re PETITION OF RIGHT OF COURT LINE, LTD. THE LAVINGTON COURT.

[KING'S BENCH DIVISION (Tucker, J.), **August 3, 1944.**]

Shipping—Charterparty—Time charter—Hire—Ship torpedoed but sinking 14 *days later—When hire ceases to be payable—Actual total loss—Constructive total loss—Abandonment—Marine Insurance Act,* 1906 (*c.* 41), *ss.* 57 (1), 60.

The motorship Lavington Court was struck by a torpedo on July 18, 1942, while proceeding in convoy to the Middle East carrying ammunition and supplies under a charterparty with the Government in the form T.99A, not extending beyond 6 months after the cessation of hostilities. The ship sustained damage of various kinds and was no longer navigable. The only chance of saving her was towing, but the convoy could not take her in tow, and, in the circumstances, the master of the ship decided to leave her, taking his crew with him in one of the convoy escorts. Owing to war conditions he was unable to take the further steps which he would have taken in peace time, such as wireless calls to other ships and reporting to his owners, but had to leave all such matters to the naval authorities. At the time of leaving the ship, the master himself thought that she would not survive a long tow, but the naval officers in charge thought otherwise. On July 26 the Lavington Court was taken in tow with a view to taking her to a port in Eire (a distance of about 780 miles), but, probably owing to bad weather, she suddenly foundered and sank on Aug. 1. The suppliants, the owners of the Lavington Court, claimed hire from July 18 to Aug. 1, 1942, under the charterparty. They contended that there was no total loss of the ship, actual or constructive, before Aug. 1, 1942. It was contended on behalf of the Crown that there was an actual total loss on July 18, or, alternatively, a constructive total loss on July 18 or 19, since, although the ship remained afloat for 14 days after being torpedoed, her loss on Aug. 1 was the inevitable result of the events of July 18 :—

Held : (i) in the circumstances of the case, the Lavington Court had not been so destroyed or damaged on July 18 as to be, on that date, an actual total loss, as defined in the Marine Insurance Act, 1906, s. 57 (1).

(ii) on July 18 or 19, no constructive total loss, under the Marine Insurance Act, 1906, s. 60, had been established since (*a*) the action of the master in leaving the ship and taking off his crew was not, in the circumstances of the case, an abandonment within the meaning of sect. 60 (1) ; (*b*) recovery of the ship on July 18 or 19, though uncertain, had not been proved to be unlikely.

[**EDITORIAL NOTE.** The question here considered is largely one of fact but the substantial point is whether it is material to take into account, in considering the question of abandonment or that of total loss, the fact that the master was not in a position to make a free choice but was bound to obey the orders of the naval officer in charge of the convoy. The necessity for the convoy to proceed on its way may lead to what appears to be an abandonment of the ship when in fact no such abandonment would take place in normal circumstances, and it is held that, in the circumstances of this case, there was no abandonment.

As to Liability for Hire under Time Charter, see HALSBURY, Hailsham Edn., Vol. 30, pp. 308-312, para. 500 ; and for Cases, see DIGEST, Vol. 41, pp. 358-363, Nos. 2074-2114.

As to Total Loss, see HALSBURY, Hailsham Edn., Vol. 18, pp. 352-354, paras. 506-508, and pp. 364-366, paras. 522-524 ; and for Cases, see DIGEST, Vol. 29, pp. 253, 254, Nos. 2042, 2056, and pp. 272-274, Nos. 2202-2220.]

Cases referred to :

*(1) *Rickards* v. *Forestal Land, Timber and Railways Co., Ltd. Robertson* v. *Middows, Ltd. Kahn* v. *W. H. Howard, Bros. & Co., Ltd.*, [1942] A.C. 50 ; [1941] 3 All E.R. 62 ; 110 L.J.K.B. 593 ; 165 L.T. 257.

*(2) *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] A.C. 371 ; [1939] 2 All E.R. 723 ; Digest Supp. ; 108 L.J.K.B. 433 ; 160 L.T. 542.

(3) *Polurrian S.S. Co., Ltd.* v. *Young*, [1915] 1 K.B. 922 ; 29 Digest 273, *2213* ; 84 L.J.K.B. 1025 ; 112 L.T. 1053.

(4) *The Girl Pat, Marstrand Fishing Co., Ltd.* v. *Beer*, [1937] 1 All E.R. 158 ; Digest Supp. ; 156 L.T. 196.

*(5) *The Olympic*, [1913] P. 92 ; 41 Digest 229, *680* ; 82 L.J.P. 41 ; 108 L.T. 592.

(6) *Coker* v. *Bolton*, [1912] 3 K.B. 315 ; 29 Digest 289, *2348* ; 82 L.J.K.B. 91 ; 107 L.T. 54.

Petition of Right by the owners of the motorship Lavington Court, claiming hire from July 18 to Aug. 1, 1942, under a charterparty in the form T.99A, effective from May 18, 1942, and thereafter for such period as the charterers might require, but, unless otherwise agreed, not extending beyond 6 months from the cessation of hostilities. The owners had been paid the agreed hire up to and including July 18, 1942. The facts are fully stated in the judgment.

Sir Robert Aske, K.C., and *Owen L. Bateson* for the suppliants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Patrick A. Devlin* for the Crown.

Tucker, J. : The Lavington Court was a ship of 5,372 tons gross. On July 18, 1942, she was proceeding in convoy carrying supplies and ammunition from Leith to the Middle East *via* the Cape. At about 11.30 p.m. she was torpedoed at a spot between the Azores and the coast of Spain, some 250 miles from the Azores. She was taken in tow on July 26 by two tugs escorted by two of H.M. ships with a view to taking her to Berehaven in Eire, which, like the Azores, is neutral territory. The distance to Berehaven was about 780 miles. After being towed some 480 miles of that distance she suddenly foundered and sank at 2 a.m. on Aug. 1.

The ship was struck by a torpedo well aft on the starboard side. The crew were placed in lifeboats. At midnight H.M.S. Wellington, one of the convoy escorting vessels, came up and took the master and his boat's crew on board. She was unable to remain longer then, but returned at about 3 a.m. and took the survivors out of the chief officer's boat. The master, the chief engineer, all deck officers, two sailors and one donkeyman returned to the ship at about 4 a.m. They found the vessel's stern was broken and hanging down at an angle of 35 degrees, No. 5 hold was full up to the 'tween decks, there were signs of water in No. 4 hold, but water does not seem to have been actually seen, and at a later date No. 4 hold was found to be free of water; the steering-house was flooded and the crew's accommodation wrecked. The engine room showed no signs of flooding; the machinery had sustained no damage excepting that to the shafting and propeller. The rudder had gone. The pumps appeared to be in working order, and the holds forward of the engine room appeared to be sound. The vessel was obviously not navigable, and the only chance of saving her was towing. As to this, the opinion of the master was that she would not survive a long tow.

In view of the fact that the convoy had to proceed and could not take the Lavington Court in tow, and having regard to the presence of enemy submarines and the condition of the ship, there was, I think, no alternative for the master but to leave the ship and take his crew with him in one of the convoy escorts. In these circumstances the master was, of course, unable to take any further steps which might have been open to him in times of peace, such as wireless calls to other ships and reporting to his owners. Instead, he had to leave all such matters to the naval officers concerned. In this connection I think it is of considerable importance to see what steps they took and what opinions they formed as to the prospects of recovering the ship. From the first the officer in command of H.M.S. Wellington had thought, notwithstanding the master's opinion, that it was worth while to send for tugs and that there was what he called a "fifty-fifty chance" of her still being afloat when they arrived, unless the weather deteriorated. He accordingly sent a message to the flag officer commanding North Atlantic, stating: "Consider salvage possible if tugs sent at once." No tug was available in the United Kingdom, and orders were given for the tugs Charon and Prudent to be sent from Gibraltar and instructions given for the Lavington Court to be towed to the United Kingdom "if practicable," and permission was given for H.M. ships Rhododendron and Haarlem to be used for escort.

Meanwhile, the Mansfield and Georgetown were detailed to search for the Lavington Court. On July 25 she was located by H.M.S. Haarlem. When found, her condition was very similar to what it had been on July 19, except that the water which had previously appeared to be in No. 4 hold had got into the engine room, which was now 15ft. deep in water, whereas No. 4 hold appeared dry. The vessel had no list. She was taken in tow on July 26. On July 27 Rhododendron reported: "Salvage prospects good but towing on broad sheer to port." On July 28, she was boarded, and nothing untoward was found. Thereafter, between July 29 and 31, except for unsuccessful attempts to secure the tug Prudent to the Lavington Court's port quarter so as to take the sheer out of her, nothing unusual occurred. On July 31 the weather deteriorated, and the swell increased, and the Lavington Court was dipping her damaged stern more than before. Early on Aug. 1 she was pitching badly, and at 2 a.m. she suddenly disappeared after what looked like two badly ignited rockets and some sparks had been observed. No explosion was heard, nor was any column of smoke seen. She had then been towed for nearly 500 miles. In the opinion of the officer in command of the Rhododendron, the bulkhead between Nos. 4 and 5 holds had collapsed and had caused the stern to go down very quickly, to which the north-west swell was the main contributing factor.

Those are the material facts; and it appears to me that the prospects of recovery of the vessel on July 18 and 19 depended on (i) the availability of tugs; (ii) the time which it would take for them to reach the vessel; (iii) the condition of the vessel when they got there; (iv) the weather before and after they got there; (v) the port to which it was decided to tow her if towing appeared practicable. All these factors have, of course, to be considered in the light of the damage done to the vessel on July 18. The master was obviously not in a position to form any judgment with regard to several of the above. The owners gave no notice of abandonment and have contended throughout that there was no total loss, actual or constructive, before Aug. 1.

On these facts the Crown contends that there was an actual total loss of the Lavington Court on July 18, or, alternatively, a constructive total loss on July 18 or 19. It is said that, although the ship remained afloat for 15 days after being torpedoed and was towed for 480 miles before she foundered on Aug. 1, she was a doomed vessel from the moment she was struck and her loss A on Aug. 1 was merely the inevitable result of the events of July 18, and she was accordingly an actual loss on that date. Actual total loss is defined by the Marine Insurance Act, 1906, s. 57 (1), as follows:

> Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

B

In my view, on July 18 the Lavington Court had not been destroyed, nor had she been so damaged as to cease to be a thing of the kind insured, nor were the insured irretrievably deprived of her on that date. Consequently, there was no actual total loss on that date.

With regard to the question of constructive total loss, the Marine Insurance Act, 1906, s. 60, so far as material to the present case, is in these words:

> (1) Subject to any express provision in the policy, there is a constructive total loss C where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable . . . (2) In particular, there is a constructive total loss (i) where the assured is deprived of the possession of his ship . . . by a peril insured against, and (*a*) it is unlikely that he can recover the ship. . . .

It has been decided by the House of Lords that subsect. (2), as compared with subsect. (1), is cumulative, not merely illustrative, and that an insured can base D his claim on either of the subsections, which contain two separate definitions, which may be applied to different conditions of fact: see *per* Lord Wright in *Rickards* v. *Forestal Land, Timber & Railways Co.* (1), at p. 84 ([1941] 3 All E.R., at p. 79). In this case the Solicitor-General relies on both subsections. He says that the action of the master in leaving the vessel and taking off the surviving members of the crew was an abandonment within the meaning of the subsection, and that it was done reasonably on account of the actual total loss E of the vessel appearing to be unavoidable. He contends that the words "reasonably abandoned" must be read in the ordinary sense of the words and not in a technical marine insurance sense. On the other hand, counsel for the suppliants argues that the words "abandon" and "abandonment" in sects. 60, 61, 62 and 63 always denote the cession, either voluntary or by operation of law, by the insured to the insurer of whatever remains of the subject-matter insured; and he refers to the note to this effect by Sir Mackenzie Chalmers to sect. 61 F in Chalmers, Marine Insurance Act, 1906. He submits that throughout the Act these words are used in that highly technical sense.

In support of the contrary view the Solicitor-General referred me to the language used by Lord Wright in *Robertson* v. *Petros M. Nomikos, Ltd.* (2), where he states that he can find no inconsistency between sect. 60 (1) and sect. 61, and says, at p. 382 ([1939] 2 All E.R., at p. 727):

G

> Sect. 60 (1) deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual abandonment . . .

He was dealing with a policy on freight payable in the event of the constructive total loss of the ship, and he had pointed out in an earlier passage that in such a policy the words "constructive total loss" must have the same meaning as H if there was no hull policy in existence at all. He says, at p. 381 ([1939] 2 All E.R., at p. 727):

> The test is not the shipowner's intention, or what he did under the hull insurances.

The test, he says, is external and objective, and does not depend on the shipowner's election. That case was concerned with sect. 60 (2) (ii), which deals with cost of repairs exceeding the value of the ship when repaired, and the contention of the appellants, which was rejected, had been that, even where subsect. (2) (ii) is relied upon, there must be an abandonment; and in that case the shipowner had not abandoned but had deliberately elected to repair and claim only for a partial loss. Sect. 60 (1) was not directly in question. I do not read LORD WRIGHT'S speech as casting doubt upon the proposition that, where abandonment under subsect. (1) is relied upon, it is necessary to show some act by the shipowner or his agent with his authority done *sine animo revertendi et sine spe recuperandi*, although that case shows that, where constructive total loss is under consideration in an action to which the insurer is not a party, such act need not be done with the intention of causing, and need not result in, a cession to the insurer; indeed, there need be no policy on the hull.

In my view, on the facts of this case, the action of the master in leaving the ship and taking off his crew does not fulfil the requirements of an abandonment within the meaning of sect. 60 (1), as interpreted above. It must be remembered that the vessel was proceeding in convoy and under the protection and orders of His Majesty's ships. The convoy had to proceed, the Lavington Court could not be taken in tow by the convoy for the reason, no doubt, among others, that this would have dangerously reduced the speed of the convoy. In all the circumstances the master had no alternative but to take off his crew and leave the question of the recovery of the vessel and cargo to the appropriate naval authorities, who, after taking into consideration factors unknown to the master, would make the decision which would normally fall to be made by the master or owners in peace time. I am accordingly of opinion that there was no abandonment of the vessel on July 18 or 19 within the meaning of subsect. (1).

I pass, therefore, to consider whether there was a constructive total loss on one or other of these dates under sect. 60 (2) (i). In this connection there was some discussion during the hearing as to the material date for the purpose of applying the test there laid down. In actions by insured against insurers it has been decided that the material date is that of the issue of the writ or the notional date of its issue when it has been agreed to treat the writ as issued at the date of notice of abandonment. Counsel for the suppliants argues that, similarly in the present case, the material date is that of the petition of right, and he says that, as by that date the ship had become an actual total loss, there can be no question of a constructive total loss at a prior date.

Although I think the date of the issue of the writ is the decisive date for the purpose of considering all the material factors as then ascertained in order to decide whether or not the recovery of the ship was unlikely on July 18 or 19, 1942, I do not agree that, in an action to which the insurers are not parties, the mere fact that, at some date subsequent to July 19, and before the issue of the writ, the ship became an actual total loss, is decisive. So to hold would, in my view, be contrary to the decision in *Robertson* v. *Petros M. Nomikos, Ltd.* (2). In this particular case there is no fresh material relevant to the decision which has become available since Aug. 1, 1942, so that my decision as to whether recovery was unlikely on July 18 or 19, 1942, would be the same whether the material date is that of the petition of right or some time between July 18 and the sinking of the ship on Aug. 1, as contended by the Crown. Whichever is the material date, I am unable to say that, on July 18 or 19, recovery was unlikely having regard to all the circumstances and weighing the views of the naval officers as against the opinion of the master. As in *Polurrian S.S. Co.* v. *Young* (3), it appears to me, judging the matter from the standpoint of the reasonable man with knowledge of the true facts (see *The Girl Pat* (4)) that, while recovery was no doubt uncertain, it is impossible to say that it has been proved that it was unlikely. I, therefore, hold that a constructive total loss on July 18 or 19, 1942, has not been established under either of the subsections of the Marine Insurance Act, 1906, s. 60.

There are three further defences that require consideration. "Frustration" of the contract is relied upon. It is said that, as from July 18 or 19, the subject-matter of the contract, namely, a cargo-carrying ship together with its crew, ceased to exist. The charterparty is a time charter of indefinite duration, not exceeding six months from the cessation of hostilities. It provides by cl. 25 that hire shall cease to be payable on loss of the vessel and that in the case of constructive total loss the loss shall be deemed to have occurred, and the hire shall cease upon the day of the casualty resulting in such loss. Cll. 7, 13 and 22 expressly provide for the cesser of hire in the circumstances therein stated. Counsel for the suppliants accordingly contends that, as the contract itself provides for all contingencies on which hire is to cease, no other events of the same nature as those dealt with, namely, events which cause damage to the ship, whether of a temporary or permanent character, will cause a cesser of hire, and the doctrine of frustration is altogether inapplicable. The Solicitor-General relies upon the following matters : (i) the extent of the damage ; (ii) the fact that the master and crew left the ship at once ; (iii) the fact that the crew were paid off, under the Merchant Shipping Act, 1894, s. 158, as from July 18 ; (iv) the combination of (i), (ii) and (iii) above. As to (i) and (ii), I have already held A that the facts fall short of what is required to establish an actual or constructive total loss as on July 18 or 19, and, if that is right, it seems to me quite impossible to say, in the case of a time charter such as this, that the damage suffered by the ship, coupled with the circumstances in which the master and crew left her, amounted to a frustration of the contract as from either of those dates. The payment-off of the crew is irrelevant. The case of *The Olympic* (5), makes it clear that the venture, the termination of which justifies the payment-off of the B crew, is a different venture altogether from that which is the subject-matter of a time charter. This matter of the payment-off of the crew was also prayed in aid by the Solicitor-General in support of his argument that there had been a total loss, either actual or constructive, on July 18 or 19. He further relied upon it in support of his submission, which I deal with next, that there was an abandonment of further performance of the contract amounting to repudiation on July 18 or 19. I think *The Olympic* (5) shows that this point does not assist C his argument under any of these heads. In my view, there was no frustration of this charterparty on July 18 or 19.

With regard to abandonment of the contract, the Solicitor-General relies upon all the matters already referred to, coupled with the fact that the owners have accepted payment from the insurers of the hull on the basis of interest and recovery of premiums calculated as for a total loss on July 18. The correspondence D shows that the owners had throughout contended that the insurance figures should be calculated on the basis of a total loss on Aug. 1, but, owing to the insistence of the Government representative, who said he was not concerned with the question of hire, they were ultimately compelled to acquiesce in payment calculated on the July 18 basis. This was a transaction which was *res inter alios acta,* and, in my view, cannot be relied upon by the Crown in these proceedings in support of their contention that the owners abandoned performance E of or repudiated their contract. I have already dealt with the other matters relied upon under other heads of defence, and my observations thereon apply equally to this defence of repudiation, which, in my opinion, is not supported by the facts.

The final defence is that contained in para. 7 of the answer and plea, namely, that the result of receiving payment from insurers on the basis of a total loss on July 18 was that, as from that date, the property in the Lavington Court F vested in the insurers or, alternatively, on that date the owners divested themselves of ownership of the vessel. One answer to this is, I think, that cl. 10 of the policy on the hull provides that, in the event of actual or constructive total loss, no claim shall be made by the association for freight or passage money whether notice of abandonment has been given or not. This deprives the insurers in that respect of the rights which they would otherwise have had by G way of subrogation, and, in the result, the owners' right to freight under this contract remains unimpaired. (See *Coker* v. *Bolton* (6)). Apart from cl. 10 of the policy, I think the result would have been that the suppliants would have been entitled to recover hire as against the charterers, but would have held the proceeds in trust for their insurers.

For the above reasons I am of opinion that the suppliants are entitled to hire under this charterparty down to and including Aug. 1, 1942. There will H be judgment accordingly for the agreed sum of £1,267 1*s*., with costs.

Judgment for the suppliants with costs.

Solicitors : *Holman, Fenwick and Willan* (for the suppliants) ; *Treasury Solicitor, Ministry of War Transport Branch* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

Re COMPTON, POWELL *v.* COMPTON AND OTHERS.

[CHANCERY DIVISION (Cohen, J.), **June 14, 1944.**]

Charities—Charitable purposes—Education of class—Twenty-eight members of the class—Validity.

By her will the testatrix provided, *inter alia*, that certain moneys were to be held by her trustees and " . . . invested in trustee stocks under a trust for ever . . . for the education of Compton and Powell and Montagu children . . . not over the age of 26 years . . . Compton children are the lawful descendants of H. C. Compton of Manor House Minstead Powell children are the lawful descendants of Weyland Powell of Foxhan Park Lyndhurst and Montagu children the lawful descendants of William Earl of Sandwich father of the Earl of Sandwich hereinbefore mentioned . . ." At the date of the summons there were 10 Compton children, 6 Powell children and 12 Montagu children and each section had members under the age of 26 years. The will further directed a settlement of " all money that I have that my mother brought into or had in any way . . . " on the plaintiff and his male heirs. The personal representatives of the deceased took out a summons to decide, *inter alia* (i) whether the trust for the education of the children was a valid charitable trust or was void, and (ii) the nature of the interest that the plaintiff was entitled to :—

HELD : (i) the trust, though for the benefit of a class which had only 28 members, was wide enough to constitute a valid educational trust.

(ii) upon the true construction of the will and the Law of Property Act, 1925, s. 130, the plaintiff was entitled to an interest in the nature of an estate tail male.

[**EDITORIAL NOTE.** It is sometimes suggested that charitable trusts must be of a public nature and that a trust confined to the testator's family or descendants is necessarily non-charitable. The court has, however, here felt bound by authority to decide that the trust in this case, although confined to members of three families, one, however, not related to the testatrix, is a valid charitable trust.

AS TO GIFT FOR THE EDUCATION OF A PARTICULAR CLASS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 117, 118, para. 154 ; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.]

Cases referred to :

(1) *White* v. *White* (1802), 7 Ves. 422 ; 8 Digest 242, *10*.
(2) *Mocatta* v. *Lousado*, *cited* 7 Ves. 423.
(3) *A.-G.* v. *Price* (1810), 17 Ves. 371 ; 8 Digest 242, *12*.
(4) *Isaac* v. *Defriez* (1754), Amb. 595 ; 44 Digest 890, *7479* ; 17 Ves. 373, *n*.
*(5) *A.-G.* v. *Duke of Northumberland* (1877), 7 Ch.D. 745 ; 8 Digest 306, *856* ; 47 L.J.Ch. 569 ; *varied without affecting this point* (1878), 38 L.T. 245.
*(6) *A.-G.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722 ; 8 Digest 332, *1171* ; 38 L.J.Ch. 656.
(7) *Re Lavelle, Concannon* v. *A.-G.*, [1914] 1 I.R. 194 ; 8 Digest 246, *644.*
(8) *Laverty* v. *Laverty*, [1907] 1 I.R. 9 ; 8 Digest 252, *d*.
(9) *Re McEnery*, [1941] I.R. 323.
(10) *Spencer* v. *All Souls College* (1762), Wilm. 163 ; 8 Digest 367, *1724*.
(11) *Flood's Case* (1616), Hob. 136 ; 8 Digest 246, *58* ; *sub nom. Jesus College, Oxford, Case*, Duke 78.
*(12) *Vaughan* v. *Marquis of Headford* (1840), 10 Sim. 639 ; 44 Digest 1021, *8791* ; 9 L.J.Ch. 271.
(13) *Rochfort* v. *Fitzmaurice* (1842), 4 I. Eq. R. 375 ; 43 Digest 608, *c*.

SUMMONS by the personal representatives of the deceased to determine certain questions arising under the will. The facts are fully set out in the judgment.

N. C. Armitage for the plaintiff.

J. N. Gray, K.C., and *E. G. Burnett-Hall* for the next of kin.

C. L. Harman, K.C., and *H. E. Salt* for one of the children, an infant.

H. O. Danckwerts for the Attorney-General.

COHEN, J. : This summons is an excellent example of the troubles arising when people endeavour to write their own wills. A lady with an estate of, I think I was told, some £160,000, has chosen to write out her will in her own hand and she has succeeded in making it in many places hardly intelligible and she has made it in such a form that, if I come to one conclusion I am bound to defeat her intention.

The testatrix made her will on May 29, 1906, and it is in these terms :

This is the last will and testament of me Alice Theophila Compton Spinster of

> Mapperton House Beaminster in the county of Dorset. I leave everything to Edward Henry George Earl of Sandwich Henry Francis Compton and Charles Henry Compton as trustees for the following purposes . . .

Then she sets out certain trusts, which I need not for the moment read, as to "all money that I have that my mother brought into or had in any way." Then she goes on :

> The money which was not brought into the family by my mother is to be held by my trustees and invested in trustee stocks under a trust for ever to be called the Mary Catherine Compton and her daughter Alice Theophila Compton [then comes the word "family" which has been struck out in the copy admitted to probate, because although initialled it was not witnessed] Trust for the education of Compton & Powell & Montagu children but Compton & Powell children are to have the preference as scholarships for the time thought best by the trustees [then comes other words struck out] to be held not over the age of 26 years. It is not to be used as a pension or income for any one and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children to be servants of God serving the nation not as students for research of any kind. No person shall be allowed as a family who is not born in wedlock and who is not of sound mind and body. Compton children are the lawful descendants of H. C. Compton of Manor House Minstead [that was her paternal grandfather] Powell children are the lawful descendants of Weyland Powell of Foxhan Park Lyndhurst [that was her maternal grandfather] and Montagu children the lawful descendants of William Earl of Sandwich father of the Earl of Sandwich hereinbefore mentioned [Lord Sandwich was no relation to the testatrix] the trustees are always to be one Compton and one Powell at the least and are never to be less than 4.

The testatrix died on Nov. 14, 1941, and letters of administration with the will annexed were granted on Mar. 1, 1943, to H. F. Compton and the plaintiff. The first two defendants are the executors of H. F. Compton, who was the sole surviving trustee of the will. They appear by counsel, who are here to argue on behalf of the next of kin that the bequest as regards the education of the Compton family is invalid. The third defendant is a lineal descendant of the Earl of Sandwich.

I have to consider the validity of what I will call the Compton Family Trust. There are at the present time 28 descendants of the three stocks, 10 Compton children, 6 Powell children and 12 Montagu children and each section has a boy and girl who would be eligible if this is a valid charitable trust. Counsel for the next of kin argues that in all four headings of charitable trusts there must be a public element and he argues that on this basis such a trust as I have to consider can only be upheld if the trustees are an educational establishment and the court can infer a dominant motive to promote education through that educational establishment, although it may be linked and subject to a condition that the beneficiaries first to be considered are to be relations of the testatrix. I confess that, had the matter been entirely free from authority, I should have been inclined to uphold the argument and to have held that in a trust such as this there is no dominant intention to promote education but a dominant intention to promote the education of members of a limited class. But I think I am bound by authority to hold in the case of a trust for the purposes of the furtherance of education, a trust of this kind in favour of the descendants of three families (including as they do now and probably did at the testatrix's death 28 descendants) is a sufficiently wide clause in the circumstances to constitute this a valid educational trust.

My attention has been called to a number of cases dealing with the question of poor relations and it is said that, just as it has been held that a trust for relieving the poverty of the relations of a testatrix or of one or of two families is upheld as a public trust, so it must surely follow that, if the educational purpose can be established, it does not prevent the trust being a valid charitable trust if the educational purpose is expressed in relation to a comparatively narrow group such as the three families in the present case. The first case was *White* v. *White* (1), where the testatrix had bequeathed a personalty fund, consisting of about £3,000 stock, for the purpose of putting out "our poor relations" as apprentices. Afterwards, by a codicil, she confined it to two families. Sir William Grant, M.R., said, at p. 423 :

> Are not such cases supported as charities ? There was a case of this kind, *Mocatta* v. *Lousado* (2), lately before me ; where a great number of Jews were the objects. I may execute it as far as I can. I do not know, why those, who are ready, may not be put out apprentices.

Counsel for the next of kin says that *Mocatta* v. *Lousado* (2) seems to be somewhat different because a large number of Jews could more easily form a particular class of the community than poor members of two families. But that is a decision of the Master of the Rolls. Then again in *A.-G.* v. *Price* (3), there was a devise to A and his heirs, with a direction that yearly he and his heirs should for ever divide and distribute according to his and their discretion amongst the testator's poor kinsmen and kinswomen and amongst their offspring and issue dwelling within the county of B. £20 by the year. SIR WILLIAM GRANT, M.R., said, at p. 373:

> This appears to me to be in the nature of a charitable bequest.

Then after referring to *Isaac* v. *Defriez* (4), he goes on, at p. 374:

> This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations.

Finally, in *A.-G.* v. *Duke of Northumberland* (5), a charitable bequest which had been constituted in 1627 was recognised as valid where the bequest was:

> I give and devise for the relief and use of the poorest of my kindred, such as are not able to work for their living, videlicet, sick, aged, and impotent persons, and such as cannot maintain their own charge, the sum of £1,000.

Later on the will proceeds:

> And my will and meaning is, that in the bestowing and distributing of my estate and goods to the poor charitable uses, which is, according to my intent and desire, those of my kindred which are poor, aged, impotent, or any other way unable to help themselves, shall be chiefly preferred and respected.

That case is not as much help to me as it would otherwise be, because in his judgment SIR GEORGE JESSEL, M.R., interprets it, I think, as containing a general charitable intent and merely as a bequest in favour of his relations. What he says, at pp. 752, 753, is this:

> It seems to me that what the testator means is that all his poor kindred who are unable to get a living, unable to work for their living because they are sick, aged, or impotent persons, or cannot otherwise maintain themselves, are to be provided for. That is the first charge. But, subject to that, I think the testator does show, under the word "preferred," an intention—reading the words "to the poor charitable uses" to mean "to charitable uses for the poor"—that the whole of the property should be devoted to charitable uses for the poor, subject to the direction as to preference which I have mentioned. That, I think, is the meaning of the will.

There is nothing in the judgment to show that in his view it would have been bad if it had not been so confined. That is the last of the cases to which I will refer on the subject of poor relations. I think the inference to be drawn from them is that the courts have held over a series of years that a gift to poor relations is a valid charitable gift.

Counsel for the next of kin next comments—and it is a forceful comment—that there is perhaps a difference between cases of poverty and cases of education because in the nature of things relief of poverty, even though amongst a limited class, necessarily operates for the benefit of the community as a whole and particularly of the community of the district where the relief is felt. But I think when one considers the cases in regard to education one finds in fact that a similar principle has been applied there. The first of such cases to which I will refer is *A.-G.* v. *Sidney Sussex College* (6). In that case the headnote reads, at p. 722:

> A testator, in 1641, gave lands to Sidney Sussex College, Cambridge, and Trinity College, Oxford, for the only use, education in piety and learning, of ten descendants of the brothers and sisters of the testator and of his two wives, and in default of such to their poor kindred. The two colleges accepted the gift, and each had always required that those persons who claimed the benefit thereof should become members of the college, and be educated there, and when there were no such claimants, each college had appropriated a moiety of the rents to their own purposes:—Held, upon the construction of the will, that any descendants claiming the benefit of the gift must become members of one of the colleges, and be educated there, and that, subject to that trust, the colleges were entitled to the lands in equal moieties:—Held, also, that, if the construction of the will had been doubtful, the contemporaneous usage might be referred to, and that the court would not assume a long series of breaches of trust to have been committed.

That decision of LORD HATHERLEY, L.C., is not in any way against the argument addressed to me by counsel for the next of kin, because there it was held that it was a gift to the colleges subject only to an obligation to allow any descendant claiming the benefit of the gift to become a member of the college. But in the court below Lord Romilly, M.R., declared that the term "descendants" included females as well as males, and was not confined to persons of an age to receive education at either of the said colleges, and declared that, in default of such persons being in existence and being so selected and educated as aforesaid, the poor kindred of the testator's wives were entitled to the gifts of the testator for their own absolute use and benefit. That decision, of course, A necessarily involves the view that a trust of which the colleges were merely trustees for the education in piety and learning of ten descendants of the brothers and sisters of the testator and his two wives was a valid charitable trust—not in any way a scholarship at that particular college or, indeed, a scholarship anywhere; in fact, obviously not limited to scholarship at that particular college, because it included females as well as males. On appeal Lord Hatherley, L.C., did not have to decide that point, but it is to be observed B that it was not argued that the gift was void because the clause was not sufficiently contained. It was argued that a gift to the descendants and not a gift for the benefit of education is not a valid charitable gift. There is no indication anywhere that such a gift would have been an invalid charitable gift.

On the whole, I think I am bound by those decisions to uphold the gift in this case.

C My attention was called to a number of Irish cases. In *Re Lavelle* (7), the bequest was to St. Jarlath's College, Tuam, of a sum of £600 the interest on which was to go for ever towards the education of the testator's relations in that college, preference to be given to the most eligible and best conducted, the selection to be given to the Archbishop for the time being, to a conscientious layman and to the parish priest of the boy to be considered. It appears to have been upheld on the view that the testator intended to give it to the college D merely subject to the obligation to have at all times one relative of the testator, so that there was clearly an intention to benefit education through the particular college. I do not think, therefore, that that case carries the matter any further than *A.-G.* v. *Sidney Sussex College* (6). The other two cases upon which counsel for the next of kin relied were *Laverty* v. *Laverty* (8), where the trust was:

> . . . to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or E Lafferty, being between the ages of 11 years complete and 23 years complete until such boy or man shall have obtained a trade or profession such sums as said trustees may think proper.

The headnote proceeds:

> Absolute discretion was given to the trustees as to the selection of recipients and the discontinuance of any payment to them for their "support or education."

F They were also empowered to accumulate and invest the interest the profits of which were to be applied:

> . . . in the same manner as those of the original shares or funds, namely, for the support of boys or men of the above-mentioned surnames under the circumstances before-mentioned:—Held, that the gift was not charitable and therefore failed.

The case was decided by Barton, J., on two grounds. First, he visualised G the possibility under this trust, there being nothing to prevent it, of the trustees carrying out the trust by employing a governess or tutor for some wealthy young Laverty and such a purpose could not be regarded as charitable. But the main ground of his decision and the one which I think clearly justifies the conclusion which he reached was that the trust was not merely to educate but for the "support and education" of the suggested beneficiaries, and that the support of those persons named was clearly not a general charitable bequest. H So far as the first ground is concerned, I do not think it has any bearing on the facts of this case because, under the trusts of this lady's will, the money has to be held as scholarships at the pleasure of the trustees and I do not think the power to give scholarships would enable the trustees under this will to employ a governess or tutor to some wealthy young Compton, Powell or Montagu.

Finally, counsel for the next of kin relied on the decision in *Re McEnery* (9), where the testator directed that moneys then invested:

> . . . shall be regarded as a trust fund for enabling the sons and daughters and male

> descendants of my brothers to obtain professions, each suitable student to receive £100 yearly for a reasonable time from the dividends arising from the said trust fund.

Then there is a further direction which I need not read. GAVAN DUFFY, J., in a lengthy judgment stresses the point that the courts of equity have been consistently insistent on the public character of legal charity, and he says, at p. 327 :

> In a search for precedent upon which by judge-made law to establish the testator's bounty here as an educational charity reliance was placed in particular upon such cases as *Spencer* v. *All Souls College* (10), *A.-G.* v. *Sidney Sussex College* (6), and *Re Lavelle* (7), decisions showing that the founder of a charity or a benefactor may lawfully associate his descendants with his bequest to a charitable institution and thus enable them to participate in his liberality : those cases find their prototype in *Flood's* case (11), where it was laid down that the Act of Elizabeth overriding the law of mortmain allowed a man to make a devise to a college at Oxford to find a scholar of his blood from time to time. But they do nothing to validate the very different provisions of our testator's will. The trust here is, in my opinion, too narrow to be charitable.

Pausing there, as I have said, if the matter had been free from authority, I should have respectfully agreed with the observations of GAVAN DUFFY, J., which I have just read, but I do not think the matter is free from authority and I think the current of authority compels me to hold that this trust is a valid educational trust. That the intention was educational there is no doubt. It is not only to be inferred from the direction that the income is not to be used as a pension or income for anyone but is to be held by the college but also from the words :

> . . . it is to be used to fit the children to be servants of God serving the nation not as students for research of any kind.

Had the matter been free from authority, I should have held that the three families mentioned were not a sufficiently wide family, but I think I am bound by the cases to hold that this is a valid charitable gift. It follows, therefore, that I must direct a scheme.

Another question which arises is a short and not easy point of construction of a direction given in the will of the testatrix to settle all moneys the testatrix might have that her mother had brought into or had in any way on Weyland Martin Powell, Major in the Royal Artillery, and his male heirs. The question I am asked is whether upon the true construction of such direction for settlement the plaintiff is entitled to an absolute interest or to an entailed interest in the nature of an estate in tail male in the property so directed to be settled. Counsel for the next of kin suggested as a third alternative a life interest to the testatrix and to Weyland Martin Powell and to his sons successively in tail male. In support of his argument counsel for the next of kin has called my attention to a number of cases dealing with gifts to A. and his children and the like. It is sufficient if I refer to *Vaughan* v. *Marquis of Headford* (12), where the testator bequeathed £40,000 to Lord Headford and his children to be secured for their benefit. It was held that Lord Headford took for life with remainder to his children. SIR LANCELOT SHADWELL, V.-C., made a number of observations which may perhaps assist me in the present case. He began by saying, at p. 641 :

> This case shows, as I have often observed before, that no light is thrown on questions like the present by quoting other cases.

He then goes on, at p. 641 :

> By the laws of this country, every testator, in disposing of his property, is at liberty to adopt his own nonsense and a decision on the expressions used by one testator seldom affords any clue to the meaning of another.

Then he states the principle of construction, at p. 641 :

> If possible, every word in a will ought to have that meaning given to it which, in common fairness of construction, it is capable of receiving. Now the words in this case are : " £40,000 in the three per cent. reduced annuities to the Marquis of Headford and his children." If it stood there, the Marquis and his children would be joint-tenants ; but then it goes on : " to be secured for their use." Now it would be absurd to hold that those words apply to the Marquis ; as he might have taken his own share, and either secured it for himself or spent it. Those words therefore do not comprehend the Marquis ; but the plain meaning of them is that the fund is to be secured for the children from the dominion of their father ; and, in my opinion, there is quite enough in this will to justify the court in holding that the father is to take for his life, and his children after his decease.

Applying that case to the facts before me, counsel for the next of kin asks me to hold that by the direction to settle the testatrix has negatived the idea of a gift to Major Powell either absolutely or in estate tail since by barring the entail he would be able to defeat the interest of his heirs on whom the testatrix had desired her trustees to settle the property. I think, however, that I am precluded from accepting that argument by the statement of the law, which I accept as correct, in Hawkins on Wills, 1st Edn., at p. 187 :

> The rule which gives to "heirs of the body" their technical meaning is not so inflexibly applied to directions to settle lands by way of executory trust. . . . Where there is an executory trust, where the testator has directed something to be done and has not himself according to the sense in which the court uses these words completed the devise in question, the court has been in the habit of looking to see what was his intention ; and if what he has done amounts to an imperfection with respect to the execution of that intention the court enquires what it is itself to do and it will mould what remains to be done so as to carry that intention into execution. Thus, although a direction to settle lands on A and the heirs of his body simpliciter would probably make A tenant in tail yet if the testator show an intention that the first taker should not be made tenant in tail (as, if the direction be to settle and assure lands as counsel should advise, to the use of A for life and after his decease on the heirs of his body) the court would direct a conveyance to uses in strict settlement.

That exception is referred to with an explanation of *Rochfort* v. *Fitzmaurice* (13).

I think here it is impossible for me to get away from the words that the testatrix has used. I do not think I can infer here a sufficiently clear indication of intention that Major Weyland Powell was to take only a life estate. I think it is quite clear that the testatrix by using the words "male heirs" has not used words which are equivalent to children : she has used words which *prima facie* are words of limitation which would have the effect in so far as real property is concerned of vesting the estate tail in Major Weyland Powell and so far as personal property is concerned of giving him an absolute title. I do not think I am justified in dealing with it in the way that counsel for the next of kin argued.

There remains the question whether the use of these words is sufficient, having regard to the Law of Property Act, 1925, s. 130 (2), to confer on Major Weyland Powell an absolute interest in the property. The Law of Property Act, 1925, s. 130 (1), authorises the creation of an estate tail in personalty. Subsect. (2) provides :

> Expressions contained in an instrument coming into operation after the commencement of this Act, which, in a will, or executory instrument coming into operation before such commencement, would have created an entailed interest in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall (save as provided by the next succeeding section) operate in equity, in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act.

Counsel for the Attorney-General, speaking for this purpose as *amicus curiae*, suggests to me that that section is applicable and that Major Weyland Powell takes an absolute interest. Counsel for Major Weyland Powell, was rather frightened of the gift that was offered to him by the *amicus curiae*, but on the whole I think he was right to be so frightened because I think this is dealing with words in an instrument which is not executory in the sense that it does not contain provision that certain property is to be settled but an instrument which by itself purports to effect a settlement. I think he is right in saying that, if I come to the conclusion that the intention of the testatrix as expressed in the will was to give Major Weyland Powell only a life interest, the direction being to settle, there would be nothing to prevent my carrying out that intention. That being so, I think I prefer to hold, as is suggested in the summons itself, that, on the true construction of the direction for settlement, the plaintiff is entitled to an entailed interest in the nature of an estate tail male.

Order accordingly. Costs of all parties to be paid out of the charitable trust fund.

Solicitors : *Lovell, Son & Pitfield*, agents for *Nantes, Mannsell & Howard*, Bridport (for the plaintiff) ; *Farrer & Co.* (for the next of kin) ; *Royds, Rawstorne & Co.* (for the infant) ; *Treasury Solicitor* (for the Attorney-General).

[*Reported by* Hubert B. Figg, Esq., *Barrister-at-Law.*]

IN THE MATTER OF THE LOCAL GOVERNMENT ACT, 1933, AND IN THE MATTER OF THE DECISION OF C. R. H. HURLE-HOBBS, DISTRICT AUDITOR.

[COURT OF APPEAL (Lord Greene, M.R., Goddard and du Parcq, L.JJ.), **May 10, 11, 12, 15, 1944.**]

Local Government—Audit—Surcharge on councillors—Contract to dispose of refuse—Decision to increase remuneration of contractor—Whether the contractor is a person "aggrieved"—Local Government Act, 1933 (*c.* 51), *ss.* 228 (1), 229.

In 1940, F.W.S. was, by reason of a contract which had two years to run, under an obligation to the Lambeth Borough Council to collect and dispose of refuse in the borough for a fixed sum per annum. In Feb., 1940, he applied to the council for additional remuneration on the ground of increased costs due to the war. The borough council considered the matter and then agreed to make an additional payment to the contractor for the two remaining years of the contract. The additional sum was arrived at by calculating the increased costs of the contractor omitting the increase in wages. The contractor agreed that during the remainder of the term of the contract he would not ask for any further increases. The district auditor disallowed the additional payments as contrary to law within the meaning of the Local Government Act, 1933, s. 228 (1) (*a*), and surcharged them on the councillors responsible for the decision. It was contended on behalf of the auditor (i) that the council did not make an adequate investigation of the contractor's accounts; (ii) that the council ought to have anticipated a decrease in the amount of the refuse to be disposed of by reason of certain statistics; (iii) that the council should have arranged for an adjustable figure to be paid to the contractor; (iv) that the contractor was not a person "aggrieved" within the meaning of the Local Government Act, 1933, s. 229, and, therefore, had no *locus standi* in the matter:—

HELD: (i) the council made such investigation of the accounts as was possible having regard to their nature and, as they had acted *bona fide* with the interests of the ratepayers in view and with reasonable business acumen having regard to the circumstances before them at the time, the additional payments made to the contractor were not unlawful.

(ii) the contractor's legal rights were not affected by the disallowance by the auditor and he was, therefore, not a person "aggrieved" within the meaning of the section.

[**EDITORIAL NOTE.** An auditor must be satisfied that the expenses of a local authority are properly incurred and that public money has not been unnecessarily spent. On the other hand, for the proper working of free institutions, local authorities must have a proper discretion given to them and, acting honestly within the limits of that discretion, they must not be liable to be called to account. The discussion as to who is a person aggrieved in this connection is important to parties dealing with local authorities.

AS TO POWERS AND DUTIES OF AUDITOR, see HALSBURY, Hailsham Edn., Vol. 21, pp. 223, 224, para. 415; and FOR CASES, see DIGEST, Vol. 33, pp. 19-21, Nos. 76-86.]

APPEAL by the district auditor from a decision of the Divisional Court (VISCOUNT CALDECOTE, L.C.J., ATKINSON and TUCKER, JJ.), reported [1944] 1 All E.R., at p. 249, where the facts are fully set out. A preliminary point, whether the contractor had a *locus standi* in the matter, was raised, but the judgments thereon were not included in the above report. For this reason, the judgments given in the Divisional Court are inserted here.

VISCOUNT CALDECOTE, L.C.J.: It is said by counsel for the auditor that Surridge has no right to be represented here by counsel; in other words, he has no right to appeal. There are two classes of persons who may appeal. The first is a person who is aggrieved by a decision on any matter in respect to which he has made an objection at the audit. The second class of person is a person aggrieved by a disallowance or surcharge made by a district auditor. If a person comes within the first class, of course he has a right to appeal. Here there is no question of that sort, because the appearance of Surridge was not to make an objection to the accounts at the audit, but in response to a call which the auditor had a right to make upon him to produce documents and to give information.

Then the question must be whether he, Surridge, comes within the second limb of the section, namely, "any person aggrieved by a disallowance or surcharge." The fact is that, if Surridge had taken up the position that he had obtained a payment of £14,000 from the Lambeth Borough Council on conditions which made it impossible for them to get the money back, I think he might have said he was not in the least interested in the question of surcharge or not, in which case I should certainly have thought he was not a person aggrieved.

The contractor says first, "I was summoned to give evidence." I do not think that puts him in the position of a person aggrieved. Secondly, he says: "I have given an undertaking to repay all or some of this money." I do not think that puts him in the position of a person aggrieved. That would be tantamount to saying that a person might give himself a status by some voluntary act or promise.

We must take the section which is the material section here, and consider that section in the light of the facts of the particular case. It is said that Surridge has a right to appeal because there has been a charge made against him. I have not been aware of any such charge. So far as I can see, he has acted in a straightforward manner, and I have not heard anybody say that he has not. Certain things have been said as to what an examination of his banking account would disclose; but, fortunately, the state of a man's banking account is no guide to his honesty or honour, and I think that ground fails also.

Lastly, he says in his affidavit that he feels as a matter of honour bound to refund the payments quite apart from any undertaking. I do not think that that, for the reasons I have already mentioned, can make him a person aggrieved. No doubt he is a person interested, but that he will suffer any loss or damage, or that he is affected in any way except sentimentally, I find it very difficult to think. For these reasons, I think that Surridge is not a person aggrieved within the meaning of the material section of the Local Government Act.

Atkinson, J.: I agree. It seems to me that the point can be put quite shortly. A person is only aggrieved if his legal rights are affected by the disallowance in question, and as everybody agrees that Surridge's legal rights were not affected, I do not think he is a person aggrieved within this section.

Tucker, J.: I agree.

The contractor appealed from the above judgments and the district auditor appealed from the judgments given in [1944] 1 All E.R. 249.

W. Craig Henderson, K.C., and *J. A. S. Collins* for the contractor.

M. P. Fitzgerald, K.C., and *Erskine Simes* for the members of the council.

Sydney G. Turner, K.C., and *H. G. Robertson* for the district auditor.

Lord Greene, M.R.: This appeal by the contractor claiming to be a person aggrieved within the Local Government Act, 1933, s. 229 (1), is, in my opinion, without any substance. I say that without any disrespect to the argument of counsel, but that argument really comes to this. He says that because the district auditor treated Surridge in a special manner at this audit, that gave Surridge some status to claim to be a person aggrieved. It is not necessary or proper to consider the details of how the district auditor conducted his audit. Nothing he could do or say could give to Surridge a status at that enquiry other than that which he had in law. In law his status was that of a person whose legal rights could not be affected one way or the other by anything that the district auditor said or did. Under those circumstances it seems to me quite impossible to suggest that he is a person aggrieved within the meaning of the section.

Goddard, L.J.: I agree.

du Parcq, L.J.: I agree.

The following judgments were given on the main appeal by the district auditor, who conducted his own case in this appeal.

Lord Greene, M.R.: The case, as I see it, is one that falls to be decided rather on broad lines than on a careful and accurate examination of details and figures. That being so, I see no useful purpose in reserving judgment.

The contract in respect of which the payments impugned were made was a contract which, at the time, had two years to run, and the payments were payments of £7,000 a year for each of those two years. They were firm payments, not subject to revision upwards or downwards either by any clause in the document under which they were given or by any understanding between the parties. There was an express understanding between the parties that these payments were to be final, and that the contractor would not ask for any further indulgence however much prices might rise against him, and that without lowering the quality of the service he was rendering. We have to put ourselves as best we can in the place of the borough councillors who were considering what was the proper solution of an urgent business problem which had presented itself. In doing that, it is a commonplace to say that we must not be wise after the event. It is not always easy to exclude from one's mind the unconscious effect of after-acquired knowledge; but I venture to think that there is another pitfall which must be avoided in considering something which happens in the past, and that is the pitfall of being too logical. The solution of a business problem does not always depend, or, indeed, perhaps does not often depend, on mere questions of logic. All sorts of factors come into consideration, such as experience, which cannot be valued, and the result of which cannot be weighed in scales. But nobody can suggest that business experience or a business appreciation of the circumstances of the time are not matters which may fairly influence and do regularly influence the decisions of business men.

In considering a practical business problem, therefore, the court must always bear in mind that the persons whose actions it is judging are persons who had to carry their conclusion into action; that their problem was not merely an academic one to be solved on paper, but a problem which had to be solved then and there by some practical action. Therefore, in working out what it was reasonable to do, the court must endeavour to avoid treating it as though the practical solution was a matter that could be arrived at by some purely logical process of weighing the obvious factors in the case. It must be remembered that most business problems present more than one possible solution. Events may prove that one was better than the other, but that does not mean that a person who has chosen what turns out to be the less desirable solution has thereby acted unreasonably. There may be six possible solutions, one of which turns out to be the right one, but that is perfectly consistent with any one of the other five being a solution to which a reasonable business man could at the time quite easily have come.

Endeavouring to bear these matters in mind, I have to approach the question presented to us in this case. The circumstances in which the problem came up for solution were circumstances which I cannot help thinking were very notorious at the time. Contractors were finding that the burdens imposed by the war, and the difficulties under which they laboured, and the further difficulties and expenses which they anticipated, were putting them in a position where their ability to carry out their contracts required very serious thought. It is easy in this case to start the argument with the proposition that the contractor had no legal rights and was in mercy. That is perfectly true, but I venture to think that no business man dealing with this type of contract on a big scale in March, 1940, dreamt of thinking of it on those lines. Everybody quite obviously knew that the outbreak of war and its consequences involved a state of affairs which nobody had contemplated, and raised problems which were not to be solved by stating that a contract is a contract and must be stuck to. I am not attempting to draw on any recollection of my own; the evidence in this case shows that, in this particular matter of local authority contracts, that aspect of the situation loomed very large. Not only had this particular council been approached by a number of its contractors, but the Ministry of Health had thought it necessary to send a circular to local authorities making suggestions as to how they should deal with requests of that kind.

That was, so to speak, the background against which this particular request by the contractor was brought up and, to put it quite shortly, it was a case where it seems to me that reasonable people acting with full consciousness of their duty to the ratepayers might start the investigation with the view that "this is probably a case where something has got to be done." Of course, if a local authority confronted with such a demand did not address its mind to what was in the interests of the ratepayers, but merely considered the interests of the contractor, and acted with a view to enabling him to keep his profits up to the standard that he had expected, they would not be acting in a proper way having regard to the fiduciary position they occupy. But this council did, on the evidence, and there is not the slightest reason for doubting its genuineness, apply their minds to the real governing matter which should determine their action, namely, the interests of the ratepayers of the borough in having an efficient standard of refuse collection and disposal maintained. I can see no warrant for the suggestion that they were endeavouring to secure by the action they took some result other than that. It is not a proper inference, in my opinion, to draw from the facts that they were concerning themselves merely with the interests of the contractor, securing for him a standard of profit on which his original contract was based, or something of that kind. What they were anxious to do was to keep up the high standard of efficiency which this contractor, on the evidence, had given them in the past, a standard which I cannot help thinking was probably substantially higher than could have been exacted under the precise legal obligations created by the contract. Anyhow, the standard was one which impressed the council, and one which they were anxious to have maintained.

It does not require figures and statistics to establish this proposition to my mind, that a contract of that kind, and one which on the evidence was at a price well below the average for the metropolitan boroughs, would not in practice be maintained at 100 per cent. efficiency if the cost of carrying it out rose very substantially against the contractor owing to circumstances which he could not have foreseen when putting in his tender. There, again, everybody in March, 1940, I should have thought, knew that without being told it.

When the actual figures of the increase in costs are examined, they are very striking indeed, and quite obviously show increases such as no contractor ever would have budgeted for when he put in his tender. In addition to that, there was, of course, the experience of the last war and what happened to prices and wages then. Once the council was apprised of the figures of those increases and, indeed, I think the borough engineer was well aware of them, it must have been manifest, if it was not manifest at the outset, that this was a case where something would have to be done if the efficiency of the service was not to be let down.

Pausing there for a moment, I ask myself this question : Can it be said that a payment of this character, apart from the question of the amount, was in the circumstances which I have outlined one which in principle was not permissible ? It seems to me that there is only one answer to that question. A payment of this class in those circumstances must have been a permissible payment because it does not require figures or statistics or calculations to prove that a contractor, faced with unexpected rises of this character, even if he can carry on the contract at all, could not be expected to refrain from endeavouring to cut down the services as much as he possibly could within the bare limits of his legal obligation, if not below them.

As the case presents itself to me, it seems to me unarguable to say that a local authority faced with those facts and appreciating (what possibly now it is difficult to recapture) the circumstances and the apprehensions of the time, appreciating the great importance of keeping up the standard of its refuse collection and disposal system, was not entitled on principle to make a payment which, in their honest opinion and according to the promises of a contractor with whom they had dealt for 20 years and whom they had every reason to trust as an honourable man, was to be a final settlement ; in those circumstances they were, it seems to me, quite clearly entitled on principle to make a payment.

If that view be right, the next question is that of *quantum*. It must not be taken from anything that I say that a local authority in circumstances such as these is to consider itself exempt from making all proper enquiries and calling for all proper and helpful accounts which may assist it in forming a proper opinion as to what sum they should pay. Obviously, it is the duty of a local authority dealing with the ratepayers' money to see that its judgment is formed after investigation of all available material which may assist it in coming to a conclusion. But the present case is a peculiar one. There was no material, as it seems to me, beyond what the council had before it, which really would have helped to throw light on this question of *quantum*. The contractor was engaged in work of this character for a number of local authorities in London. He had other businesses as well, and all these businesses were combined into one set of accounts. It was quite impossible to dissect those accounts so as to show what was his position under any one particular contract. There is the strongest evidence in this case, it seems to me, that an inspection of the contractor's accounts could have led nowhere.

I shall say a word later with regard to the specific matters on which Mr. Hurle-Hobbs particularly relies but, accepting for a moment that the accounts would not have assisted the local authority in coming to a conclusion on the question of *quantum*, then what were they to do ? Were they to say : " Here is a case where we are satisfied that something ought to be done but, in view of the way you have kept your accounts, we are very sorry we cannot find out how much we ought to pay you, and, therefore, we shall pay you nothing and do nothing " ? Would that have been in the interests of the ratepayers ? I should have thought not, because, if something had to be done, something had to be done ; and, if you could not arrive at the exact thing you had to do by an examination of accounts, figures and statistics, then some other method must be adopted of arriving at the desired result. There again it seems to me quite impossible to say that it would be unreasonable to adopt what may be called a rough and ready business solution in a case where a solution arrived at by those methods was the only possible one.

Collins, who had investigated this contractor's accounts in connection with an arbitration which he conducted for three other local authorities and found no help in the accounts, approved the method which the borough engineer had adopted in the present case. That method was to take the contract price, split it up into different heads and ascertain the percentage referable to those heads, and then arrive at a percentage addition to the contract price in respect of those heads. The three heads were barging and disposal, which represented 50 per cent., establishment, wharves, lorries, horses, etc., representing 16⅔ per cent., and wages representing 33⅓ per cent. There was no real dispute about the increases referable to those particular subdivisions. They were common knowledge. The cost of barging had gone up 12½ per cent. With regard to wages, the rate had gone up 12½ per cent. With regard to the matters coming under the other head, establishment, wharves, lorries, horses, etc., some of the items had gone up very much higher ; they had gone up as regards petrol 33⅓ per cent., oil 45 per cent., oats 125 per cent., mixture 33⅓ per cent., straw 50 per cent. As a great deal of this business involved the use of lorries and horse-drawn vehicles, those items for petrol, oil, oats, stores and so forth were obviously a substantial part of the expenditure. A number of other things had also gone up, replacements and so forth, which are mentioned in a paragraph of Collins' affidavit, and everybody knew it.

The method which was agreed upon with the borough engineer was to eliminate wages altogether, which represented 33⅓ per cent. of the contract price. The reason for eliminating wages was that there was a clause in the contract under which the contractor agreed to pay the proper wages as might be determined in the competent manner from time to time, and it appears to have been thought that the presence of that clause removed any possibility of a demand being put forward in respect of what I may call any abnormal rise in wages which might be attributable to the war. I cannot myself see the logic of that, because an abnormal rise in wages attributable to the war for the purpose they were discussing seems to have been just as much a matter proper to be taken into consideration as an abnormal rise in the cost of anything else. However, the wages figure, amounting to 33⅓ per cent. of the whole, was cut out entirely. In respect of barging and disposal they agreed on the 12½ per cent. which was the admitted increase in the cost. With regard to the other matters, which represented together 16⅔ per cent., they took the lowest of the percentage figures of increase which I have mentioned, namely, 33⅓ per cent., and applied that to the whole of that item. In the result, that gave a sum of some £7,366, and they settled on £7,000.

Was that, or was it not, a reasonable method of arriving, by admittedly a rough and ready method, at what I may call a compromise figure ? Let it not be misunderstood when I say "a compromise figure." I am not referring to a compromise of legal rights, because they did not come into the question at all, but to a figure which the parties might regard as a fair mean between two extreme views. But that was not all that was done. The contractor agreed that, if a settlement was come to on that basis, he would not in the future during the rest of the term of the contract put forward a similar demand, even if prices continued to rise, and that he would adopt that attitude without lowering the quality of the services he was rendering under the contract.

The contract had only two years to run, and the respondents were, on the facts, entitled to treat the contractor as a man of his word. Therefore, it seems to me, when he said : "Pay me that sum, and I will not ask for any more, and I will not let the quality of my work go down," the local authority might quite properly and reasonably say to themselves : "That is a very reasonable and good bargain." Here, again, we must try and have present to our minds the facts as they were known in March, 1940, and the uncertainty as to the course of the war, its repercussion on prices, the conditions under which work could be carried out, the availability of labour, movement of population, and so forth. All these were matters on which any two people meeting together might very well have had totally divergent views. One attitude might have been : "We think things will get along all right, and we shall get along for the remaining two years in circumstances of at any rate some stability, and therefore we will assume that things will remain as they are." It might have been equally reasonable to say : "We think there will be very great difficulties of all sorts and things will get very much worse," and a third equally reasonable person might have said that he anticipated things would tend to get very much better.

The view that the council took was that it would be a fair business arrangement, a fair deal from their point of view, if they could make a payment which would ensure to them the continuance of the services no matter how much worse things got. As it has turned out, it was a very good piece of business from the contractor's point of view, but nobody could anticipate that at the time. One of the reasons why it has turned out to be a good thing from the contractor's point of view has been the decrease in the work to be performed owing to the heavy bombing and evacuation that has taken place in the borough. Nobody could have foreseen that, and is it not being wise after the event to say that the only thing a prudent council could do in those circumstances was not to agree on a compromise figure of this kind as a final figure, but that what they ought to have done was to agree to some adjustment clause, which might turn out worse for them or might turn out better ? As it has turned out, that would have been the better thing to do. What we have to decide here is not what has turned out to be the better thing, not what somebody who perhaps made a more lucky forecast at the time would have done ; we have to decide : Was the basis, the expectation of what was to happen, on which the council acted so unreasonable that we ought to say that the figure they have given to the contractor or some part of it ought to be disallowed ?

I think it would be extremely unfair to this council for this court, sitting here and taking into account the facts and the only facts which were available to the council at the time, to say not "You were wrong in coming to the conclusion you did," but that "The conclusion you came to was such an unbusinesslike one in the interests of your ratepayers that no reasonable council could have come to such a conclusion." It seems to me, therefore, treating the matter on the broad lines I have indicated, that the claim to surcharge the councillors must fail.

But there are one or two particular matters to which Mr. Hurle-Hobbs quite rightly called special attention with which I must deal. He has very carefully and quite properly endeavoured to extract from the contractor's books, figures which he says—and it is a perfectly fair argument, although I am unable to accept it—would have shown, if they had been looked at, that there was no real justification for the contractor's suggestion that he must have an increase over the contract price. I have listened to the exposition of those figures and the arguments on both sides, and I have considered the evidence of Collins, and in view of the fact that these are comprehensive figures dealing with all the businesses of Surridge and all his contracts. in view of that fact alone, I find it impossible to extract from them anything which would help me, if I were a business man, to form any useful conclusion to guide me in deciding the particular practical problem with which this council was confronted. Collins had had that same experience in examining these very figures, and while appreciating the points which Mr. Hurle-Hobbs made upon them, I cannot regard these figures as a trustworthy guide on which the court ought to stigmatise the conduct of these councillors as having been unreasonable. They did not ask for these accounts, but it cannot be made a ground for disallowing these payments, if it is discovered that the accounts would not have helped them, had they asked for them. If the accounts had shown something which pointed to a wrong estimate and a wrong conclusion on their part, very different considerations would have applied ; but, when these accounts are looked at, and when we are told by Collins what we are told, and when we are told that the borough engineer knew and, indeed, everybody concerned appears to have known quite well, that the contractor kept no separate accounts, and that it was not any use looking at them—when we know that, are we to say that we can find something here, some sure guide which would justify the court in attaching this stigma to these councillors ? I should require something very much more precise, very much clearer in the matter of proof than the very vague, uncertain and, in my opinion, quite unreliable inferences which might on the face of the actual figures alone be drawn. Figures are things which are very often misleading, but to draw inferences with regard to the position of this particular contractor from these figures without knowing a great deal more, having a great deal more information which was not available about the business of the contractor and the details of it would, it seems to me, lead the court into doing an injustice.

I, therefore, do not propose to examine them in detail, but there is one more figure to which I must refer, and that is the figure of tonnage, which it is said would have shown that there was a very considerable fall in the actual service in the way of removal of refuse which the contractor was at the time being called upon to do. There, again, figures of that kind require to be scrutinised with a great deal of suspicion, of course not suspicion as to their accuracy, but as to their value as forming the basis of some conclusion as to the future. What is said about those particular figures, as well as about certain trends which it is said are to be observed in the accounts, is that, in March, 1940, they formed so sure a guide as to future probabilities that the council ought to have acted upon them, and that any action which disregarded their alleged significance must have been unreasonable. I cannot myself find that the figures in question, whether from the accounts or whether from the tonnage figures at that time, afforded any sure basis for a prophecy as to future trends. There were many factors which could be thrown into the opposite scale which I should have thought required even more attention, namely, the conviction that everybody must have had that the increase in wages and prices of all descriptions would go up and up, as, indeed, they did during the course of the last two years of this contract.

That led Mr. Hurle-Hobbs back to the argument that, if it was really impossible on the accounts to arrive at a proper figure, that was a reason why they should have arranged for an adjustable figure which would be corrected afterwards up or down according as things worked out. I have already said all I have to say about that. A choice between having a fixed figure now, with no further demands in the future, and a service assured, and an adjustable figure which might or might not work out to the benefit of the council, was a fair matter of choice to business people. To say that the solution which they adopted was not one which reasonable people could have adopted seems to me to be putting the case very much higher than it can fairly be put.

There is one last matter to which I should refer, and it is this : Mr. Hurle-Hobbs quite rightly makes the point that this contractor had got contracts with several other metropolitan boroughs. All these contracts were in operation pooled in the sense that he used the same lorries, horses and carts and all the rest of it indiscriminately for any of them, the same barges, the same tip and so forth. All the accounts were kept together. No separate accounts referable to each local authority and, indeed, no accounts were kept in which the refuse part of his business was kept distinct from the other businesses which he carried on, sand

and gravel, and so forth, which apparently involved barge transport. It is said, and said with some force, that in those circumstances you would have expected the council to consult the other local authorities having contracts with this contractor, in order, at any rate, to see that they, Lambeth, were not left to bear either the whole burden that he was suffering through the war in respect of the totality of his contracts, or an undue share, and that at any rate it was a case for concerted action. I think there is a great deal to be said for the point of view that a number of local authorities, confronted with a situation like that in relation to a contractor common to all of them, would be wise if they put their heads together and pooled their information and endeavoured to arrive at some uniform method of dealing with the contractor. That seems to be a very good way of ensuring that no local authority is left to carry more than its fair share of the burden. They did not do it. But does that compel us to say that their failure to do it stamps the whole of their action as being unreasonable? There is no evidence here that they were taking on their shoulders more than their proper share of the burden which had fallen upon the enterprise of this contractor. The method by which the percentage additions was arrived at seems to me to preclude any such notion, and although, as I say, it would have been from other points of view a wiser or more businesslike thing to have consulted the other borough councils and formed a common plan of action, I cannot myself see how their failure to do so involves the consequence either that they ought not to have paid anything at all or that what they did pay was excessive. It seems to me to be really outside the particular matter which we have to decide.

Those are the broad lines, and, as I say, I think this case must be decided on broad lines, on which I think this appeal fails. If I have not gone into every detail in the case which has been put before us, it is not because I have failed to appreciate the points that were urged or to give due weight to them in considering the decision to which I should come. In my opinion, it is not possible to be satisfied on this material that the action of the council, either in deciding on principle that something ought to be paid, or in deciding on the *quantum* they should pay, was so unreasonable that this court ought to pronounce it as having been illegal, and, therefore, liable to surcharge.

GODDARD, L.J.: As we are affirming a unanimous judgment of the Divisional Court, and as LORD GREENE, M.R., has dealt with the matter so comprehensively in his judgment, with which I agree, I think it would be only superfluous for me to add anything; I, therefore, content myself with saying that the appeal fails.

DU PARCQ, L.J.: I also feel that it is unnecessary to add anything to what has been said by LORD GREENE, M.R. I think, if I may say so, Mr. Hurle-Hobbs presented powerfully as well as temperately arguments which had to be considered very seriously, and I have no doubt he felt it to be his duty to cause this question to be more fully inquired into. But, of course, it is one thing to say that powerful criticism is directed to the action of the council—that may be true in many cases; I daresay in many instances powerful criticisms are directed to the actions of the members of the council—but it is quite another thing to say that the council has not exercised its discretion according to law. For the reasons given by LORD GREENE, M.R., I am satisfied that Mr. Hurle-Hobbs has not succeeded in establishing that there was not here a reasonable and proper exercise of the discretion of the council.

Both appeals dismissed.

Solicitors: *Tudor & Rowe* (for the contractor); *O. L. Roberts*, Town Clerk, Lambeth Borough Council (for the members of the council); *Sharpe, Pritchard & Co.* (for the auditor).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

OFFICE CLEANING SERVICES, LTD. *v.* WESTMINSTER OFFICE CLEANING ASSOCIATION.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **July 28, 1944.**]

Trade Names—Passing off—Name merely descriptive of business—Fraud expressly negatived—Office Cleaning Services—Office Cleaning Association.

The plaintiffs, a limited liability company, formed in 1930, carried on the business of cleaning the interiors of offices and window cleaning under the name of "Office Cleaning Services, Ltd." The defendants and their predecessors were engaged since 1894 in a similar kind of business, trading since 1931 under the style "Westminster Office Cleaning Association." In 1942 the defendants omitted from their advertisements the word "Westminster" and carried on the office cleaning work under the style of "Office Cleaning Association." The plaintiffs sued for an injunction to restrain the defendants from using in connection with their business as contractors for the cleaning of offices the trading style "Office Cleaning Association" or any other style so closely resembling the name of the plaintiffs as to be calculated to lead to the defendants' business being confused by members of the public with that of the plaintiffs. The defendants denied that the trading style complained of was capable of producing confusion, contending that the words "Office Cleaning" were merely descriptive and, when read in conjunction with the word "Association," were sufficient to distinguish their title from the plaintiffs' title "Office Cleaning Services, Ltd." They further denied any intention to deceive by the omission of the word "Westminster" from their trading style, and it was found as a fact that there was no fraud:—

HELD: in the absence of any fraudulent intention the differentiation between the words "Services" and "Association" was sufficient to distinguish the defendants' business from that of the plaintiffs and the plaintiffs' claim should be dismissed.

[**EDITORIAL NOTE.** In the case of descriptive names, the court is reluctant to interfere even where the resemblance is very close. Here there has been a difference of opinion between the court of first instance and the Court of Appeal and the latter court has thought the matter of sufficient importance to give their reasons in a written judgment.

AS TO TRADE NAMES AND PASSING OFF, see HALSBURY, Hailsham Edn., Vol. 32, pp. 623-630, paras. 928-932; and FOR CASES, see DIGEST, Vol. 43, pp. 282-285, Nos. 1122-1142.]

Cases referred to:

(1) *Aerators, Ltd.* v. *Tollitt*, [1902] 2 Ch. 319; 9 Digest 64, *196*; 71 L.J.Ch. 727; 86 L.T. 651.

(2) *British Vacuum Cleaner Co., Ltd.* v. *New Vacuum Cleaner Co., Ltd.*, [1907] 2 Ch. 312; 9 Digest 65, *198*; 76 L.J.Ch. 511; 97 L.T. 201.

*(3) *Reddaway* v. *Banham*, [1896] A.C. 199; 43 Digest 277, *1098*; 65 L.J.Q.B. 381; 74 L.T. 289.

(4) *Cellular Clothing Co., Ltd.* v. *Maxton*, [1899] A.C. 326; 43 Digest 276, *1090*; 68 L.J.P.C. 72; 80 L.T. 809.

APPEAL by the defendants from an order of MORTON, J., dated Oct. 27, 1943. The facts are fully set out in the judgment of the court delivered by LUXMOORE, J.

F. W. Beney, K.C., and *E. L. Minty* for the appellants.

R. Burrell, K.C., and *J. Mould* for the respondents.

LUXMOORE, L.J. [delivering the judgment of the court]: On Feb. 11, 1943, the Office Cleaning Services, Ltd. (hereinafter referred to as the plaintiffs) instituted an action against the Westminster Window and General Cleaners, Ltd. (hereinafter referred to as the defendants) claiming an injunction to restrain the defendants from using in connection with their business as contractors for the cleaning of offices the trading style "Office Cleaning Association" or any other style so closely resembling the name of the plaintiffs as to be calculated to lead to the defendants' business being confused with the plaintiffs' business and to lead to members of the public utilising the services of the defendants' said business in the belief that they are utilising the services of the plaintiffs' business, and generally from passing off or attempting to pass off the defendants' said business as and for the plaintiffs' business, and for ancillary relief. The action was heard by MORTON, J. who granted the injunction sought and gave certain ancillary relief, including an inquiry as to damages. The defendants have appealed from this decision and claim that the judge's order be reversed and that judgment in the action be entered for the defendants with costs.

There is no dispute of fact. The plaintiffs were incorporated with limited liability under the Companies Acts on Oct. 10, 1930, to carry on the business of cleaning the interiors of office premises, and such business has always been carried on in association with the business of the New Century Window and General Cleaning Co., Ltd. The last-named company was incorporated in or about the year 1900 and its activities have been for all practical purposes confined to window cleaning, although to oblige a customer it occasionally undertook office cleaning work. The plaintiffs' business premises were until 1941 in Eagle Street, Holborn. In that year their business premises were destroyed by enemy action and they removed to Brownlow Street, where they still carry on their business.

The history of the defendants is as follows. In 1894 a man named Walker started business as a window cleaner under the style "The London and Westminster Window Cleaning Association." This business was carried on until July, 1922, when a limited liability company was incorporated to take it over. The name of the company was the London and Westminster Window Cleaning Association, Ltd. Soon after 1922 this company undertook and from time to time did office cleaning work, but its regular business was that of window cleaning. This company went into liquidation in January, 1931, when the defendants were incorporated to take over its business, but although the name of the old company was not adopted as the title of the new company, the use of the old title was continued in connection with some of the customers of the old company. In 1932 the defendants got their first contract for daily office cleaning, and about 1933 they started carrying on office cleaning business under the style "Westminster Office Cleaning Association." In 1942 the defendants omitted from their advertisements the word "Westminster" and carried on the office cleaning work under the style "Office Cleaning Association."

It will be observed that the plaintiffs' case is not based on the Companies Act, 1929, s. 17, which prohibits the registration of a company by a name which is identical with that by which a company in existence is already registered or so nearly resembles that name as to be calculated to deceive except in certain circumstances which it is not material to mention and, therefore, in order to obtain the relief sought, the plaintiffs must bring their case within the limits laid down by the general law relating to passing off. Although, as was pointed out by FARWELL, J., in *Aerators, Ltd.* v. *Tollitt* (1), at p. 324, and by PARKER, J., in *British Vacuum Cleaner Co., Ltd.* v. *New Vacuum Cleaner Co., Ltd.* (2), at p. 321, the principles which govern what we may call the ordinary cases of passing off, where the question is whether a trade name or a trade description or a description of a particular class of goods or get up of a particular class of goods is or is not likely to deceive, are, at any rate, extremely analogous to those to be considered under the Companies Act, 1929, s. 17, when the question to be determined is whether a trade name is likely to deceive having regard to the existence of a similar name on the register of companies. The foundation of the right to restrain the user of a similar name is the principle that no one is entitled to represent his business or goods as being the business or goods of another by whatever means that result may be achieved, and it makes no difference whether the representation be intentional or otherwise; but a distinction has been and must always be drawn between cases in which the trade name or the part of it in question consists of a word or words of ordinary use descriptive of the business carried on or the article dealt in and cases in which the word or words complained of is or are of the character of a fancy word or words and primarily have no relation to such business or article but only to the person carrying on the business or dealing in the article: see *per* PARKER, J., in *British Vacuum Cleaner Co., Ltd.* v. *New Vacuum Cleaner Co., Ltd.* (2), at p. 321. Of course, if it can be established that the descriptive word or words has or have acquired among the public, or that class of the public likely to deal with the business or goods in question, a subsidiary or secondary meaning denoting or connoting the business or the origin of the article, the person claiming to restrain the user of that word or those words can obtain the relief he seeks. This, we think, is plainly established by the decisions in such cases as *Reddaway* v.

Banham (3), and *Cellular Clothing Co.* v. *Maxton* (4), but the burden of establishing such fact is exceedingly difficult to discharge, as was pointed out by LORD SHAND in the last mentioned case where he said, at p. 340, in referring to *Reddaway* v. *Banham* (3):

> Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only—and, indeed, were it not for the decision in *Reddaway's* case (3), I should say this should be made altogether impossible.

It has often been pointed out by the courts that where the name under which a plaintiff trades is a descriptive one, the court is always reluctant to interfere even where the defendant has taken a name very closely resembling that of the plaintiff: see, for example, *Aerators, Ltd.* v. *Tollitt* (1), and consequently small differences have often been held to afford sufficient differentiation. Nevertheless, if the plaintiff can show that the name, though composed of descriptive elements, in fact distinguishes his firm or company, the court will restrain the improper use of such name or of a name so closely resembling it as to be calculated to deceive (see HALSBURY, LAWS OF ENGLAND, Hailsham Edn., Vol. 32, p. 628, and the cases cited in note (*t*)), and it is easier for a plaintiff to discharge the burden on him if he can prove that the defendants object is to produce confusion, and is, therefore, fraudulent.

In the present case MORTON, J., expressly negatived any deliberate intention to deceive on the part of the defendants in the assumption of the trading style of "Office Cleaning Association" after stating that, before he had heard the explanation given in the witness box by Pritchard, the managing director of the defendants, he had been extremely suspicious. Further, the plaintiffs admitted that the words "Office Cleaning" had not acquired any secondary meaning which would confine their user to the plaintiffs. They also admitted that there could be no objection to the user by the defendants of the words "Office Cleaning" if prefaced by the word "Westminster," as the last-mentioned word would be sufficient to distinguish the defendants' business from that of the plaintiffs, but the defendants are unwilling to continue to use that word because it suggests that their business is limited to the Westminster area, whereas it is carried on not only in that area but generally in London. We think this is not an unreasonable attitude for the defendants to adopt and that it affords a satisfactory explanation in the circumstances of the omission to use the word.

In the result the question to be determined is narrowed down to whether the word "association" when used in connection with the descriptive words "office cleaning" is sufficient to distinguish the defendants' title from that of the plaintiffs' "Office Cleaning Services, Ltd." It must be borne in mind that the plaintiffs have chosen to incorporate into their name the words "office cleaning" which are descriptive of the business they carry on, and, unless they are in a position to establish a monopoly of the use of those words on the ground that they have acquired a secondary or subsidiary meaning, we do not think they can obtain such a monopoly by reason of the fact that there is some risk of confusion if those words are also used by another. In the absence of any fraudulent intention, the cases appear to establish beyond controversy that a small differentiation is sufficient to defeat a plaintiff's claim. In the present case the most distinctive word used by the plaintiffs in their title is "services." The defendants have used in their title the word "association" which bears no resemblance in appearance or sense to the word "services." In our judgment in all the circumstances of this case this difference is sufficient to distinguish the defendants' business from that of the plaintiffs, and we, therefore, think that MORTON, J., should have dismissed the action. We, accordingly, allow the appeal with costs here and below.

Appeal allowed.

Solicitors: *Hardcastle Sanders & Co.* (for the appellants); *Maltz, Mitchell & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MAITLAND *v.* RAISBECK.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **July 10, 1944.**]

Nuisance—Unlighted vehicle on road in darkness—No negligence—Not ipso facto a nuisance.

The appellant was a passenger in an omnibus which in the dark ran into the back of a moving lorry, the rear light of which was not illuminated. The appellant brought an action against the omnibus company and the owner of the lorry for personal injuries sustained as a result of the accident. The appellant alleged negligence and also contended that, even in the absence of negligence on the part of the lorry driver, the fact that the rear light of the lorry was not illuminated made the lorry a nuisance. It was found as a fact that neither of the respondents was guilty of negligence and on appeal :—

Held : the fact that the light of the lorry was out at the time of necessity did not *ipso facto* and immediately create a nuisance.

[**EDITORIAL NOTE.** The advantage to the plaintiff in being able to sue in nuisance is well appreciated, but the general trend of the authorities goes to show that in accidents arising out of the use or presence of vehicles on the highway, this form of action is seldom open to the plaintiff. Generally speaking, such proceedings must be based on negligence, but this necessarily gives an added importance to the cases where a claim in nuisance has succeeded.

As to Nuisance on the Highway, see HALSBURY, Hailsham Edn., Vol. 16, pp. 354-363, paras. 483, 484 ; and for Cases, see DIGEST, Vol. 26, p. 437, Nos. 1545, 1546.]

Case referred to :

(1) *Ware* v. *Garston Haulage Co., Ltd.*, [1943] 2 All E.R. 558.

Appeal by the plaintiff from a decision of His Honour Judge Richardson dated Jan. 10, 1944. The facts are fully set out in the judgment of Lord Greene, M.R.

J. A. Petrie for the appellant.

F. W. Beney, K.C., and *A. Karmel* for the respondent.

Lord Greene, M.R. : It is no doubt a misfortune for the plaintiff in this action that, as things have turned out she has no remedy against either of the two defendants whom she sued. She was a passenger in a motor omnibus belonging to the defendants. That motor omnibus collided with a lorry belonging to the second defendant. On a dark night the lorry was proceeding slowly in the same direction as the omnibus, but its tail light was out. The plaintiff in those circumstances sued both defendants. Her case against the omnibus proprietor was dismissed because the county court judge found that the driver in the circumstances was not negligent, since he had no reasonable means of avoiding the accident. She, therefore, failed against the proprietors of the omnibus in which she was travelling and no appeal is brought to this court against that decision, as, indeed, no appeal could have been brought, as it depended purely on a finding of fact as to which there was ample evidence. She appeals against the decision in so far as it dismissed her claim against the second defendant, the owner of the lorry. The county court judge found that the tail light was in fact out at the time and had obviously been out for some minutes at the least. He acquitted the driver of the lorry of negligence in that respect. The driver said that he had had the tail light attended to, no doubt by a competent person, and he had no reason to suppose, at any rate so far as the evidence went, that it was not in perfectly good order. It was working all right when he first put his lights on and he did not know that it had gone out.

On the case as framed below that disposes of any question of negligence as against the owners of the lorry. No case of negligence was raised based on an allegation that the owners of the lorry put on the road a lorry with a defective lighting system, containing defects which with reasonable care they ought to have detected and put right. No such case was made, and the evidence clearly would be insufficient for us to draw any inference in that respect. Indeed, in opening the appeal counsel for the appellant did not attempt to put his case on any such ground. The ground on which he put it was purely that of nuisance, which was the second ground in the case against the lorry owners as made in the court below.

We must approach this question of nuisance on the footing of the judge's finding that there was no negligence on the part of the second defendants in respect of the extinction of this tail light; in other words, the tail light went out for some reason not referable to any negligence on the part of the lorry owners. It was, therefore, a misfortune which occurred to that particular lorry without their fault. It is argued that, quite apart from the driver's knowledge, or lack of knowledge, that the light was out, quite apart from any suggestion of negligence, the mere fact that the light on that lorry was out at the time of necessity turned that lorry into a nuisance on the highway. That is a proposition which the county court judge refused to accept and, in my opinion, he was perfectly right. Every person who uses the highway has to exercise due and proper care. He has a right to use the highway and, if something happens to him which in fact causes an obstruction to the highway but is in no way referable to his fault, it is quite impossible, in my view, to say that *ipso facto* and immediately a nuisance is created. It would be obviously created if he allows it to be an obstruction for an unreasonable time or in unreasonable circumstances, but the mere fact that it has become an obstruction cannot turn it into a nuisance. It must depend on the facts of each case as to whether or not a nuisance is created. If that were not so, it seems to me that every driver of a vehicle on the road would be turned into an insurer in respect of latent defects in his own machine. It might be a latent defect in the engine or the wheels which might cause the car or lorry to break down and remain stationary on the highway.

No authority is quoted for the proposition that such is the law except one case in this court. That was *Ware* v. *Garston Haulage Co., Ltd.* (1). I do not suppose I shall be saying anything which would be wrong if I say that I am perfectly certain that the members of the court on that occasion would have been extremely surprised to find that that case was going to be considered a case that ought to be reported as laying down some new principle of law. The report does not suggest that there was any argument on any authorities referred to. It was a case of very special facts and, in my opinion, it would be quite wrong, merely because this has got into the reports, to pick out of it sentences and treat them as of general application. In my opinion, the observations of SCOTT, L.J., which were concurred in by MACKINNON and GODDARD, L.JJ., were made in reference to the facts of that particular case. It so often happens that in the case of a judgment delivered *extempore* on special facts the language of the judge who is thinking of those facts is couched in words which, if taken out of their context, appear to have some general application. The facts of that case were as much unlike the facts of this case as any facts could be. A motor lorry with a trailer broke down on the highway early in the morning and remained there broken down all day long until nightfall. At nightfall, according to the men on the lorry, they tried the lights and found that they were all working. The judge had some suspicion about that, but anyhow they went away at 7 o'clock—this was in November, 1941, and I suppose it was after dark—to get some hurricane lamps. So they left it there all day long and while they were away the lamps went out. They were going to fetch hurricane lamps presumably to warn oncoming traffic. They had done nothing all day long in that respect and while they were away trying to get the hurricane lamps the lights were in fact out and the judge suspected strongly that they knew they were defective. They came and found that an accident had happened. There was a case where there was ample time for them to take all proper precautions to ensure that the accident which had occurred to them, for which they were not responsible, should not develop into a nuisance to the highway. Of course, if a person has an accident for which he is in no way responsible, the time may quite clearly come sooner or later when failure to take some appropriate steps on his part may render him liable for maintaining a nuisance to the highway. It was suggested that this case really said that *ipso facto* automatically and at once in the case of an accident which caused an obstruction a nuisance is created. The actual language of the judge, if taken literally and out of context with the facts might lead to the view that that was the law, but any such proposition as a general proposition would, in my judgment, run contrary to the law as recognised on the question of nuisance on highways. After all, in the case of a highway the user of the highway is entitled to use it in a reasonable manner and he is entitled to expect other people to do the same. But on the highway accidents happen when both parties have been reasonable and neither has misused the highway. If damage arises in those circumstances and there is no negligence, the person injured must put up with it. On the decision of this case, the driver of the bus having been acquitted of negligence, the driver of the lorry having been acquitted of negligence, there remains nothing but the allegation of nuisance and, in my opinion, on the facts of this case the county court judge was perfectly right in saying nuisance was not established. In the result therefore, the appeal must be dismissed.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal dismissed.

Solicitors: *W. Easton & Sons* (for the appellant); *R. I. Lewis & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

TROWER & SONS, LTD. *v.* RIPSTEIN (*since deceased*)

[Privy Council (Viscount Simon, L.C., Lord Macmillan, Lord Wright, Lord Porter and Lord Simonds), **July 22, 23, 24, 27, 1944.**]

Privy Council—Quebec—Practice—Writ of summons—Jurisdiction—Breach of a contract made in London—Action brought in Montreal—Writ not personally served—Code of Civil Procedure (Quebec), art. 94.

Privy Council—Quebec—Partnership—Agreement for payment of commission on orders obtained—Whether partnership agreement.

In 1927 the respondent entered into an agreement with a partnership firm in London, under the terms of which the firm were to open and maintain at their own expense an office in Montreal for the sale of their goods and the respondent was to use his best endeavours to introduce customers in Canada and the United States to the firm and was to be paid commission on orders obtained by him. Customers' payments for goods sold were to be made direct to the firm in London. The rights of the partnership firm were acquired in 1929 by the appellant, a company formed in London and having, at the date of the commencement of the action in question, no assets in the Province of Quebec and no place of business or domicil there. The original agreement was made in London and although it was varied and extended at different times, the action proceeded on the footing that the original agreement continued until 1937. The action was brought by the respondent in Montreal claiming that the agreement was a partnership agreement, and asking for an account and a partition of the assets of the partnership. The writ was not served personally on the appellant but the respondent applied for and obtained an order that the appellant should be called through the newspapers on the ground that it had no known place of business in Montreal or the Province of Quebec. On behalf of the respondent it was contended that the court had jurisdiction since the whole cause of action had arisen in Montreal, as required by the Code of Civil Procedure of the Province of Quebec, art. 94 (3):—

Held: (i) the agreement did not constitute a partnership, the defendant being an employee or agent of the firm or the company and receiving remuneration for services rendered.

(ii) except where such power is expressly conferred by legislation, a court has no jurisdiction over a person outside the jurisdiction who has not been personally served within it and who does not submit to the jurisdiction.

(iii) the action being based on a contract made in London, the whole cause of action did not arise in Montreal or the Province of Quebec, and art 94 (3) did not apply.

[**EDITORIAL NOTE.** A court normally has jurisdiction only over persons resident within its area. Jurisdiction beyond that area can only be acquired by special legislation or submission to the jurisdiction. The Quebec Courts have jurisdiction where the whole cause of action has arisen in the Province and the main contest in this case is whether the whole cause of action had arisen there. In the view of their Lordships, the Canadian Court had not given sufficient weight to the fact that the contract was made outside Quebec.

As to Cause of Action, see HALSBURY, Hailsham Edn., Vol. 1, pp. 8, 9, para. 9; and for Cases, see DIGEST, Vol. 1, pp. 13, 14, Nos. 104-113.]

Cases referred to:

*(1) *Berkley* v. *Thompson* (1884), 10 App. Cas. 45; 3 Digest 393, *312*; 54 L.J.M.C. 57; 52 L.T. 1.

*(2) *Read* v. *Brown* (1888), 22 Q.B.D. 128; 1 Digest 13, *107*; 58 L.J.Q.B. 120; 60 L.T. 250.

*(3) *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107; 1 Digest 13, *106*; 42 L.J.C.P. 98; 28 L.T. 32.

Appeal from a judgment of the Supreme Court of Canada (Rinfret, Crocket and Taschereau, JJ., Davis and Hudson, JJ., dissenting), dated Feb. 3, 1942, and allowing an appeal of the present respondent from a judgment of the Court of the King's Bench for the Province of Quebec (Appeal Side) (Letourneau, Hall, Galipeault, Walsh and Barclay, JJ.), dated Feb. 28, 1940, which had affirmed a judgment of the Superior Court for the District of Montreal (Decarie, J.), dated March 15, 1939, maintaining a preliminary or declinatory exception made by the present appellant and dismissing the action brought by the respondent against the appellant, on the ground that the Superior Court did not have jurisdiction. The facts are fully stated in the judgment of the Board delivered by Lord Wright.

Valentine Holmes and *G. Granville Slack* for the appellant company.

W. D. Roberts and *Mortimer Weinfield* (of the Canadian Bar) for the respondent.

Lord Wright: The appellant is a limited company formed in 1929 under the English Companies Act. At the date of the commencement of the action it had no assets in the Province of Quebec, and no place of business or domicil there. The action was brought against the appellant along with two other defendants Gillespie and Redpath, who were described as carrying on business together as partners under the firm name of Redpath & Co., in the district of Montreal. These two latter defendants are not parties to this appeal. In the action which was instituted by writ of summons in the Superior Court of the Province of Quebec in the district of Montreal the respondent claimed a declaration that an agreement, as afterwards varied and extended, was a partnership agreement in existence from Mar. 27, 1927, to Mar. 27, 1937, and asked for an account and a partition of the assets of the partnership and in default a sum of $225,000 as representing the respondent's share in the partition. The declaration also claimed that there had been breaches of the agreement and incorrect accounting by the defendants. The respondent on June 23, 1938, applied for an order that the appellant should be called through the newspapers on the ground that it had no known office or place of business in the City and District of Montreal nor in the Province of Quebec, nor any officer or representative in the Province. The order was made and appellant company was duly called through the newspapers. The writ was not served personally upon it. On Aug. 23, 1938, it entered an appearance without prejudice and on Sept. 1, 1938, it moved by way of declinatory exception that the action should be dismissed as against it on various grounds, in particular on the grounds that it was not domiciled in the district of the court, that the process had not been personally served upon it, that the whole cause of action was not alleged to have arisen in the district or elsewhere in the Province and did not in fact so arise, and that no property of the appellant was alleged to be or was in fact, situate in the district or Province. Such was the substance of the main objections founded upon in the declinatory exception when it came after various amendments before Decarie, J., sitting as a judge of the Superior Court for the District of Montreal. The question in debate was whether the court had jurisdiction under the Code of Civil Procedure of the Province of Quebec to summon the appellant. The Superior Court held that it had not, and its judgment was affirmed by the Court of King's Bench (Appeal Side) of the Province. But their decision was reversed by the Supreme Court of Canada by a majority, two judges dissenting. Hence the present appeal to His Majesty in Council.

The terms of the agreement on which the respondent's claim was based are to be found set out in a written document bearing date Mar. 27, 1927, expressed to be made between a partnership firm of Trower & Sons, carrying on business as wine merchants in the City of London and the defendant Gillespie and the respondent. In fact as it has been (rightly in their Lordships' judgment) found by DECARIE, J., and the Court of Appeal in Montreal, the actual agreement was made orally in London, between the partnership firm of Trower & Sons, the defendant Gillespie and the respondent, the two latter being represented by the defendant Redpath. The written agreement having been prepared in London and signed by the firm was forwarded to Montreal where it was signed by Gillespie and the respondent in or about Aug. 1927, but was dated back to March, 1927, from which date the parties had been doing business on its basis. The parties continued to do business on the terms of the agreement but when the appellant company was formed in 1929 it acquired the rights of Trower & Sons, and thereafter it was treated as taking their place in regard to the agreement. It is clear that this substitution must have involved a novation; the original agreement was changed in the sense that the parties were changed from some date in 1929. The evidence is defective because it does not show where that change was effected since it is the changed or new agreement on which the action was brought against the appellant, at least in regard to matters since 1929, nor is there any allegation in the proceedings to show this. Whatever changes however were made, the original agreement still remained a necessary fact to be proved as part of the cause of action. The case has proceeded on the footing that the original agreement which was made in London continued until it terminated in March, 1937, after being extended until that date.

The terms of the agreement may be summarised as follows. The firm were to open and maintain at their own expense an office in Montreal (the Canadian office as it was called) for the sale of their goods and were to appoint the defendant Redpath as manager of that office. The defendant Gillespie and the respondent were to use their best endeavours to introduce customers in Canada and the United States to the firm. They were to be paid commission on orders obtained by them. But customers' payments for goods sold were to be made direct to the firm's London office, which was to remit each month the commission due to the Canadian office. That commission was to be divided in equal thirds between the firm, Gillespie and the respondent. The commission was to be net, all expenses of the Canadian office, all expenses in Canada and the United States being debited to the Canadian office, that is to the firm or the appellant. At a later date the defendant Redpath was allotted a share of the commission, the shares of the other parties abating proportionately. It has not been suggested that wherever the variation of the agreement was made, the circumstance affects the issue in the particular proceedings, any more than the other variations of the agreement mentioned above.

It is clear in their Lordships' opinion that the agreement did not constitute a partnership. The business was not carried on in common by the parties but was the business first of the firm and later of the appellant. There was no sharing of profits and losses. The respondent and the defendants were employees or agents of the firm or the appellant. The share of net profit which they were to receive was their remuneration for the services which they rendered under the agreement. Their Lordships agree with the finding of both courts in Quebec that there was no partnership under the agreement. DAVIS, J., in his dissenting judgment in the Supreme Court also agreed. The majority in the Supreme Court did not find it necessary to decide the point. Their Lordships will proceed on the basis that no partnership was constituted under the Code of Civil Procedure of the Province of Quebec, and need not further consider any arguments which are based on the assumption that there was a partnership.

The articles of the Code which were particularly relied upon in these proceedings as giving jurisdiction to the court to order service on the appellant were arts. 27, 94, 102 and 103 of the Code. The trial judge held that the court had not jurisdiction under any of these articles. He held that the court had no jurisdiction under art. 94 (3) as the whole cause of action had not arisen in Montreal: that the court had no jurisdiction under art. 94 (4) as the appellant had no goods in the Province; and that the court had no jurisdiction under art. 94 (5) because the contract had been made orally in London. The appeal from his judgment was heard by five judges, who unanimously dismissed it. Their reasons for the decision were substantially in agreement. They all agreed that no one of the heads under art. 94 of the Code applied; the court was not the court of the appellant's domicil nor was it the court of the place where he was personally served, nor was it the court of the place where the whole cause of action had arisen, nor was it the court of the place where the whole or part of his property was situate, nor was it the court of the place where the contract was made. They held that art. 103 of the Code of Civil Procedure did not apply, and that art. 27 of the Civil Code was irrelevant.

On appeal to the Supreme Court, the judgment of the majority composed of Rinfret, Crocket, and Taschereau, JJ., was delivered by Rinfret, J. The judgment was primarily based on the conclusion that the whole cause of action as constituted had arisen in the City and District of Montreal, and hence under art. 94 (3) of the Code of Civil Procedure, the respondent was entitled to bring his action in that court. It held that whatever the nature of the agreement, the intention of the parties was that the whole business covered by it should be as it was, carried on in and from the Canadian office in Montreal even though the business had ramifications outside the district of Montreal and throughout the Province of Quebec, Canada and the United States. The business, it said, and the transactions in the course of it, originated in the Canadian office in Montreal, whence the goods were shipped and invoiced to customers and where books, records and accounts were kept. As an accounting of that business and of these transactions was what the respondent prayed for in his action, it should be decided that the whole cause of his action had arisen in Montreal.

Davis, J., who with Hudson, J., dissented, held that the whole cause of the action within art. 94 (3) meant all the material facts which must be proved in order to entitle the plaintiff in the action to recover and that all these facts must have arisen within the jurisdiction of the court. He held that in this case :

> . . . the making or assuming of a contract by the company, the receipt of payments by the company in London from Canadian and American sales, the failure of the company to remit from London to Montreal certain commissions on these sales and probably other facts necessary to establish the alleged cause of action did not arise within the jurisdiction of the Quebec Court.

He was for dismissing the appeal. Hudson, J., was of the same opinion. He said that " the whole cause of action " referred to in art. 94 (3) must signify all the facts, causes, moyens and motifs alleged in the declaration which, if traversed, must be proved. This interpretation, he said, had been placed on the article by many decisions in the Court of Quebec. While he agreed with Rinfret, J., that the place from where the services rendered by the plaintiff radiated was Montreal which was also the place where the accounts were kept and where the eventual division of profits was to be made, he went on to observe that the contract itself was made in London, England, and moneys collected as a consequence of the plaintiff's work were collected by the appellant in London, and though the plaintiff asked for an accounting in respect of business done at or through Montreal, yet he also asked for an accounting by the appellant in respect of all transactions under the agreement whether in Canada or the United States of America or England. Hudson, J., held accordingly that the whole cause of action could not be said to have arisen within the district of Montreal and was for dismissing the appeal.

With all respect to the three judges of the Supreme Court who formed the majority in that court, their Lordships are unable to concur in their decision despite the forcible reasoning in support of it expounded by Rinfret, J. The question here is whether the court has power in the circumstances of this case to exercise jurisdiction over a person or corporation not personally served within it. If a party has been personally served within the jursidiction, even though merely temporarily there, the jurisdiction of the court is generally established. But a court will not generally be entitled to assume jurisdiction over a person who is outside the jurisdiction and has not been formally served within it and who does not submit to the jurisdiction. If that power is to be exercised, it must be given to the court by legislation. Thus it was stated in *Berkley* v. *Thompson* (1), at p. 49, by the Earl of Selborne, L.C. :

> . . . the general principle of law is " *Actor sequitur forum rei* " ; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal ; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it.

If he is found within the jurisdiction of the court and served there he will generally be bound by the process; equally, he may be bound if he submits to the jurisdiction. But otherwise the court has no power unless it is expressly conferred upon it. It is not a question of practice but of jurisdiction, whether the court has the power to serve a summons on a party resident abroad, so that the party may be brought within the jurisdiction of what is to him a foreign court. The exercise of the power involves the exercise of extra-territorial jurisdiction. In England, the power depends on R.S.C., Ord. XI, which has the force of a statute. In Quebec it is conferred by articles of the Code of Civil Procedure of the Province. The court is strictly bound by the terms of these articles. It has no general power to proceed on what might be described as the "equity" of the articles. It cannot, because, in the particular case before it, it would be more convenient to apply some other rule than can be found on the true interpretation of the articles, depart from or amplify their meaning. It has no discretionary power to go outside the terms of the articles, merely because in its opinion it would be the *forum conveniens.*

In the elaborate judgments of the judges of the Appeal Court of the Province, a careful examination was made of the terms of the relevant articles of the Code, supported by a copious citation of authority. Their Lordships have examined these authorities which seem to them amply to justify what the appeal judges said, in particular in respect of the subclauses of art. 94 which were principally relied upon. When the appeal came before the Supreme Court, the argument seems to have become concentrated for all practical purposes (as indeed it was before this Board) on art. 94 (3) in which power is given to summon a defendant "before the court of the place where the whole cause of action has arisen." Now it is clear from the series of decisions cited in the Appeal Court that these words have been consistently construed according to their natural meaning, which is well expressed in the language of Davis, J., and of Hudson, J., already quoted by their Lordships in this judgment. There is no strict parallel in English law to aid in the construction of this sub-article of the Code, because R.S.C., Ord. XI, which defines the power of allowing service out of the jurisdiction, does not contain the same phrase or impose the same condition. But the words or analogous words have been used for the purpose of defining the jurisdiction of some local courts. Thus, in *Read* v. *Brown* (2), the phrase to be construed was "a cause of action arising in the city." That was defined, at p. 131, as meaning:

> . . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

Such was the definition given by Lord Esher, M.R., which followed a similar decision given in *Cooke* v. *Gill* (3), and earlier decisions. As it is a question of jurisdiction, the court must be satisfied that the conditions which justify its exercise are satisfied. Lord Esher's definition agrees with the definitions given by Davis, and Hudson, JJ., which have already been cited and with the definitions given by the judges in the appeal in Quebec. It also agrees with the definitions given by numerous judges in the authorities cited, in particular by Hall, Walsh, and Barclay, JJ., in their judgments. In the judgment delivered by Rinfret, J., their Lordships do not find any precise definition. But he seems to accept or approach one in his words:

> . . . all the essential facts which together gave rise to the action brought by the appellant [that is the then appellant, the present respondent] or in other words the whole cause of action has arisen in the City and District of Montreal.

But the action was based on a contract, and in their Lordships' opinion, it is impossible to treat the place where the original contract was made as immaterial in the way that Rinfret, J., does. It was in their Lordships' view an element in the definition of "the whole cause of action." He does indeed enumerate a number of acts or things necessarily occurring in the course of the transactions which occurred in Montreal, but against this may be set the lists given by Davis, and Hudson, JJ., of matters which took place outside Montreal and which it was necessary to prove in order to establish the cause of action. The Supreme Court may have been influenced by considering that the action was for an accounting and that as the books of the Canadian office and other material papers and accounts were kept in Montreal, Montreal was the more convenient forum. But in their Lordships' opinion, even if that were so, it is not, as they have explained, the true test. It is not necessary again to refer to the many material elements in the conduct of the business which took place outside Montreal, and constituted part of the cause of action.

Their Lordships, with all respect, are unable to concur with the views of the majority of the Supreme Court. In their judgment the views of the minority of that court and of all the judges in the courts below were correct and should be affirmed.

Two other minor points only call for mention at this stage. One is in reference to art. 103 of the Code, which as it then stood, DAVIS, J., rightly construed as meaning by "districts," judicial districts within the Province of Quebec. He rightly said it had no application to a person resident outside that Province. Since then the article has been amended by the Quebec legislature, by the Act (1943) 7 Geo. VI, c. 47, s. 5, and may sometime call for consideration in its new form. The other point is that art. 27 of the Civil Code is not dealing with service outside the jurisdiction. It is merely a general provision to show that aliens are not as such exempt in proper cases from the jurisdiction of the courts of the Province.

On the whole case their Lordships are of opinion that the appeal should be allowed and the judgments of the Quebec courts restored. The respondent will pay the costs of the appeal and of the proceedings in the courts below. They will humbly so advise His Majesty.

Appeal allowed.

Solicitors: *Simmons & Simmons* (for the appellant company); *J. M. Isaacs* (for the respondent.)

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

J. H. BEAN (H.M. INSPECTOR OF TAXES) *v.* DONCASTER AMALGAMATED COLLIERIES, LTD.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Uthwatt, J.), **July 26, 1944.**]

Income Tax—Deduction against profits—Coal mine—Statutory obligation to remedy damage to district drainage system resulting from subsidence—Contribution to scheme releasing mine owner from statutory obligation—Contribution payable by instalments—Whether capital or revenue expense.

The respondent company was a mineowner which proposed to mine coal in a certain seam. Before it could do so it would have been necessary to provide for remedial works in order to carry out its obligations, imposed by the Dun Area Drainage Act, 1929, s. 9, to obviate or remedy any decrease in the efficient working of the drainage system in the district which resulted from the working of minerals. The company arrived at a preliminary estimate of £68,000 as being their expenditure for this purpose. But before operations were commenced the Dun Drainage Commissioners proposed a joint scheme of extensive drainage works which would in effect procure for the respondents immunity from all the duties and liabilities of the Doncaster Drainage Act, 1929, including the possibility of injunctions of a far-reaching character. The respondents were asked to contribute to this scheme £39,000 payable by instalments over a number of years. The question for the decision of the court was whether these sums were revenue or capital expenditure:—

HELD: the contribution to the scheme secured an enduring advantage for the respondents' business and should be regarded as a capital expenditure for the purposes of income tax.

Decision of MACNAGHTEN, J. ([1944] 1 All E.R. 621) *reversed.*

[**EDITORIAL NOTE.** The importance of this case lies in the discussion by the court of the question how far an appeal can be brought upon a decision that a certain expense is a capital or income expense. That depends upon whether such a decision is one upon a question of fact or of law. Facts similar to those in the present case will not often occur, but the question how far such a decision of the Commissioners can be reviewed by the court is one of some difficulty. The point is carefully considered herein by du Parcq, L.J.

As to Expenses of Mines, see HALSBURY, Hailsham Edn., Vol. 17, p. 141, paras. 290, 291; and for Cases, see DIGEST, Vol. 28, pp. 42-56, Nos. 215-283.]

Cases referred to:

*(1) *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205; Digest Supp.; 10 Tax Cas. 155.

(2) *Vallambrosa Rubber Co., Ltd.* v. *Farmer* (*Surveyor of Taxes*) (1910), 5 Tax Cas. 529; 28 Digest 44, k.

(3) *Bonner* v. *Basset Mines, Ltd.* (1912), 6 Tax Cas. 146; 28 Digest 48, *248*; 108 L.T. 764.

(4) *Ounsworth* v. *Vickers, Ltd.*, [1915] 3 K.B. 267; 28 Digest 48, *251*; 84 L.J.K.B. 2036; 113 L.T. 865; 6 Tax Cas. 671.

(5) *Addie* (*Robert*) *& Sons Collieries* v. *Inland Revenue Comrs.*, [1924] S.C. 231; Digest Supp.; 8 Tax Cas. 671.

(6) *United Collieries, Ltd.* v. *Inland Revenue Comrs.* (1930), 12 Tax Cas. 1248; (1930) S.C. 215.

(7) *Mallett* v. *Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405; Digest Supp.; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772.

(8) *Boyce* v. *Whitwick Colliery Co., Ltd., Coalville Urban District Council* v. *Boyce* (1934), 18 Tax Cas. 655; Digest Supp.; 151 L.T. 464.

(9) *Anglo-Persian Oil Co., Ltd.* v. *Dale* (1931), 16 Tax Cas. 253; *on appeal*, [1932] 1 K.B. 124; Digest Supp.; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253.

(10) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.*, [1914] 2 K.B. 891.

*(11) *Van den Berghs, Ltd.* v. *Clark*, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390.

(12) *Ducker* v. *Rees Roturbo Development Syndicate, etc.*, [1928] A.C. 132; Digest Supp.; 97 L.J.K.B. 317; 138 L.T. 598; *sub nom. Rees Roturbo Development Syndicate, Ltd.* v. *Ducker, etc.*, 13 Tax Cas. 366; *revsg.*, [1928] 1 K.B. 506.

Appeal by the Crown from a decision of Macnaghten, J., dated Mar. 28, 1944, and reported [1944] 1 All E.R. 621, where the facts are fully set out.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the appellant.

F. Heyworth Talbot for the respondents.

Scott, L.J.: This appeal raises the question of the distinction between capital and income, a familiar problem in income tax law and one which is easily stated, but often not easily solved. The Commissioners decided, and Macnaghten, J., agreed with them, that a lump sum of £39,000 which the respondents in September, 1939, agreed to pay to the Dun Drainage Commissioners (to whom I will refer as the Drainage Board), was not an expenditure of capital, but a revenue payment, properly treated by the company as an expense to be deducted in calculating the company's income for assessment. The company had agreed to pay it as their contribution to a joint drainage scheme promoted by the Drainage Board to which they and Barber Walker & Co., Ltd., the owners of the Bentley Colliery, lying two or three miles to the eastward of the respondents' Brodsworth Main Colliery, had agreed. The Crown contends that it was a capital expenditure and could not be deducted, and therefore appeals. The special case states the facts very fully and quite clearly, and it is not necessary to restate more than the salient points. The part of the South Yorkshire coalfield, with which the appeal is concerned, is low lying, and receives a considerable influx of upland water from the north and north-west, which has to find its way to the sea by water courses leading to the river Don. The coal seams are worked longwall, and the whole of the coal is thus extracted, with the inevitable result of a general lowering of the surface, and the dislocation of all surface drainage. This effect is not limited to the area vertically above the area of extraction, but to a degree dependent on the dip and depth of seam, and may extend a considerable distance beyond the vertical from the advancing face of the working. The Drainage Board came into existence as a statutory body in 1873 and on the passing of the Land Drainage Act, 1930, became also an internal drainage board within the area of the River Ouse Catchment Board. The Doncaster Area Drainage Act, 1929, was passed (*inter alia*) to deal with the additional complications of surface drainage caused by mining subsidence. It set up the Doncaster District

Drainage Board; and by a series of sections (conveniently set out in Annex C to the special case) imposed on the respondents and other mineworkers the duty of constructing and maintaining such works as might be "reasonably necessary to obviate or remedy any loss of efficiency in the drainage works" of the Doncaster district. This duty is obviously of a very onerous character, and might easily entail very heavy capital expenditure, not only in raising the banks of many miles of watercourses, or in constructing new raised channels, but also in erecting, maintaining and working expensive pumping stations: see particularly sect. 9 (1), (3) and (5) of that Act. In addition, by sect. 10 the Act called for the establishment and maintenance of a capital fund for such purposes in perpetuity; sect. 11 gave the Doncaster District Drainage Board default powers of a drastic kind. An amending Act in 1933 kept the above powers and duties alive, and gave jurisdiction to the Railway and Canal Commission to enquire into and enforce the proper maintenance of the drainage fund directed by the 1929 Act. It is not necessary for present purposes to consider the statutory position in the matter of the River Ouse Catchment Board.

By 1937 the respondents had extracted the whole of the coal from large areas of the Barnsley Seam, and had carried their faces in the Parkgate Seam, which underlies the Barnsley Seam, to within a distance of from 400 to 600 yds. of an important watercourse known as the Mill Brook, which there ran roughly parallel to the London & North Eastern Railway main line. To the eastward of the Parkgate face there lay some five million tons of workable coal in that seam, enough to occupy the respondents for six or seven years of continuous working. That coal could not be worked at all, unless the respondents carried out very extensive drainage works on the surface under the Acts of 1929 and 1933. The coal was theirs, but it was forbidden ground. They therefore started to think out the necessary "remedial works" on the surface to enable them to get the coal without upsetting the drainage system of the surface. They arrived at a preliminary estimate of £68,000. That expenditure was the essential condition of their even beginning to get the coal. It was as if stranger owners of the surface had possessed an absolute right of support, but had offered to give it up for a lump sum payment of £68,000; or as if that coal had by experimental boring been found to have been displaced by a huge fault, entailing either the sinking of a new shaft, or driving long tunnels through the rock. In each of such cases the expense would be preliminary to the commencement of working the area in question; and, like preliminary expenditure at the outset of a colliery's life, would be of a capital nature. The expenditure of the £68,000 in order to make possible the future working of the 5 million tons area would have been in my opinion exactly similar in principle.

That being the position, what happened next was a proposal from the Drainage Board of a joint scheme of extensive drainage works, including five pumping stations, to be carried out by the Board, over a wider area, but relieving the respondents of the £68,000 liability. To this the two colliery companies were asked to contribute, the amount to be found by the respondents being £39,000. The respondents naturally accepted the proposal; it brought the 5 million tons of Parkgate coal into immediate accessibility instead of their remaining wholly inaccessible without a previous expenditure by them of £68,000. In addition, it procured for the respondents immunity from all the onerous duties and liabilities of the Doncaster Area Drainage Acts, to which I have already referred, including unpleasant possibilities of injunctions of a far-reaching character. The agreement with its £39,000 expenditure thus procured for the respondents two "enduring advantages." The first was in effect a large new acquisition of workable coal—for the company's proprietary rights had no commercial reality, unless the surface drainage was maintained in accordance with the Acts. The second was permanent immunity from all the continuing expenditure entailed by the obligations of those Acts. Each of those two considerations is, in my opinion, sufficient by itself to constitute the expenditure in question a capital and not a revenue item in the respondents' accounts; and it is on that accountancy test that the solution of the problem must nearly always depend.

It will be observed that the only legal touchstone I have used in the above reasoning is Lord Cave's helpful phrase, "an enduring advantage," applied by him in *Atherton* v. *British Insulated and Helsby Cables, Ltd.* (1), which he there treated not as an exhaustive definition, but as a useful guide. Another such guide is that of LORD DUNEDIN, when Lord President, in *Vallambrosa Rubber Co., Ltd.* v. *Farmer* (2), at p. 536 : "what is going to be spent once and for all." In *Bonner* v. *Basset Mines, Ltd.* (3), HORRIDGE, J., at pp. 150-1, overruling the commissioners, held that the deepening of a shaft, being a necessary preliminary to future working, was a capital expense. In *Ounsworth* v. *Vickers, Ltd.* (4), ROWLATT, J., at pp. 274-6, regarded the works carried out in the sea channel leading to the company's shipbuilding yard as involving capital expenditure because it was :

> . . . not to be put against any particular work but was to be regarded as enduring expenditure to serve the business as a whole.

This anticipates LORD CAVE's "enduring advantage." In *Addie (Robert) & Sons Collieries* v. *I.R.C.* (5), the purchase from lessors of the right to leave surface ground, which had been damaged by the lessees' operations, unrestored without paying the 30 years of rent called for by the lease for that privilege was treated as a capital expense. In the *Atherton* case (1), the whole of pp. 212-4 of LORD CAVE's judgment is exactly relevant. In *United Collieries, Ltd.* v. *I.R.C.* (6), the unwatering of a pit was treated as a capital expense : see *per* the LORD PRESIDENT at p. 1253 and LORD BLACKBURN at p. 1254. In *Mallett* v. *Staveley Coal & Iron Co., Ltd.* (7), ROWLATT, J., at p. 410, treated the payment for the surrender of coal seams as being on the clearest possible principles a capital transaction, and SARGANT, L.J., on pp. 419-420, expressed similar views. In *Boyce* v. *Whitwick Colliery Co., Ltd.* (8), the company had contracted to erect waterworks to supply the council with water, under which the council were to defray the cost incurred by the company by a series of instalments, including interest over a period of 30 years. It was held that the total cost payable to the company was a capital item, and that the provision for the discharge of the debt by annual instalments did not change its nature : see *per* ROMER, L.J., at p. 686.

In many of these cases the courts differed from the conclusion at which the Commissioners had arrived, but the reasoning of the judgments shows that the ground on which they differed was that, whilst accepting the findings of fact, they took the view that the Commissioners had drawn legally erroneous inferences through misunderstanding the difference in law between a capital item and a revenue item in the accounts of the particular business. The truth is that it must of necessity happen very often that the line to be drawn between the two types of item which is distinct in law is made indistinct in the particular case by reason of some of the facts under investigation seeming to point the other way. Between pure white on the one side and jet black on the other side is a penumbra of grey shading off gradually into white and black respectively. Within this penumbra there must, of course, often lie cases where the decision is one of fact for the Commissioners ; but in others it will depend on the correct appreciation of the true character in law of some one or more of the facts. Where it is clear to the court that the Commissioners have mis-read that character, the decision in law rests with the court. Nearly all the cases I have cited are illustrations of this sort of legal discrimination. As Mr. Justice O. W. HOLMES said so often, it is the business of the courts to decide on which side of the line the particular case must be placed ; with the result that the penumbra is always shrinking in width as the law draws the line more and more clearly. The reasoning in the case of *Anglo-Persian Oil Co., Ltd.* v. *Dale* (9), where the Commissioners held that the payment of £300,000 in commutation of the obligation of the company to pay annual commissions was a capital payment, but the courts held that the mere fact of the discharge of the many revenue payments by one lump sum payment did not change the quality of the payment, is a good illustration of the process of discrimination between fact and law, which I have been endeavouring to describe. The issue of "capital versus income" is not necessarily or even often a pure question of law, although that seems to have been said incidentally by one member of the Court of Appeal in that case. The facts of each particular case—often complicated or difficult to understand in relation to the business under consideration—have always to be ascertained and considered before the final conclusion of law can be reached ; and that process may often call for inferences of fact by the Commissioners from which the court may properly decline to differ. The reasoning of ROWLATT, J., in the *Anglo-Persian* case (9), on pp. 261-2, illustrates the attitude of the court which seems to me right on these mixed questions of fact and law which so often arise.

In the present case the Commissioners found such facts as in my opinion compel the court to say that the item of £39,000 was in law a capital liability and that each instalment payment was a capital expenditure.

The appeal must be allowed, the judgment below discharged, and the Commissioners directed to adjust the assessments accordingly.

DU PARCQ, L.J.: The respondents to this appeal, to whom I will refer as
A the company, appealed to the Commissioners against assessments to income tax under Case I of Sched. D for the years 1940-41 and 1941-42. The rule applicable to Case I provides that the tax "shall be computed on the full amount of the balance of the profits or gains" in the accounting period. The question whether a particular item is properly deductible in order to arrive at the required "balance" is often a matter of controversy. The legislature has not thought it
B necessary to provide any guidance for its solution. The intention of parliament clearly is that such items should be deducted as the trader should normally deduct in order to ascertain his profits or gains. LORD SUMNER, in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (10), at p. 468, said that a deduction:

> . . . is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it.

C The facts of the present case have been found by the Commissioners and are set out in the case stated. There is no doubt that this court is bound, as was MACNAGHTEN, J., to accept those findings of fact as correct. No appeal lies from the Commissioners unless their determination is "erroneous in point of law" (Income Tax Act, 1918, s. 149). Counsel for the respondents devoted part of his most able and lucid argument to a contention that the Commissioners
D could not be shown to have erred in point of law, and that contention cannot be answered offhand by saying that we think that the Commissioners were wrong. We must be sure that there was indeed an error of law.

The submission of counsel for the respondents derived some support from the words of VISCOUNT CAVE, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.* (1), at p. 213. There, as here, the question was whether a sum expended was "in substance a revenue or a capital expenditure." At p. 213
E VISCOUNT CAVE, L.C., said:

> This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case.

In the case then before the House there had been no express finding by the Commissioners, and VISCOUNT CAVE, L.C., went on to say, at p. 213, that, in the absence of such a finding, the question:

F
> . . . must be determined by the courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities.

It seems to follow that, even if there had been a finding by the Commissioners, the House of Lords would have felt themselves free to review it, if it had not commended itself to them. Further, it was pointed out by the Solicitor-General that in the more recent case of *Van den Berghs, Ltd.* v. *Clark* (11), the dis-
G tinction between a capital disbursement and an income disbursement, for income tax purposes, seems to have been regarded by the House of Lords as a question of law even in those borderline cases to which LORD MACMILLAN referred in his speech at p. 438.

A borderline case is one in which the opinions of traders and even of accountants may be expected sometimes to differ. In such cases the task of assigning a sum expended to income or capital may, as LORD MACMILLAN said, "become
H one of much refinement." Apart from authority, it might have been thought that the answer given by Commissioners to the question propounded in these doubtful cases would be a finding of fact which the courts would have no jurisdiction to disturb. There might even be found some persons bold enough to say that a judge was not to be assumed to be better qualified to resolve such a problem than a skilled trader or accountant, or a body of Commissioners. It seems clear, however, that in both the cases to which I have referred, the House of Lords regarded the question as one which, although its solution depended (as the solution of every problem must depend) on the facts found, was ultimately

a question of law. This view of the matter may be expressed by saying that, when once the facts have been ascertained, then only one answer to the question posed can be right. Opinions may differ, but that is not to say that more than one of the differing opinions can be correct. Unless the Commissioners, having found the relevant facts and put to themselves the proper question, have proceeded to give the right answer, they may be said, on this view, to have erred in point of law. If an inference from facts does not logically accord with and follow from them, then one must say that there is no evidence to support it. To come to a conclusion which there is no evidence to support is to make an error in law. Thus the courts have assumed, and must continue to bear, the burden of laying down the principles on which traders should keep their accounts in order to arrive at the balance of their profits for the purposes of taxation, and, as Viscount Cave, L.C., said, due regard must be paid to the principles which the authorities have laid down. Many instances may be given of "questions of fact" which have been held to admit of more answers than one, in the sense that the appropriate tribunal cannot be said to have made an error in point of law unless it has hit on an answer so wide off the mark that, on the available evidence, no reasonable man could have given it. On the authorities it is, in my opinion, impossible to regard the particular question which this case raises as one of that class, however much one might have been tempted, apart from authority, to do so. It remains true, I think, that in the words of Scrutton, L.J., in *Rees Roturbo Development Syndicate, Ltd.* v. *Commissioners of Inland Revenue* (12), at p. 517 :

> . . . it is impossible to reconcile the various statements of high authorities on the division between fact which is unappealable and law which is appealable.

The Commissioners, it is now conceded, based their conclusion on a wrong interpretation of the facts when they said that the payments in question were made "in order to fulfil their (the company's) obligations under the Doncaster Area Drainage Act, 1929," so that, if the matter were one solely for their decision, it would probably have been necessary to remit the case to them. On the view which I have stated, however, no purpose would be served by remitting it, and this court must determine the question for itself.

With great respect to Macnaghten, J., and with sincere diffidence, I have come to the conclusion that, though the case may be near the borderline, the expenditure in question falls within the words of the test laid down by Viscount Cave, L.C., in *Atherton's* case (1). It appears to me that the company has acquired by this expenditure an advantage for the enduring benefit of its trade, since thereby it has been enabled to work about 5,000,000 tons of coal over a period of six or seven years. It seems to me to be more reasonable to regard this as capital expenditure than as a mere outlay for the purpose of earning profits in the normal course of business.

For these reasons I am of opinion that the appeal should be allowed.

Uthwatt, J.: The obligations of the company under the Doncaster Area Drainage Act, 1929, s. 9, were first to construct and maintain such works and to do such things as were necessary to obviate or remedy any loss of efficiency in the drainage system and works of the Doncaster district due to subsidence which resulted or might result from the working of minerals by the company (sect. 9), and second (subject to sect. 10 (5)), to set up a fund sufficient by its income to provide the sums necessary for the maintenance so far as was reasonably necessary of any such works after the mine had ceased to be worked, and to hold the capital of that fund in trust for the Board (sect. 10). The agreement of Sept. 21, 1939, did not affect to release the company from either of these obligations, but the execution of the works provided for by that agreement which were to be maintained in perpetuity by the Board would (save that possibly later some further works might be necessary) get rid of the need for works occasioned by the mining of coal near Mill Dyke. The result of the execution of the works pursuant to the agreement was that the working of some 5 million tons of coal was, in the words of the Commissioners, "rendered practicable"—that is, the consequences of subsidence with its attendant liabilities under the Act could for practical purposes be disregarded.

No evidence was given as to the proper accountancy practice in the case of a transaction such as the present, and I apprehend that, as the mine was a wasting asset and the actual payments were to be spread over a period of years, the effect of the transaction might be dealt with in the company's accounts in many ways. But I cannot imagine that, under any system of commercial accountancy the increase in value accruing to the company's mines as the result of the agreement would appear as a credit in the trading account or the profit and loss account, and, in my view, proper commercial accountancy would permit that increase (which might or might not correspond with the sum paid) to be reflected in the capital accounts of the company by an appropriate addition to any value theretofore rightly attributed in those accounts to the coal measures the working of which was, as the result of the agreement, "rendered practicable."

Putting aside any question of accountancy practice, the result of the transaction clearly was that the value of the particular coal measures—a capital asset remaining unchanged in character—was increased both for use and exchange. There was, therefore, as the result of the transaction, brought into existence, not, indeed, an asset, but "an advantage for the enduring benefit of the trade of the company": see *Atherton's* case (1), *per* VISCOUNT CAVE, L.C., at p. 213. Applying that principle, I am of the opinion that the payments to be made under the agreement represent a capital expenditure which ought not to be deducted in computing profits or gains unless there are some special circumstances leading to a contrary conclusion.

I do not see that there are any such special circumstances. The payments to be made are, indeed, level payments spread over a period of thirty years, but no stress can be, nor, indeed, was laid on that fact, for it was the agreed method of satisfying an initial liability fixed at £39,000. None of the works provided for by the agreement were to be carried out on the property of the company. That is immaterial, for the company got an advantage from the works. Further, it is true that the coal measures benefited by the payment might be worked out in some six or seven years, but they were a capital asset. Again, the occasion for the transaction did not arise as incident to the actual working of the coal and the liability incurred was not in any real sense a working expense incurred by the company. Lastly, if for the purpose of determining the nature of the payment it is related to the liabilities of the colliery company under the Act, then, as I have said, the transaction obviates not only the doing of preventive and remedial works arising in connection with subsidence, but also the setting up of capital funds the income of which would be applicable for maintenance of those works and the capital of which would be held on trust for the Board. The transaction is singularly like the redemption of a capital charge on the company's undertaking, and that is obviously a capital expense.

For these reasons I am of the opinion that the sums are not deductible in ascertaining profits and gains, and that the appeal should be allowed.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Bird & Bird*, agents for *C. M. H. Glover*, Doncaster (for the respondent company).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*].

LEVER BROS. AND UNILEVER, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Macnaghten, J.), **June 6, 1944.**]

Revenue—Excess profits tax—Capital employed in chargeable accounting period—Contribution to superannuation fund to equalise benefits for employees—Whether company had acquired an asset in consideration of contribution—"Asset"—Finance (No. 2) Act 1939 (*c.* 109), *s.* 13 (3), *Sched.* 7, *Pt.* II, *para.* 1.

The appellant company acquired a controlling interest in two trading companies, Van den Berghs, Ltd., and Jurgens, Ltd. The former had an established contributory superannuation fund for the benefit of its staff. The employees of Jurgens, Ltd., were admitted to the fund as if they had been contributors to the fund from the commencement of their service with Jurgens, Ltd. The benefits of the employees of the appellant company were calculated as from the date when they were admitted to the fund. In order to remove the disparity, the appellant company agreed to pay the trustees of the fund the sum of £1,026,526 8*s.* in two payments. The respondents contended that, in consequence of the payment made by the appellants in the year 1940, the average amount of the capital employed in their business during that year was less than the average amount of the capital employed in the standard period and that, by virtue of the Finance (No. 2) Act, 1939, s. 13 (3), for the purposes of excess profits tax, the standard profits for that year must be decreased by the prescribed percentage :—

Held : by making the payment to the trustees of the superannuation fund the appellants obtained benefits for their employees which would make them more content with their employment and the appellants had, therefore, acquired an "asset" within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, para. 1, which had to be taken into consideration in computing the capital employed in the business.

[**EDITORIAL NOTE.** This case turns upon the meaning of the word "asset" in the Act imposing excess profits tax and it is given a wide meaning, being held to include an increase of the contentment of the employees with the employment.

For the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, Para. 1, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1221.]

Appeal by the taxpayer from a decision of the Special Commissioners. The facts are fully set out in the judgment.

J. Millard Tucker, K.C., and *Heyworth Talbot* for the appellant.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

Macnaghten, J. : The excess profits tax imposed by the Finance (No. 2) Act, 1939, ss. 12-22, is a tax on the amount whereby the profits of a trade or business in a chargeable accounting period, *i.e.*, the period for which an assessment to the tax may be made, exceed its standard profits ; and it was provided by sect. 13 (3) of the Act that, if, in any chargeable accounting period, the average amount of the capital employed in the trade or business is greater or less than the average amount of the capital employed therein in the standard period, the standard profits for a full year shall, in relation to that chargeable accounting period, be increased or decreased, as the case may be, by a prescribed percentage of the increase or decrease of the average amount of capital employed in the trade or business.

The question at issue on this appeal arises with regard to the assessment to excess profits tax made upon the appellant, Lever Bros. & Unilever, Ltd., for the chargeable accounting period, Jan. 1 to Dec. 31, 1940.

The respondents contend—and their contention has been upheld by the Special Commissioners—that, in consequence of certain payments made by the appellant in that year to the trustees of a superannuation fund, the average amount of the capital employed in the business of the appellant during 1940 was less than the average amount of the capital employed therein in the standard period, and that the standard profits for that year must, therefore, for the purposes of the assessment in question be decreased by the prescribed percentage (which in that case would be 6 per cent.) of the decrease in the average amount of the capital employed.

On the other hand, the appellant contends that, since it obtained value for the payments made to the superannuation fund, there was no decrease at all of the capital employed in its business in the year 1940.

The facts which have given rise to this dispute are few and simple : they can be stated briefly. By a trust deed dated Mar. 27, 1922, a large trading company, called Van den Berghs, Ltd., established a contributory superannuation fund for the benefit of its employees and of their widows and other dependants. The employees contributed 5 per cent. of their annual salaries to the fund and the company contributed an amount equal to the contributions of its employees. The contributions were payable as from Jan. 1, 1921 : but, since the amount of the allowance or pensions payable out of the fund was calculated on the length of service of the employees, the company paid into the fund, in respect of those employees whose employment had commenced before Jan. 1, 1921, an amount equal to the sum which would have been contributed by it and those employees who entered its service before that date if the fund had then been established when their employment commenced, and thus the fund was, from the very first, self-supporting.

The fund was administered by four trustees, two of whom were appointed by the directors of the company, and two by the employees.

In 1928 a newly formed company called Margarine Union, Ltd., acquired a controlling interest in Van den Berghs, Ltd., and also in another large trading company called Jurgens, Ltd., and thereafter the name of the new company was changed from Margarine Union, Ltd., to Unilever, Ltd.

By deed dated Dec. 28, 1928, the trust deed of Mar. 27, 1922, was revised, so as to admit the employees of Jurgens, Ltd., to the benefits of the superannuation fund, and they were accordingly admitted to it on terms which entitled A them to the same allowances and pensions for themselves and for their widows and dependants as if they had been contributors to the fund from the commencement of their service with Jurgens, Ltd. They were placed, in all respects, on a parity with the employees of Van den Berghs, Ltd. By a further deed, dated Feb. 18, 1932, provision was made for the admission of the employees of the appellant company, which had been incorporated in 1894 under the name of Lever Bros., Ltd., to the fund as from July 31, 1931, and the number B of trustees was then increased from four to six, three to be appointed by the employers and three by the employees. The employees of the appellant company were not, however, placed on a parity with the employees of Van den Berghs and Jurgens, since the benefits to which they became entitled were not calculated on the basis that they had been admitted to the fund at the date when they entered the service of the appellant company; their benefits were calculated as from the date when they were in fact admitted to the fund, namely, July C 31, 1931.

In 1937 the appellant acquired the undertaking of Unilever, Ltd., and changed its name from Lever Bros., Ltd., to its present name, Lever Bros. & Unilever, Ltd.; and the appellant then arranged with the trustees of the fund to make an annual contribution which would entitle the widows of those of its employees who had entered its service before July 31, 1931, to receive the same benefits as D were payable to the widows of the employees of Van den Berghs and Jurgens; that is to say, that the benefits would be calculated on the basis that their husbands had been admitted to the fund when they entered the service of the appellant company; but no such arrangement was made with regard to the pensions payable to the employees themselves.

In accordance with that arrangement, the appellant paid to the trustees of the fund for each of the years 1938 and 1939 the appropriate contribution as E computed by the actuary. The amount paid for the year 1939 was £18,993. In 1940—the year for which the assessment to the excess profits tax in question on this appeal has been made—the commuted value of the future contributions to be made by the appellant to the fund pursuant to the arrangement made with the trustees in 1937, was ascertained, on an actuarial valuation, to be £131,196 12*s*., and the appellant then paid that sum to the trustees and thereby put the widows of its employees on a parity with the widows of the employees F of Van den Berghs and Jurgens.

In the same year the appellant paid to the trustees the sum £895,329 16*s*. in order that all its employees might receive allowances and pensions on the same scale as the employees of Van den Berghs and Jurgens; that is to say, on the basis that they had been contributors from the date when they entered the employment of the appellant. By these two payments, amounting together G to £1,026,526 8*s*., the appellant placed its own employees on an exact parity, both as regards the contributions payable to the fund and the benefits receiveable from it, with the employees of Van den Berghs, Ltd., and Jurgens, Ltd.

It was provided by the Finance (No. 2) Act, 1939, s. 14 (1), that, for the purposes of the excess profits tax, the profits of a trade or business should be computed on income tax principles as adapted in accordance with the provisions of Part. I of Sched. 7, to that Act. By the Finance Act, 1921, s. 32 (1), it was H provided that, for the purposes of income tax, any sum paid by an employer or employee by way of contribution towards a superannuation fund approved by the Commissioners of Inland Revenue should, in computing the profits or gains for the purpose of assessment to income tax under Case I and Case II of Sched. D, or under Sched. E, be allowed to be deducted as an expense incurred in the year in which the sum was paid, subject to this proviso, that, when a contribution by an employer is not an ordinary annual contribution, it shall be treated as the Commissioners of Inland Revenue may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over such period of years as the Commissioners may think proper.

It is to be observed, in view of a point I will mention later, that the Commissioners have, it would seem, no option in this matter. They must allow the payment, which is not an ordinary annual contribution, to be deducted as an expense in the computation of the profits of the business, either in the year in which the sum is paid, or spread over such period of years as they may think proper. In this particular case, the Commissioners of Inland Revenue thought it proper to allow the amount to be spread out over a period of six years. So that one-sixth of the total amount will be allowed as a trading expense in each of the six years.

The question, and the only question, at issue is: Was the average amount of the capital employed in the business of the appellant during the year 1940 any less than the average amount employed in the standard period by reason of the payments which it made to the trustees of the superannuation fund? If it were less, the standard profits for that year must be diminished by 6 per cent. of the decrease, with the result, since the tax is now 100 per cent., that the amount of the tax payable by the appellant will be increased by the amount of the diminution in the standard profits.

The case submitted for the opinion of the court states a number of somewhat complicated facts, in addition to those which I have set out above, but it seems to me that those other facts do not affect the question at issue, and, therefore, it is not, I think, necessary to mention them.

The Finance (No. 2) Act, 1939, Sched. 7, Pt. II, para. 1, provides as follows:

> (1) Subject to the provisions of this Part of this Schedule, the amount of the capital employed in a trade or business (so far as it does not consist of money) shall be taken to be (*a*) so far as it consists of assets acquired by purchase on or after the commencement of the trade or business, the price at which those assets were acquired . . . (*b*) so far as it consists of assets being debts due to the person carrying on the trade or business, the nominal amount of those debts . . . (*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the trade or business . . .

The payments in question on this appeal were made by the appellant to obtain for its employees increased benefits from the superannuation fund. Before the payments were made the position as between the appellant's employees and those of Van den Berghs, Ltd., and Jurgens, Ltd., was that, while they all made the same contributions year by year to the fund, namely, 5 per cent. of their annual salaries, the appellant's employees received smaller benefits, a position of inequality which might well cause discontent. Equal contributions ought, it might be thought, to give the right to equal benefits. Indeed, it seems that, from 1931 onwards, the appellant used to supplement the pensions paid to its employees out of the fund so as to bring their pensions up to the amount which the employees of the other two companies were receiving.

It was said on behalf of the appellant that, by the payments in question, the appellant acquired an asset of like value in the enhanced loyalty and contentment of its employees; but the Special Commissioners rejected this contention. Since the Commissioners have held that the whole of the payments should be treated as a diminution of the capital employed in the business in 1940, they must, I presume, have formed the opinion that the appellant did not get any value for its payments; that it had paid the money for nothing, as if for instance, it had given the money to the Chancellor of the Exchequer for reduction of the National Debt and had received nothing but a letter of acknowledgment and thanks.

The view that the appellant got nothing for its money cannot, I think, be maintained. Trading companies do not usually give away their money for nothing and by the payments in question the appellant did acquire the right, as against the trustees of the fund, to compel them to pay the increased benefits to its employees. In common parlance, the transaction was a purchase of benefits by way of allowances and pensions for its employees, their widows and dependants; and thereby to make them more content with their employment, or, at least, to remove a cause of discontent.

It cannot be suggested that the word "asset" in Pt. II of Sched. 7 to the Act, as applied to a trade or business, is restricted to material things that you can touch and see, because it includes debts. It obviously includes rights of every sort, and even such an intangible possession as goodwill.

I think, therefore, the Special Commissioners erred in matter of law in their construction of the word "asset," and that the appellant did, by the payment it made in 1940 to the trustees of the superannuation fund, acquire an asset within the meaning of the Finance (No. 2) Act, 1939, Sched. 7, Pt. II, para. 1.

If, as I hold, the appellant did acquire an asset, within the meaning of that paragraph, by their payments, then it was either an asset acquired by purchase, or it was an asset which had been acquired otherwise than by purchase. In the one case, the amount paid by the appellant was the price paid for it and in the other its value.

One further point is to be noted under the Finance Act, 1921, s. 32. As I read it, the Commissioners of Inland Revenue are bound to allow these payments as a trading expense either in the year 1940, in which they were made, or spread over a series of years. The Commissioners of Inland Revenue have spread them over a period of six years. Each of the six annual instalments of the payment allowed as a trading expense reduces by so much the profits of the appellant for that year. That is the effect of every item allowed as an expense in computation of the profits or gains of a trading company.

By Sched. 7, Pt. II, para. 4, it is provided:

> For the purpose of ascertaining the average amount of capital employed in a trade or business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed (*a*) to have accrued at an even rate throughout the period; and (*b*) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the trade or business.

The consequence of the decision of the Commissioners, therefore, would be this. First of all, the whole of the payments amounting to more than a million pounds would be allowed as a diminution of the capital employed in the business in 1940. Then, in each of the six years, one-sixth of the sum would be reckoned as a trading expense and thereby reduce the annual profits and so reduce the average amount of the capital employed in the business for that year, so that, by the end of six years, the payments in question would have been used twice to diminish the average amount of the capital employed in the business.

I, therefore, think that this appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *L. A. Ellwood* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

HEANEY *v.* B. A. COLLIERIES, LIMITED.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **July 27, 1944.**]

Workmen's Compensation—Partial incapacity —Workman called up for military service—Pay and allowance in Army less than pre-accident wages but probably more than in civil employment—Compensation only for actual loss—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (3) (i).

The appellant, a workman, was injured in an accident on Nov. 18, 1937, and thereafter received compensation by the respondents on the footing of total incapacity until early March, 1938. From then until Sept. 3, 1939, he was working intermittently for the respondents at light work, earning wages appreciably lower than his pre-accident wages, and receiving compensation on the basis of partial incapacity. On Sept. 3, 1939, he was called up for military service and since then had been receiving Army pay and allowances which taken together amounted to less than his pre-accident wages, but exceeded probably those he could or would have earned in any civil employment. In May, 1942, the workman applied for review and compensation for partial incapacity from Mar. 5, 1938, giving credit for all sums received so far by way of compensation and contending that his Army pay and allowances should be disregarded and that compensation should be calculated on the basis of his true earning capacity. The respondents denied liability contending *inter alia* that the workman's service was not a suitable employment within the meaning of the Act and that the workman since September, 1939, would have been able to earn in some suitable industrial or commercial employment more than his "notional pre-accident" earnings:—

HELD: the workman's Army pay and allowances were to be considered his true earnings whether he was a volunteer or a conscript, and those earnings cannot be disregarded. The workman was entitled to compensation only in so far as his Army pay and allowances fell short of the amount of his pre-accident earnings, and not in so far as the amount he could have earned in civil life fell short of that amount.

[**EDITORIAL NOTE.** In *Jones's* case (1), it was held that, since compensation can be granted only for loss due to incapacity caused by the accident, a loss attributable to the lower rate of pay a man receives as a conscript in the Army is not relevant in considering the amount of compensation to be awarded. In the converse, however, the same reasoning is not applicable. If the Army pay is greater than a man would earn in civil life, it is relevant and must be taken into account for it diminishes the loss the man suffers and compensation can be given only for an actual loss.

As to Earnings during Incapacity, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914, 915, paras. 1258, 1259; and for Cases, see DIGEST, Vol. 34, pp. 416-420, Nos. 3378-3411.]

Cases referred to:

*(1) *Jones* v. *Amalgamated Anthracite Collieries, Ltd.*, [1944] A.C. 14; [1944] 1 All E.R. 1; 112 L.J.K.B. 120; 36 B.W.C.C. 195; *affg.* [1943] 1 K.B. 145; [1942] 2 All E.R. 600.

*(2) *Port of London Authority* v. *Gray*, [1919] 1 K.B. 65; 34 Digest 417, *3384*; 88 L.J.K.B. 107; 120 L.T. 11; 11 B.W.C.C. 206.

*(3) *Doncaster Amalgamated Collieries* v. *Leech*, [1941] 1 K.B. 649; [1941] 2 All E.R. 7; 110 L.J.K.B. 676; 165 L.T. 338; 34 B.W.C.C. 88.

Appeal by a workman from an award dated Oct. 5, 1943, of His Honour Judge Hildyard, K.C., sitting at Nottingham County Court as arbitrator in a claim under the Workmen's Compensation Act, 1925. The facts are fully stated in the judgment of the court.

F. W. Beney, K.C., and *G. C. Dare* for the appellant workman.

W. J. K. Diplock for the respondents.

du Parcq, L.J. [delivering the judgment of the court]: The appellant, to whom we will refer as the workman, on Nov. 18, 1937, suffered personal injury by accident arising out of and in the course of his employment. He was then working for the respondents, to whom we will refer as the employers. He was totally incapacitated by his injury until early in March, 1938. No question now arises as to this period of total incapacity, during which his employers paid him the proper amount by way of compensation. From March, 1938, to Sept. 3, 1939, the workman was working intermittently for the employers at light work, earning wages much lower than his average weekly wage before the accident, which was £5 4*s*. 1*d*., and receiving varying amounts which the employers paid him by way of compensation on the basis of partial incapacity. The workman was an Army reservist, and when the war broke out on Sept. 3, 1939, he was called to the colours in pursuance of the terms of his service. Since then he has been receiving Army pay and allowances which, taken together, represent an amount less than that of his pre-accident wages, but (as both parties agree) probably greater than the amount which he would in fact be earning, or would be able to earn, in any other employment if he were not serving in the Army.

On May 19, 1942, the workman made two separate requests for arbitration. The first put forward a claim for a review under the Workman's Compensation Act, 1925, s. 11 (3). The second claimed compensation in accordance with the Act on the basis of partial incapacity from Mar. 5, 1938, giving credit for such sums as had admittedly been received from the employers by way of compensation since that date.

On Sept. 1, 1942, the county court judge dealt with both the workman's applications, which were heard together. He found that the workman was entitled to a review as from Apr. 1, 1942, and it is unnecessary to refer further to this part of the award, as to which no question now arises. The judge found (and it was not disputed) that the workman had been partially incapacitated since Mar. 8, 1938, and that his pre-accident average weekly earnings were £5 4*s*. 1*d*. The award next contains a finding that the workman impliedly agreed to accept weekly compensation under the Act from Mar. 8, 1938, to Sept. 2, 1939, based on an assumed weekly earning capacity of £3 3*s*. 6*d*. The workman appeals against this finding on the ground that there was no evidence by which it can be supported. Counsel for the respondents conceded that it would be difficult to support the finding on the evidence, and did not endeavour to defend it. He agreed that it was based on a misunderstanding. Both the judge and the solicitor who appeared before him on behalf of the employers understood counsel for the workman to agree the figure of £3 3*s.* 6*d.* We were assured that counsel for the workman never intended to, and did not in fact, accept this figure. The employers' representatives frankly acknowledged that there had been a misunderstanding, and very properly consented to the case being remitted to the county court in order that the question of the workman's true earnings or earning capacity from March, 1938, to September, 1939, should be ascertained, and the figure of £3 3*s.* 6*d.* revised, and increased or reduced, as the facts may require. The court will accordingly so order.

This agreement left one other matter for our consideration. In their answer to the workman's second request for arbitration the employers denied liability on the following, among other, grounds: "That the applicant's service in the Army is not a suitable employment within the meaning of the Act." "That the applicant since Sept. 2, 1939, has been able to earn in some suitable industrial or commercial employment more than his 'notional pre-accident' earnings." This plea was no doubt founded on the assumption, which now seems to be erroneous, that the workman, if he had not been called up for service, would have earned more in civil employment than the total amount of his Army pay and allowances. It formed the chief subject of discussion at the arbitration, which was held on Sept. 1, 1942. The judge, having heard the evidence and the arguments of the advocates, reserved judgment, hoping that the then pending decision of this court in *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* (1), would throw some light on the point. When that judgment had been delivered on Nov. 13, 1942, he further postponed his judgment in order to await the decision of the House of Lords. He eventually delivered judgment on July 15, 1943, when he was on the eve of retirement and, therefore, unable to wait longer for that decision, which was in fact pronounced on Dec. 7, 1943. In his judgment the judge expressed some doubt whether the decision in *Jones* v. *Amalgamated Anthracite Collieries* (1), which dealt with the case of a conscript, would necessarily cover the facts of the present case. He came to the conclusion, after a careful review of the authorities as they then stood, that the figure to be taken under the Workmen's Compensation Act, 1925, sect. 9, subsect. (3) (i):

> . . . though primarily the amount of the army pay and allowances must, if it is higher be the amount which the applicant could earn in suitable employment if not in the army.

His decision on the point is expressed as follows in the fourth finding of his award:

> That from Sept. 2, 1939, to Mar. 31, 1942, the applicant is entitled to half the difference between his said pre-accident average weekly earnings of £5 4*s.* 1*d.* and an assumed weekly earning capacity of £3 3*s.* 6*d.* or such higher amount as represented the weekly value of his army pay and allowances and for that purpose I fix the weekly value of the applicant's board lodging and clothes at 19*s.*

One of the grounds of appeal set out in the workman's notice of appeal was as follows:

> That whilst the applicant was serving in His Majesty's Army his earnings in that service were earnings for the purposes of the said section, and his compensation should have been calculated with regard thereto and to no other factor.

As both parties are now agreed that whatever may have been the workman's true earning capacity in civil employment down to Mar. 31, 1942, it certainly fell short of what he was in fact earning in money and money's worth in the Army after September, 1939, it is apparent that it was not in the workman's interest to stand on this ground of appeal. His counsel, therefore, abandoned it, and asked leave to argue that in view of the decision of the House of Lords in *Jones's* case (1), the workman's earnings in the Army ought to be wholly disregarded for the purposes of the relevant subsection. The situation is paradoxical, but we thought it right, in all the circumstances, to have the point argued and to come to a conclusion upon it.

In our judgment, the application of the words of the section to the facts of this case presents no real difficulty. It is well settled that the words "which he is earning" are not qualified by the later words "in some suitable business or employment." If a workman is in fact earning money in any capacity, the general rule is that the amount which he is earning must be the basis of the calculation which falls to be made. This general rule has been applied in this court to the pay and allowances of a man who has voluntarily enlisted in the Army (*Port of London Authority* v. *Gray* (2), and *Doncaster Amalgamated Collieries* v. *Leech* (3).) This general rule is, however, subject to a necessary exception. Section 9 lays down rules for calculating the amount of compensation for incapacity for work, and they must not be applied so as to compel an employer to compensate a workman for a loss of earnings which is due, not to incapacity for work, but to some cause wholly unconnected with his incapacity. If a man chooses to take work at a low rate of pay when he could get better paid work, or if he chooses to be idle and to do less work than might reasonably be expected of him, and so keeps down his wages, then his actual earnings cannot be taken as the basis of the calculation. In such cases the words "which he is earning" cease to be applicable, and the arbitrator must ascertain what the man is "able to earn in some suitable employment or business."

The peculiarity of *Jones's* case (1) was that the workman had not elected, but had been compelled, to take work for lower pay than he could have earned in other employment. The decision of the House of Lords was that, in the circumstances his "earnings" in the Army could not be treated as the basis of the calculation. If they were so treated, the employers would be compensating the workman not for a loss due to incapacity, but for a loss due to his liability to serve in the forces of the Crown. For this purpose we are of opinion that no distinction can be made between the volunteer and the conscript. In each case the loss suffered is due to a cause which has nothing to do with the man's incapacity, and it is immaterial that the cause is in the one case the man's voluntary act and in the other an act done under compulsion of law.

When, however, either by his own act, or because of some external cause, the workman is so fortunate as to be paid a higher wage than otherwise he could have earned, the principle to which effect was given in *Jones's* case (1) can have no application. The first question always is: Has the workman suffered any loss owing to his incapacity? If his earnings are in fact as great as, or greater than, they were before the incapacity was incurred, the answer is "No," and the inquiry need proceed no further. If his present earnings are less than they were before the incapacity was incurred, it is apparent that he has suffered a loss, and the next question is: Can it be shown that the loss which he has suffered is due, not in any degree to the incapacity, but solely to some other cause? This question has to be put and answered, because, in the words of LORD RUSSELL OF KILLOWEN, in *Jones's* case (1), at pp. 24, 25 ([1944] 1 All E.R., at p. 5):

> . . . some link or nexus must be shown to connect the reduction in earnings with the accident, otherwise the workman would be receiving compensation for something which did not result from the injury.

In *Jones's* case (1), the answer was that the reduction in earnings of which the workman complained was not in any degree due to his incapacity. When, as here, the reduction in earnings is not greater, but less, than it would have been but for the fact that he has obtained employment of a special kind, his actual earnings must always remain the proper basis of the calculation. No other measure of the loss attributable to his incapacity is possible. If by good fortune he has lost little or nothing, it follows that there is little or no loss for which he can claim to be compensated. He is not to be compensated for a notional or fictitious loss. Counsel for the appellant cited to us the observation of MACKINNON, L.J., in the Court of Appeal in *Jones* v. *Amalgamated Anthracite Collieries, Ltd.* (1), to the effect that the employers would not be entitled to take a conscript's Army pay as the basis of calculation if it amounted to more than the workman could earn in suitable employment. If it were right to say, as MACKINNON, L.J., then thought, that a conscript's Army pay was not properly described as "earnings," this observation would no doubt be justified; but since the majority of the House of Lords have held that the soldier must be said to be "earning" his pay and allowances, it must now be regarded as erroneous.

The appeal must be allowed. The matter will be remitted to the county court judge at Nottingham in order that he may ascertain the average weekly amount which the workman was earning, or was able to earn in some suitable employment or business, between Mar. 5, 1938, and Sept. 2, 1939. We were told by counsel for the respondents that the employers proposed to contend that the workman if he had acted reasonably could have earned more than his actual earnings between March, 1938, and September, 1939. It will be open to them to rely on this contention and, if it should succeed the learned judge will proceed to ascertain what the workman was "able to earn," under the second limb of the subsection. The third and fourth findings in the award will be amended by omitting the reference to an implied agreement and substituting for £3 3*s.* 6*d.* the sum so ascertained. Otherwise the findings in the award are to stand, but paras. 1 and 2 of the order will be set aside, and in lieu of them the judge to whom the matter is referred will make such order as is appropriate on his findings.

Although the workman's appeal thus succeeds in part, the main contest was occasioned by his unsuccessful contention that his Army pay and allowances should be disregarded, and, if his only ground of appeal had been that on which he succeeded without meeting any opposition, very little of the time of the court would have been occupied. In the circumstances, we make no order as to the costs of the appeal and leave the parties to pay their own costs. The costs of the further hearing will be in the discretion of the county court judge.

Appeal allowed. Case remitted to county court judge.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Son*, Mansfield (for the appellant); *Peacock & Goddard*, agents for *Brown, White & Pears*, Nottingham (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

YOUNG *v.* BRISTOL AEROPLANE CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Scott, MacKinnon and Luxmoore, L.JJ., Lord Goddard and du Parcq, L.J.), **July 28, 1944.**]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Knowledge of workman—Workmen's Compensation Act, 1925 (c. 84), *s.* 29 (1).

Judgments—Judicial decisions as authorities—Court bound by its previous decision—Full Court of Appeal has no greater power than division of the court—Decisions given per incuriam.

The appellant, a workman in the respondents' factory, sustained injuries in the course of his employment owing to the failure of the respondents to fence a machine. He lost three fingers and was unable to return to work for 6 months. Shortly after the accident the respondents offered him, and he accepted, a weekly sum of money and he signed receipts for weekly payments made under the Workmen's Compensation Act, 1925. These sums were paid to him throughout the period of his unemployment. The appellant brought an action against the respondents claiming damages for breach of their statutory duty. It was found as a fact that, although the appellant could not be said to have exercised his option under the Workmen's Compensation Act, 1925, s. 29 (1), since he did not know of his right to elect, nevertheless he had received the payments made to him by the respondents as compensation under the Act. The court of first instance held that it was bound by the decisions of the Court of Appeal in *Perkins* v. *Stevenson* (1) and *Selwood* v. *Towneley Coal & Fireclay Co.* (2), to give judgment against the appellant. On appeal to the Court of Appeal it was contended on behalf of the appellant (i) that the decisions in *Perkins*' case (1) and *Selwood's* case (2), were inconsistent with the decision of the House of Lords in *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (4); (ii) that the decisions in *Perkins*' case (1) and *Selwood's* case (2) were wrong and that the Court of Appeal was not bound by its own earlier decisions. The appeal was argued before the full court:—

HELD: (i) there was no inconsistency between the decision of the House of Lords and those of the Court of Appeal since *Kinneil's* case (4) dealt with a different point from that decided in *Perkins*' case (1) and *Selwood's* case (2).

(ii) a full court of the Court of Appeal has no greater powers than any division of the court.

(iii) the Court of Appeal is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction with 3 exceptions: (*a*) it may choose between two conflicting decisions of its own; (*b*) it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of the House of Lords; (*c*) it is not bound to follow a decision of its own given *per incuriam*.

[**EDITORIAL NOTE.** There is ample authority for the statement that in all questions of election or waiver, the first matter to be considered is the knowledge of the person said to have elected or waived a right. It must be shown that he knew that he had a right to elect or that he intended to waive the right alleged to be waived. In workmen's compensation cases there seems to have been established by a series of decisions a doctrine of implied election. If the workman has signed a receipt for compensation as such, it seems to be immaterial that he was ignorant of any right to bring an action at common law and that, by accepting such payment, he is waiving that right. In the present case it was found as a fact at the trial that the receipts were signed and the money received as compensation under the Workmen's Compensation Acts, but that the workman was unaware of any right to proceed at common law or that he had any option or right to elect. The Court of Appeal have held that it was bound by its previous decision to hold that the workman was barred from bringing an action at common law. The opportunity was taken in this case to clear up one or two matters concerning the powers of the Full Court of Appeal. It has been generally supposed that these powers were no greater than those of a division of the court, but there were one or two *dicta* which might suggest the contrary. The Court of Appeal has considered these authorities and confirmed the view that the powers of the full court are no greater than those of a division of the court.

As to Alternative Remedies, see HALSBURY, Hailsham Edn., Vol. 34, pp. 961-966, paras. 1318-1325; and for Cases, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., pp. 522-549.

As to Judicial Decisions as Authorities, see HALSBURY, Hailsham Edn., Vol. 19, pp. 251-257; and for Cases, see DIGEST, Vol. 30, pp. 180-203, Nos. 489-732.]

Cases referred to:

*(1) *Perkins* v. *Stevenson (Hugh) & Sons, Ltd.*, [1940] 1 K.B. 56; [1939] 3 All E.R. 697; Digest Supp.; 109 L.J.K.B. 1; 161 L.T. 149; 32 B.W.C.C. 181.

*(2) *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.*, [1940] 1 K.B. 180; [1939] 4 All E.R. 34; Digest Supp.; 109 L.J.K.B. 8; 161 L.T. 323; 32 B.W.C.C. 238.

*(3) *Unsworth* v. *Elder Dempster Lines, Ltd.*, [1940] 1 K.B. 658; [1940] 1 All E.R. 362; Digest Supp.; 109 L.J.K.B. 305; 162 L.T. 163; 33 B.W.C.C. 1.

*(4) *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)*, [1931] A.C. 575; Digest Supp.; 100 L.J.P.C. 113; 145 L.T. 289; 24 B.W.C.C. 181.

(5) *Brown* v. *William Hamilton & Co., Ltd.*, [1943] Session Notes 82.

*(6) *Produce Brokers Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.* (1915), 21 Com. Cas. 320; *revsd.*, [1916] 1 A.C. 314; 2 Digest 475, *1187*; 85 L.J.K.B. 160; 114 L.T. 94.

*(7) *Velazquez, Ltd.* v. *Inland Revenue Comrs.*, [1914] 3 K.B. 458; 30 Digest 194, *624*; 83 L.J.K.B. 1108; 111 L.T. 417.

(8) *English, Scottish & Australian Bank, Ltd.* v. *Inland Revenue Comrs.*, [1932] A.C. 238; Digest Supp.; 101 L.J.K.B. 193; 146 L.T. 330.

(9) *Perrin* v. *Morgan*, [1943] A.C. 399; [1943] 1 All E.R. 187; 112 L.J.Ch. 81; 168 L.T. 177.

*(10) *Newsholme Bros.* v. *Road Transport & General Insurance Co., Ltd*, [1929] 2 K.B. 356; Digest Supp.; 98 L.J.K.B. 751; 141 L.T. 570.

(11) *Re Shoesmith*, [1938] 2 K.B. 637; Digest Supp.; 107 L.J.K.B. 582; *sub nom. Shoesmith* v. *Lancashire Mental Hospital Board*, [1938] 3 All E.R. 186; 159 L.T. 155.

(12) *Kelly & Co.* v. *Kellond* (1888), 20 Q.B.D. 569; 30 Digest 195, *628*; 57 L.J.Q.B. 330; 58 L.T. 263; *on appeal sub nom. Thomas* v. *Kelly*, 13 App. Cas. 506.

(13) *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475; 2 Digest 632, *2593*; 72 L.J.Ch. 723; 89 L.T. 123.

(14) *Re Barber, Ex p. Stanford* (1886), 17 Q.B.D. 259; 7 Digest 51, *272*; 55 L.J.Q.B. 341; 54 L.T. 894.

(15) *Roberts* v. *Roberts* (1884), 13 Q.B.D. 794; 7 Digest 43, *223*; 53 L.J.Q.B. 313; 50 L.T. 351.

*(16) *Daglish* v. *Barton*, [1900] 1 Q.B. 284; 2 Digest 633, *2604*; 68 L.J.Q.B. 1044; 81 L.T. 551.

(17) *Mills* v. *Jennings* (1880), 13 Ch.D. 639; *on appeal sub nom. Jennings* v. *Jordan* (1881) 6 App. Cas. 698; 43 Digest 793, *2303*; 51 L.J.Ch. 129; 45 L.T. 593.

(18) *Lancaster Motor Co. (London), Ltd.* v. *Bremith, Ltd. Barclays Bank, Ltd. (Garnishees)*, [1941] 1 K.B. 675; [1941] 2 All E.R. 11; 110 L.J.Ch. 398; 165 L.T. 134.

Appeal by the plaintiff from a judgment of the Commissioner of Assize, given at Lancaster on Nov. 30, 1943. Directions were given for the appeal to be argued before the full court, owing to the importance of a question raised as to the jurisdiction of the Court of Appeal to refuse to follow its own decisions. The facts are fully stated in the judgment of the court delivered by Lord Greene, M.R.

Gilbert Paull, K.C., and *Henry Barton* for the appellant.

G. J. Lynskey, K.C., and *W. Matabele Davies* for the respondents.

Lord Greene, M.R.: On Apr. 3, 1942, the plaintiff, who was then working for the defendant company in their factory, was injured and lost three fingers through the defendant company's failure, in breach of their statutory duty, to fence a machine which he was using. He nevertheless failed in his action because the commissioner who tried it held that the defendants had established the plea set out as follows in para. 5 of the defence:

> In the further alternative the defendants say that the plaintiff before the commencement of this action claimed and received compensation under the Workmen's Compensation Acts in respect of an accident arising out of and in the course of his said employment with the defendants. The plaintiff is thereby barred from recovering damages in respect of the said accident which is the alleged accident upon which this action is founded.

To anyone familiar with the Workmen's Compensation Act, 1925, it was plain that this plea was based on sect. 29 (1) of that Act, the material words of which are as follows:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act . . .

The relevant facts may be shortly stated. About three weeks after the accident the plaintiff had an interview with Howarth, assistant to the commercial manager of the defendants. Howarth asked him if he intended to seek advice on the matter "before committing himself" and probably suggested that he should consult his trade union. The plaintiff did not then take advice, and it was not shown that he was ever aware of his common law rights. On Apr. 30, the plaintiff saw Howarth again. Howarth then handed him a pay sheet with the heading "Receipts for weekly payment made under the Workmen's Compensation Acts to W. Young by Messrs. Bristol Aeroplane Co., Ltd." Howarth said in his evidence: "So far as I recollect he read it," and later, under cross-examination, added "He pondered over it." The evidence of the plaintiff was that he did not remember reading it. The commissioner was satisfied that in fact he did read it, and that he understood it, and this finding was obviously justified by the evidence. Howarth then paid the plaintiff the compensation to which he was entitled under the Act for the four weeks ending Apr. 30, and the plaintiff signed a receipt for the amount on the pay sheet, Howarth signing as witness. Thereafter, in the words of the commissioner:

> . . . week after week with one exception (and that only so far as the signature of Howarth is concerned) the plaintiff came, drew his money, and signed the receipt on the same form as that which he had read and signed on Apr. 30, 1942.

The last payment was made on Oct. 2, 1942, on which date the plaintiff returned to work. The total sums paid to him then amounted to £45 10*s*. Meanwhile, on July 24, 1942, the plaintiff's solicitor had written a letter to the defendants in which he said:

> I desire to claim compensation under the Workmen's Compensation Act and, alternatively, I desire to claim damages.

On Aug. 19, 1942, the company with which the defendants were insured wrote to the plaintiff's solicitor as follows:

> We would state that liability is only admitted under the Workmen's Compensation Act and your client has been in receipt of compensation under the statute since his cessation following the injuries.

On Aug. 21, the solicitor wrote to his client, the plaintiff, asking to be told "the circumstances of your acceptance of compensation and of any explanation given to you as to your rights."

After a very careful review of the facts, the commissioner arrived at the following conclusions: (i) That the plaintiff did not make a claim for compensation (namely, compensation under the Workmen's Compensation Act) "as such." (ii) That the plaintiff could not be said to have exercised the option given to him by the subsection, since he did not know of "his right to elect." (iii) That "the plaintiff received the payments made to him as compensation under the Workmen's Compensation Act," and that "the payments were paid to him as such." We see no reason to differ from any of these conclusions. The commissioner having come to these conclusions considered himself bound by the authority of judgments of this court, in particular those in *Perkins* v. *Hugh Stevenson & Sons, Ltd.* (1) and *Selwood* v. *Towneley Coal & Fireclay Co., Ltd.* (2), to hold that the third of his findings was fatal to the plaintiff's claim. In so holding we are of opinion that he was clearly right. *Perkins*' case (1) differed from the present case, in that there the workman had claimed compensation, but in *Selwood's* case (2), there had been no claim, and no exercise by the workman of his option. The court in *Selwood's* case (2) regarded this distinction as immaterial so far as concerned what was referred to as "the second limb" of the subsection, that is to say, the sentence which begins with the words "but the employer shall not be liable" (see especially the judgment of Slesser, L.J., at pp. 184-186; [1939] 4 All E.R., at pp. 37, 38). It is manifest from all the judgments in *Selwood's* case (2) that, in the view of the court the decision which was then arrived at followed logically and inevitably from the *ratio decidendi* in *Perkins*' case (1). As a result of these two decisions, therefore, it must be regarded as having been decided by this court that a workman who has been paid compensation under the Act, which he has knowingly accepted as such compensation, is thereby precluded from recovering damages from his employers at common law.

We were reminded by counsel for the appellant that in *Unsworth* v. *Elder Dempster Lines, Ltd.* (3), one part of the reasoning on which the decision in *Perkins*' case (1) had been based was criticised and doubted: see *per* MacKinnon, L.J., at pp. 670, 671 ([1940] 1 All E.R., at pp. 370, 371), and *per* Goddard, L.J., at pp. 673, 674 ([1940] 1 All E.R., at p. 374). That criticism in no way affects the validity of the decision in *Perkins*' case (1), since, as both MacKinnon and Goddard, L.JJ., pointed out, those passages in the judgments which they regarded as open to doubt were not necessary to the decision and are to be regarded as *obiter dicta*: see at pp. 671, 673, 674 ([1940] 1 All E.R., at pp. 371, 374). Counsel for the appellant, while frankly conceding that the decisions to which we have referred made his task in this court difficult, and perhaps impossible, suggested that they might be treated as inconsistent with the decision of the House of Lords in *Kinneil Cannel & Coking Coal Co.* v. *Sneddon* (4), and for that reason ought not to be followed. It is a conclusive answer to this submission that *Kinneil's* case (4) was cited to this court in *Perkins*' case (1), at p. 59 ([1939] 3 All E.R., at p. 700). The argument of counsel for the appellant, therefore, involves a submission that in *Perkins*' case (1) this court, with the relevant authorities before it, came to a wrong decision. We will, however, add that we are of opinion that there is no inconsistency between the decision of the House of Lords and those of this court. The House of Lords in the *Kinneil* case (4), was dealing with the right of a widow to claim damages at common law on behalf of her children and herself, in respect of an accident which had already been the foundation of a successful claim for compensation under the Workmen's Compensation Act by another dependent. It was held that the claims of the widow and children at common law could not be defeated by the act of somebody to whom the common law remedy was not open. The House of Lords said nothing contrary to the view that the second limb of the subsection precluded a workman from claiming damages after receiving compensation under the Act. Of this second limb Lord Buckmaster said, at p. 580:

> The latter provision is intended to relate only to cases where the proceedings are taken by the same persons and affects only the cases where the workman proceeding under the statute had the option of proceeding either under the statute or at common law.

For these reasons we are clearly of opinion that the present case is covered by the earlier decisions of this court.

Our attention was called to the opinion expressed by Lord Patrick in *Brown* v. *William Hamilton & Co., Ltd.* (5). In that opinion Lord Patrick referred to *Perkins*' case (1) and *Selwood's* case (2), and refused to follow them because he thought they were contrary to the current of decision in Scotland and to the true intent of the Workmen's Compensation Act, 1925, and to the proper construction of sect. 29 (1) of that Act. His criticism deserves the most careful consideration but, even if we were inclined to accept it, we should not, by reason of it, be entitled to ignore the decisions in *Perkins*' case (1) and *Selwood's* case (2), which, for reasons which we now proceed to state, are, in our opinion, binding on us and must, therefore, be followed.

We now turn to what is the more important question raised by this appeal. When it first came on for hearing before Lord Greene, M.R., and MacKinnon and Goddard, L.JJ., counsel for the appellant stated that unless he could establish that *Perkins*' case (1) and *Selwood's* case (2) could not stand with the decision of the House of Lords in *Kinneil's* case (4), his only chance of succeeding lay in satisfying this court that those two cases were wrongly decided and that he wished to argue that this court was not bound to follow them. The question thus raised as to the jurisdiction of this court to refuse to follow decisions of its own was obviously one of great general importance and directions were given for the appeal to be argued before the full court. It is surprising that so fundamental a matter should at this date still remain in doubt. To anyone unacquainted with the rare cases in which it has been suggested or asserted that this court is not bound to follow its own decisions or those of a court of coordinate jurisdiction the question would, we think, appear to be beyond controversy. Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports. When in such cases the matter has been carried to the House of Lords it has never, so far as we know, been suggested by the House that this view was wrong and that this court could itself have done justice by declining to follow a previous decision of its own which it considered to be erroneous. On the contrary, the House has, so far as we are aware, invariably assumed and in many cases expressly stated that this court was bound by its own previous decision to act as it did. The attitude both of this court and of the House of Lords is so well known that citations are scarcely necessary. But we take three modern examples at random. The first is *Produce Brokers Co., Ltd.* v. *Olympia Oil & Cake Co., Ltd.* (6), in which Buckley, L.J., began his judgment as follows, at p. 322:

> I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority—which, of course, it is my duty to follow—and, following authority, I feel bound to pronounce the judgment which I am about to deliver.

Phillimore and Pickford, L.JJ., similarly expressed themselves to be bound by previous decisions of this court with which they did not agree. The decision was reversed by the House of Lords. The second example is *Velazquez, Ltd.* v. *Inland Revenue Comrs.* (7), where this court held itself bound by a previous decision of its own which, it considered, had not been overruled by an intervening decision of the House of Lords. Lord Cozens-Hardy, M.R., said, at p. 461:

> But there is one rule by which, of course, we are bound to abide—that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have power to settle the law and hold that the decision which is binding upon us is not good law.

The correctness of *Velazquez's* case (7) was impugned in *English, Scottish & Australian Bank, Ltd.* v. *Inland Revenue Comrs.* (8). This court held that it was bound to follow *Velazquez's* case (7), and in the House of Lords Lord Buckmaster said, at p. 242, that it was right in so holding. In the result the appeal was allowed and *Velazquez's* case (7) overruled. This was a strong case since, even before the question was set at rest by the House of Lords, *Velazquez's* case (7) was generally regarded as having been wrongly decided. The third example is the very recent one of *Perrin* v. *Morgan* (9). There this court held itself bound by previous decisions to give a narrow construction to the word "money" in a will. In the House of Lords Viscount Simon, L.C., said, at p. 405 ([1943] 1 All E.R., at p. 189), that this court :

> . . . could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound.

It is true that in this and similar cases the court which held itself to be bound by previous decisions consisted of three members only. But we can find no warrant for the argument that what is conveniently but inaccurately called the Full Court has any greater power in this respect than a division of the court consisting of three members only.

The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions ; each division has co-ordinate jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court. Its jurisdiction is mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the county courts), but in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer, L.J., as will presently appear, we think that he was right in saying that what can be done by a full court can equally well be done by a division of the court. The corollary of this is, we think, clearly true, namely, that what cannot be done by a division of the court cannot be done by the full court.

In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this court comes to the conclusion that a previous decision was given *per incuriam*. In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment.

For the moment it is the first class which we have to consider. Although the language both of decision and of *dictum* as well as the constant practice of the court appears to us clearly to negative the suggested power, there are to be found *dicta* and, indeed, decisions the other way. So far as *dicta* are concerned, we are, of course, not bound to follow them. In the case of decisions we are entitled to choose between those which assert and those which deny the existence of the power. In recent times the question was discussed *obiter* in *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (10). In that case Scrutton, L.J., said, at p. 375 :

> The decision of the Court of Appeal on fact is not binding on any other court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts.

But Greer, L.J., in the same case said, at p. 384 :

> . . . I should like to point out this fact, that [this court] has, at least on two occasions, sitting as a full court, differed from a previous decision by the same court ; and it

seems to me that, if that is right, it is equally right to say that, sitting with a quorum of three judges, it has exactly the same power as if it were sitting with six judges, though it would only be in most exceptional cases that those powers would be exercised.

In *Re Shoesmith* (11), Greer, L.J., said, at p. 644 ([1938] 3 All E.R. at p. 189):

> I wish to repeat what I said in the course of the argument, that the court has more than once, sitting as a court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a court sitting with a quorum of members can do the same thing.

It is noteworthy that the substantial question in *Newsholme Bros.* v. *Road Transport & General Insurance Co.* (10) was not whether the Court of Appeal had jurisdiction to overrule a previous decision, but how it should exercise its choice between apparently irreconcilable decisions given by it previously. The two decisions mentioned by Greer, L.J., in the passage first quoted are *Kelly & Co.* v. *Kellond* (12), and *Wynne-Finch* v. *Chaytor* (13). In the former case Lord Esher, M.R., said, at p. 572:

> This court is one composed of six members, and, if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number.

This *dictum* of Lord Esher, M.R., was not assented to by Fry, L.J., who said, at p. 574:

> As to the power of this court when sitting as a full court to overrule the decision of a court consisting of a smaller number, I do not think it is necessary to give an opinion.

It is not very clear what view was taken by Lopes, L.J., the other member of the court. He said, at p. 575:

> I do not desire to express an opinion as to what is the power of a full Court of Appeal in respect of a decision of three of their number, but I understand that the full court was called together in *Ex parte Stanford* (14) to consider the question arising in that case, and to revise and reconsider any decision touching the point in that case which had been previously laid down.

But lower down on p. 575 he is reported as having said that, if the earlier decision decided what was contended for, it was overruled by the later decision, a view which seems inconsistent with what he said in the passage quoted. It is to be observed that the question in *Kelly & Co.* v. *Kellond* (12) was not whether a particular decision should be overruled, but which of two inconsistent decisions should be followed. The two decisions in question were *Roberts* v. *Roberts* (15) and *Ex parte Stanford* (14), the latter being a decision of the full Court of Appeal, and the court followed *Ex parte Stanford*. Although the decision in *Roberts* v. *Roberts* (15) was cited during the hearing of *Ex parte Stanford* (14) by the full court, the decision was not commented on or even referred to in the judgment. It appears to have been open to the court in *Kelly & Co.* v. *Kellond* (12) to choose between the two decisions but, of course, in such circumstances the decision of the full court would be likely to carry greater weight than that of a division of the court. In *Wynne-Finch* v. *Chaytor* (13), the decision was on a point of practice, the question being whether an application ought to have been made to the Chancery Division to set aside a judgment directed to be entered by an official referee to whom the whole action had been referred or whether the proper procedure was by way of appeal to the Court of Appeal. The question was directed to be argued before the full court. Reference was made to *Daglish* v. *Barton* (16). Stirling, L.J., who delivered the judgment of the court, said, at p. 485:

> With the greatest respect, we are unable to agree with *Daglish* v. *Barton* (16), and think that it ought not to be followed; and it is, therefore, overruled.

It may be that the true explanation of this decision is that the court came to the conclusion that the decision in *Daglish* v. *Barton* (16) was manifestly incorrect and contrary to the plain words of the statute. Nevertheless the case is, we think, an authority in favour of the proposition that the court has power to overrule its previous decisions. Certainly it cannot be said that there is any statutory right of appeal from a decision of the Court of Appeal to the full court, although on occasions where there has been a conflict caused by the existence of inconsistent earlier decisions the court has ordered the case to be argued before a full court. Apart from a recent case which falls under the fourth class referred to above, we only know of one other case in which the Court of Appeal appears to have exercised the suggested power. That was *Mills* v. *Jennings* (17). It is to be noted that the earlier authority which the court refused to follow was a decision not of the Court of Appeal but of the old Court of Appeal in Chancery. Indeed, this fact was given as the justification of the view which the Court of Appeal then took. Cotton, L.J., in delivering the judgment of the court, said, at p. 648:

> . . . we think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in Chancery, as was not uncommon.

It remains to consider *Lancaster Motor Co. (London), Ltd.* v. *Bremith, Ltd.* (18), in which a court consisting of Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ., declined to follow an earlier decision of a court consisting of Slesser and Romer, L.JJ. This was clearly a case where the earlier decision was given *per incuriam.* It depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam.* We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts. Two classes of decisions *per incuriam* fall outside the scope of our enquiry, namely (i) those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords.

On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*

The appeal is dismissed with costs.

I should perhaps add, speaking for myself individually, with regard to the observations in *Unsworth's* case (3), mentioned in this judgment, that I have carefully considered my own observations there mentioned in *Perkins'* case (1), and I have come to the conclusion that the criticism of them in *Unsworth's* case (3) is justified, and that what I said was wrong. What I said there formed no part of the *ratio decidendi*, as would appear from a reading of the judgment and does not affect its validity, for that reason.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *W. H. Thompson* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ANNIE AMELIA BAKER *v.* MAYOR, ALDERMEN AND BURGESSES OF BETHNAL GREEN.

[KING'S BENCH DIVISION (Singleton, J.), **July 18, 1944.**]

Negligence—Air-raid shelter—Stairway uneven, inadequately illuminated and no centre hand-rail—Concealed danger—"War injury"—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *s.* 8.

The defendants were the local authority having the management of an underground station which they adapted for use as an air-raid shelter. The plaintiff, her husband and her daughter lawfully entered the shelter together with a large number of other persons and were proceeding down the stairway which was uneven and worn, was not illuminated, and to which there was no hand-rail in the centre, when some person tripped and fell causing a number of the other persons, including the plaintiff and her family, to fall and to collect on one another, so that the plaintiff was injured and her husband and daughter were killed. There had been previous complaints as to the condition of the stairway. The plaintiff brought an action on her own behalf and as the administratrix of the estates of her husband and her daughter, on the ground that the stairway was in the nature of a trap of which the defendants were aware. The defendants contended (i) that the accident was not caused by the condition of the stairway, and (ii) that the injuries in question were "war injuries" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, and that, therefore, the plaintiff's actions were barred under s. 3 :—

HELD : (i) the cause of the accident was the condition of the stairway which amounted to a concealed danger of which the defendants were aware.

(ii) the effective and dominant cause of the accident was not the air raid but the condition of the stairway, therefore, the injuries sustained as a result of the accident were not "war injuries" within the meaning of sect. 8 of the Act.

[**EDITORIAL NOTE.** It is part of the duty of public authorities to deal from time to time with crowds and this at a time when it can quite reasonably be expected that such crowds will be desirous of proceeding to some particular place with all possible speed. It is not a little singular that none of the authorities relied upon herein deal with facts even remotely connected with such facts and, although the principles to be applied have no doubt been considered often enough, they do not seem to have been previously applied to such a state of facts.

AS TO OCCUPIER'S DUTIES TO INVITEES AND LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-612, paras. 851-863 ; and FOR CASES, see DIGEST, Vol. 36, pp. 35-49, Nos. 208-306.]

Cases referred to :

*(1) *Ellis* v. *Fulham Borough Council,* [1938] 1 K.B. 212 ; Digest Supp. ; [1937] 3 All E.R. 454 ; 107 L.J.K.B. 84 ; 157 L.T. 380.

(2) *Purkis* v. *Walthamstow Borough Council* (1934), 151 L.T. 30 ; Digest Supp.

*(3) *Yorkshire Dale Steamship Co., Ltd.* v. *Minister of War Transport,* [1942] A.C. 691 ; [1942] 2 All E.R. 6.

ACTION by the plaintiff on behalf of herself to recover damages for personal injuries, and actions by the plaintiff as the administratrix of the estates of the two deceased to recover damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

Gilbert J. Paull, K.C., and *Phineas Quass* for the plaintiff.

Patrick Hastings, K.C., and *Montague Berryman* for the defendants.

SINGLETON, J. : On the night of Mar. 3, 1943, there was an air raid over London. There is no evidence that any bombs were dropped anywhere near Bethnal Green, but there was an air raid warning and there was gun fire. Our Air Force had carried out a raid on Berlin a few days before and it was expected by many that there would be reprisals. It is not surprising that considerable numbers of people made their way to the air-raid shelter immediately the warning was heard ; indeed a good many had gone there already and had taken up their quarters for the night.

The shelter was an underground station in the course of construction for the London Passenger Transport Board prior to the war, and on Oct. 5, 1940, it was taken over by the metropolitan borough of Bethnal Green as an air-raid shelter. From the street entrance doors open inwards. There is then a small triangular space, next a rather long flight of nineteen steps leading down to a small square platform, after which at right angles there is a shorter flight of seven steps to that which was to have been the booking-hall floor. An escalator leads down from the booking-hall floor to the platforms and to the space which is now fitted up with places for people to sleep.

Among those who went to the shelter about the time of the warning were George Steven Baker and his wife and daughter. Something took place which led to a blocking of the first or top flight of steps. At the same time some people were trying to get into the shelter and down the steps, and in the result 173 people were killed and 60 injured. Among those killed were Mr. Baker and his daughter. Mrs. Baker, as the administratrix of the estate of each of them, is the plaintiff in this action claiming damages against the borough council in respect of the death of her husband under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934, and in respect of her daughter under the latter Act. She also claims damages in respect of personal injuries which she sustained.

The defendants are the local authority responsible within the borough for making provision for the safety or protection of persons from injury in the event of hostile attack from the air. Certain powers, permissive in character, were given by the Air Raid Precautions Act, 1937, and by the Civil Defence Act, 1939, ss. 1, 2 and 4. In accordance with their powers and with the approval of the Minister of Home Security the council took over the unfinished underground station within the borough and adapted it for use and used it as a shelter.

The claim of the plaintiff is based on negligence alleged against the defendants as occupiers of the shelter or as those responsible for carrying on an activity and responsible for making proper arrangements. Para. 6 of the statement of claim alleges :

> On Mar. 3, 1943, shortly after 8 o'clock in the evening, an alert sounded in the said area indicating that a hostile air attack was anticipated, whereupon the said George Steven Baker, the plaintiff (his wife) and their three children [it should be one child] proceeded towards the said shelter to obtain protection as aforesaid, and began to descend in the midst of a number of other persons who were there for the same purpose, the upper flight of the said staircase, when one of the said persons tripped and fell on one of the lower steps of the said flight, causing a number of others of the said persons, including the said George Steven Baker the plaintiff and their said child, to fall with her and to collect on one another.

Particulars of negligence are set out in para. 7 of the statement of claim. They may be summarised as failure to provide a proper or safe entry ; having a dangerous staircase in that the steps were uneven and worn ; that there was no hand-rail in the middle ; that the light was insufficient ; and in that no warning of danger was given. On the second allegation the plaintiff alleges that no proper means were taken to control the crowd or to warn people of the danger.

In para. 8 of the statement of claim it is alleged that the accident was caused by the mode of access being :

> . . . dangerous and unsafe and unfit to be used, as the defendants well knew or ought to have known, and was in the nature of a trap or concealed danger.

The defendants in para. 2 of the defence admit that they were at all material times responsible for making arrangements for the provision of air raid shelters in the borough of Bethnal Green and that they were at all material times in occupation of, and in charge of, the air-raid shelter mentioned in the statement of claim, but they deny the allegations in para. 2 of the statement of claim.

Para. 4 of the defence denies that the accident was caused by any person tripping or falling as alleged, and it is alleged that the accident was caused by reason of a large number of persons outside the entrance to the shelter "pushing and/or struggling" to enter the shelter.

Counsel for the defendants made it clear at an early stage of the case that he was not alleging panic ; but it is right to say that he did allege and seek to prove that the accident was caused by people outside the entrance to the shelter pushing and/or struggling to enter the shelter. I should add that the defendants denied that there was anything in the nature of a trap or concealed danger at any part of the entrance or on the steps.

In para. 6 of the defence it is said that the plaintiff and those with her were at the most licensees. In para. 7 there is an alternative plea :

> The defendants say that if the accident complained of in the statement of claim was occasioned by reason of any person or persons tripping or falling as alleged in para. 6 of the statement of claim (which is denied) such person or persons tripped and/or fell and caused the accident complained of by reason of their own negligence in failing to keep any or any proper look out or to heed where they were going and in failing so to walk on or use the flight of stairs mentioned in the statement of claim as to prevent themselves from tripping and/or falling. . . . in any event such person or persons tripped and fell, if at all, without any negligence or breach of duty on the part of the defendants.

I am not sure that that is meant as an allegation of contributory negligence. It is rather directed to persons other than members of the Baker family, persons who fell and so in one sense brought about the accident. In any case it has not been proved or indeed alleged that there was any negligence on the part of Mrs. Baker or of her husband or daughter.

In para. 8 there is a plea in the alternative :

> The plaintiff's alleged personal injuries and the deaths mentioned in the statement of claim were war injuries within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939 and by reason of sect. 3 of that Act the plaintiff's claim in this action is barred.

My attention was drawn to the position of the defendants *vis-a-vis* the Minister of Home Security and the Regional Commissioner ; but it is right to say that counsel for the defendants made it clear that he was not seeking to say that the accident was anyone else's fault and was not saying the defendants are not the responsible party if anyone is responsible to the plaintiff in damages.

At the time the shelter was taken over by the defendants on Oct. 5, 1940, there was no roof over the entrance. The concrete steps were unfinished ; the boards, shutter-board risers, behind which the concrete had been poured or placed, remained in position and they were still there at the date of the accident. By reason of rain water and use they had sprung or become separated by some little distance from the concrete The space between board and concrete was up to an inch in the centre in some cases and less at the ends of the steps. Moreover the boards had been worn so that the top of them was in places two inches below the level of the concrete. The topping of cement had not been put on to the concrete and the surface was uneven. So far as I have heard no repairs were done to the steps and as time went on, their condition must have become worse. The space between the concrete and the boards became full or nearly full of dirt or dust so that it was not obvious in all stages of the light that there was a space ; but none the less the space was such that it constituted a danger in that the heel of a shoe might easily be caught, or a person might trip or slip. The worn woodwork added to the danger and so to a less extent did the uneven nature of the concrete.

Before the roof was put on, the lighting of the stairway was by hurricane lamps ; they were sometimes broken and sometimes taken away. When the roof was put over the entrance a bulkhead electric light was installed in the roof above the steps. There were complaints that too much light was thrown outside and consequently the globe was blackened more and more until the light was only dim. It was insufficient for a place of this character and for steps of this nature.

The shelter is at a road junction. There is only a very small space between the entrance doors and the steps, and that space is wider at one side than at the other. The steps themselves are 10ft. wide. A hand-rail was put on the wall at each side but no such rail was provided in the centre. In steps of this width there ought to be a middle hand-rail, especially so if there is reason to expect a crowd at any time ; that is a well recognised safety measure.

From the time when the defendants took over the shelter, it was used by many thousands of people without serious accident until Mar. 3, 1943. Bunks were erected to accommodate 3,500 people. There was an office and I think a canteen. At times when there were air raids very large numbers of people used the shelter. At other times some slept there each night, some hundreds, down to about 200 at the quietest time.

In correspondence with Regional Headquarters in August and September, 1941, the defendants gave 5,000 as the number which could comfortably be accommodated in the shelter and added that it was estimated that in a heavy air raid approximately 10,000 people would seek shelter in the tube. One witness told me that there had been 12,000 in on one night, but that may be an over-estimate. It is clear that large numbers of people were expected and that they might be expected to come quickly on an air raid warning being sounded, having regard to the situation of the shelter. The number who could get down steps of this width would be around 250 a minute. There was only the one entry at this point on the tube, although the London Passenger Transport Board had others in contemplation and partly prepared. There were no means of closing the inward opening doors and there was no crush barrier or sliding device. There was little possibility of police being there in strength to control and guide a crowd ; they could not be spared from regular duty. Immediately on the warning being given Police Constable Henderson made his way there but the accident had already occurred when he arrived. It should be made plain that no blame attaches to the police in any sense whatever.

The plaintiff told me that she had been to the shelter on one earlier occasion. After she and her husband had gone to live in the neighbourhood—not in Bethnal Green proper I think but quite near this shelter—a warden called and discussed with her which shelter they should use in case of need and he told her to go to the tube station which is the place where this accident happened. Her husband had never been to the shelter ; she and her daughter had been once before. On that earlier occasion, she told me they could not see very well and they had some little difficulty because it was rather dark ; they scraped along until they got to the bottom and held together for safety. That was the only previous visit which she and her daughter had made to the shelter.

It is, I think, desirable that I should refer in some detail to Mrs. Baker's evidence as to what happened on Mar. 3, 1943. She told me that the air raid warning went between 8 o'clock and a quarter past 8, and that she and her husband and daughter were in the house. "It was thought it would be rough" as our aeroplanes had been over Berlin recently ; she thought they would take shelter and on this occasion her husband went with them. They did not take anything in the way of blankets or bundles. They walked to the shelter and it took them about five minutes. She took a torch. When they got to the shelter they entered by the big door. She said there were a good many people about, all following on. There was a crowd following on. There was no panic. She got inside the door but she could not see. She put her torch on to find the first step and a man called out "Put that torch out," so she put it off. She told me that they then had to shuffle to find the first step. Then they were able to go down about five or six steps. They were side by side with the child in the centre. They could not go any further. They had to stand still. "The crowd seemed to come and twisted me round." She went on :

> I had no idea that an accident had happened down below. I could not see down. I did not know an accident had happened below when I was pulled out. I was not frightened at first. The crowd was pouring in and we were getting pressed more and more together. My husband called out "Help" and all the other people called out for help. It was then just like a black hole, you could not see anything. The next thing I remember is being pulled out.

She was taken to hospital suffering from injuries.

What was the real cause of this most unfortunate happening ? Counsel for the defendants said that no one has said anyone tripped ; but it seems to me that is not paying due regard to the evidence. Probably the old lady who seemed, as a witness said, to slip on the edge of the step was the first to fall and she took at least one person with her. In a very short time there was a block or jam. There was nothing in the nature of panic. People were going down the steps and no doubt some of them were hurrying and there were more people than usual.

It is clear upon the evidence that the block took place before the rocket guns were fired. They had nothing to do with the accident to the Bakers. When they were fired people surged forward the more anxiously and the position may well have been aggravated. It seems to me that the only inference to be drawn is that the block was caused by someone or by more than one person tripping or slipping on the unsafe steps. It was not the result of the firing of the rocket guns nor was there anything in the nature of rushing or surging when the block occurred.

The real cause of this tragedy was the dangerous condition of the steps. There were other matters which contributed—for example the very poor light and the lack of a hand-rail in the centre. Another factor which probably added to the extent of the trouble was the fact that there was no one on duty on the steps or at the entrance, and those entering did not know that an accident had taken place and continued to hurry forward. They could not see and there was no one to tell them of the position.

Those are the conclusions at which I arrive after consideration of the evidence of a large number of witnesses on both sides.

A warden who was at the top of the stairs near the door of the shelter when the warning was sounded, went down to the booking-hall floor forthwith. He said that he went down in order to keep people moving down the escalator. According to the chief shelter warden there were other wardens available on the booking-hall floor, but I am not sure. It is to be regretted that at the material time there was no one in authority at the entrance, on the steps or on the platform between the steps.

I have now to consider the state of knowledge of those responsible for the management of the shelter. Inside the shelter Bridger was in charge nightly as chief shelter warden and he was assisted by Hastings, the deputy chief shelter warden, and others. A number of witnesses called on behalf of the plaintiff gave evidence as to accidents on the steps through people tripping and as to defective light, and some of them said they had reported such matters to Bridger and to Hastings or to one of them. This is denied by Bridger and Hastings.

I cannot accept the denial of the chief and assistant shelter warden. I am satisfied on the evidence that the condition of the steps and of the entrance at that time was brought to the notice of those responsible for the management of the shelter. I do not believe that those witnesses who say they complained are inventing those complaints. It is proper that I should say, that in two instances at least it was suggested there was some reason for their giving evidence which was not true. I think they were speaking the truth. I cannot help feeling that the thought of the chief shelter warden was devoted more to the arrangements down below than to conditions above, else he would have passed on the complaints which he received.

Counsel for the defendants submitted that those who used the shelter were licensees at the highest. Counsel for the plaintiff, while desiring to keep open the question as to whether they ought to be considered as invitees, argued the case before me on the supposition that the plaintiff, her husband and her daughter were licensees. This seems to me to be the true position having regard to the decision of the Court of Appeal in *Ellis* v. *Fulham Borough Council* (1), in which case it was held that children using a paddling pool in a park provided by the local authority were to be regarded as licensees, though GREER, L.J., left the point open.

The duty which is owed by an occupier to a licensee is clear. It is stated in SALMOND ON TORTS, 9th Edn., at p. 520, in this way :

> This rule, however, is subject to an important qualification. Although the occupier is not bound to use any care to make the premises safe for the use of a mere licensee, he is under an obligation to give warning to such a licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead even a bare licensee into a trap by permitting him to enter on premises which the licensee reasonably supposes to be safe and the occupier knows to be dangerous.

The law is quite clearly stated again in the case to which I have just referred of *Ellis* v. *Fulham Borough Council* (1), by GREER, L.J., at p. 222. He read part of the headnote (repeating words of his own) in an earlier case, and these were the words :

> The plaintiff was merely a licensee, and any liability of the council could only arise if there was a danger known to them and not known to the plaintiff which he could not be expected to avoid.

At the foot of p. 223, he said this :

> In the present case, assuming, as I do assume for the purposes of this case without finally determining it, that the infant plaintiff was a mere licensee, what is the position

> of the defendants towards the licensee ? The position, I think, is that to which I referred in *Purkis* v. *Walthamstow Borough Council* (2) : If they knew of the danger to which the children would be exposed by using this paddling pool (a description which is taken from the notice that they put up at the side of the pool), their obligation was to see that the danger, which they recognised existed, should be provided against either by sufficiently removing all risk to which the children were likely to be subjected when they paddled in the pool or by seeing that the children did not paddle in the pool at all.

And at p. 227 he said :

> I think that is all I need say about this case. I have already indicated that I am not giving any binding decision upon the question whether the learned judge was right in finding that this was a case of invitor and invitee ; I am treating it as a case of licensor and licensee ; but still there is a liability on the licensors to protect licensees from dangers which are known to the corporation, the licensors, and which are not likely to be known to the licensee, that is to say, to a child who is not likely either to have read notices or performed the mental operation of considering whether or not there are likely to be dangers in the pond.

I am satisfied that the way down to the shelter was, for the reasons I have given, dangerous and unsafe, and that it was in the nature of a trap or concealed danger ; and further that the defendants, through Bridger and Hastings knew of that position or condition. Neither the plaintiff nor her husband nor her daughter knew of that condition, nor had they any reasonable opportunity of seeing it. The husband had never been there before ; the plaintiff and her daughter had been but once in conditions which the plaintiff described.

In these circumstances, the plaintiff is entitled to succeed in this action, subject to the statutory defence pleaded in para. 8 of the defence, and it is not necessary for me to express an opinion upon the further points of counsel for the plaintiff that the defendants, conducting an activity, must carry on that activity in a reasonable manner and must arrange for proper supervision, etc. ; and also that when taking over the premises, they must adapt them for use and and make them as suitable as possible for the purpose. I have already expressed the view that the presence of a warden or wardens on the entrance or on the steps might have reduced the casualties. I say no more than that.

It remains for me to deal with the plea under the Personal Injuries (Emergency Provisions) Act, 1939, which was an Act to make provisions as respects certain personal injuries sustained during the period of the present emergency. Under sect. 3 of that Act, if the accidents to the plaintiff, to her husband and to her child were war injuries, her claim in this action is barred. The definition of "war injuries " is in sect. 8, the interpretation section :

> " War injuries " means physical injuries (*a*) caused by (i) the discharge of any missile (including liquids and gas) ; or (ii) the use of any weapon, explosive or other noxious thing ; or (iii) the doing of any other injurious act ; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy ; or (*b*) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

It is to be observed that that definition is divided into two parts, (*a*) and (*b*). Counsel for the defendants submitted that this case falls under (*a*) (iii), " the doing of any other injurious act." Aircraft are dealt with in the other part, (*b*) ; and if the argument or submission of counsel for the defendants is sound, it would seem that there would be no need at least for that part of (*b*) which deals with hostile aircraft, for his submission was that every hostile air raid is an " injurious act," whether anything was dropped from the aircraft or not. It seems to me rather as though (*a*) (iii) is an attempted general sweeping up under (*a*), and that (*b*) deals with aircraft, and was intended so to do. Counsel for the defendants suggested that everyone hurt while running or hurrying to a shelter on an air raid warning being given meets with a " war injury." I am not sure as to that, though it may be that under the generous interpretation which has been given by the government to these matters, it might be so treated.

Apart from this, I have already found that the cause of the accident was due to conditions in the entrance or stairway. If it can be said that an air raid is *per se* an " injurious act," it was not that act which caused the accident to the plaintiff, her husband and daughter. On an alarm being given, people made their way to an air raid shelter. An accident took place. Strother, the borough surveyor, in the course of his evidence said :

> It was not an air raid at all as far as Bethnal Green was concerned. There was no bomb dropped in Bethnal Green that night. It was nothing beyond what we had had before.

Strother, of course, was not saying that this was not an air raid ; it was an air raid, but there was nothing dropped in Bethnal Green—nothing near this shelter as far as the evidence before me shows.

A In *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (3) the question arose as to whether loss or damage to a ship had been occasioned through a war risk or marine risk ; and the House of Lords had to consider what was the proximate cause of the loss. There it was said, at p. 691 :

> The proximate cause of the loss of a ship is not necessarily the one which operates last, but is the effective and predominant cause, selected from among co-operating causes. This choice of the real or efficient cause from out of the whole complex of the B facts must be made by applying common-sense standards. An accident of a kind which arises from a marine risk may in some circumstances be regarded as the consequence of a warlike operation, but, because a ship is employed on a warlike operation, everything that happens to her is not necessarily a proximate consequence of it. A marine risk does not become a war risk merely because the conditions of war make it more probable that the marine risk will operate.

I cannot help referring to two or three lines from the argument of counsel C for the appellants in that case—I suppose the last argument which he presented. He puts his submission in this way, at p. 694 :

> In every case it is necessary to review all the circumstances and to decide what was the dominant cause of the loss.

In the course of his speech, VISCOUNT SIMON, L.C., said, at p. 698 :

> It seems to me that there is no abstract proposition, the application of which will D provide the answer in every case, except this : one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be.

Applying those standards and those tests, it seems to me clear that the "effective and predominant cause" of this accident was not the air raid. Indeed, as I have said, the real cause was the condition of the steps and the condition of the entry generally. Consequently, that plea of the defendants fails.

E I am sorry for several reasons to have to arrive at this conclusion. I was told that the Minister had treated this as a war injury within the Act, and had granted a pension to the plaintiff. It may well be that in such a case, she and her child would have been better off under the scheme, for I know that in such cases widows are treated generously by the government ; and I cannot leave the case without saying that it is only after full consideration of all the evidence F that I have arrived at my findings against the defendants on the facts. I have not overlooked the fact that many of those who were called were voluntary workers, nor have I forgotten the difficulties of the times or the nature of the undertaking. Shelters are not places of great comfort ; they are refuges, as Admiral Sir Edward Evans said. None the less, the defendants had been in occupation for 2½ years, and nothing had been done to the unfinished steps. It is surprising that no one ever suggested moving the frontal boards from G them. After the accident changes were made to the steps and to the lighting, and central hand-rails were put in. It was not a very heavy task. The fact that these alterations were made ought not to be taken against the defendants ; it is, as a witness said, easy to be wise after the event.

I now come to the question of damages. It is agreed that I have not to take into consideration in any degree the amount of pension which the plaintiff has received or may receive. Indeed, it is clear that under the Personal Injuries H (Emergency Provisions) Act, 1939, s. 1 (4), and under the scheme made under the Act, the Minister may withdraw the pension or modify it. I assume that he will take some such step if my finding that this is not a war injury is sound.

The plaintiff was 38 years of age at the time of this accident, and her husband was the same age. He earned £4 3*s.* a week, and he gave her £3 a week. The loss to the family fund is around £2 a week. He might have given her a little more in case of necessity. The two sons who were evacuated from Bethnal Green at the time of the accident are aged 12 and 8 respectively. If I had to deal with a claim for the death of the husband under Lord Campbell's Act alone, I should award the sum of £1,200 as damages, bearing in mind the fact that the plaintiff herself was earning substantial wages at the time. But there is a claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and I assess the damages under that Act at the sum of £250, which will come out of the £1,200, there being no additional expense, so far as I know, to be taken into consideration. This means that the damages in respect of the death of the husband will be £250 under the Law Reform (Miscellaneous Provisions) Act, and £950 under Lord Campbell's Act. The £950 will be apportioned so that the elder boy, George, receives £150, and the younger boy, Leslie, £250.

The plaintiff is also entitled to damages in respect of her daughter, who was 14½ years old, and those damages I assess at the sum of £250. It was agreed between the parties that if there was liability, the plaintiff should receive the sum of £100 in respect of her own personal injuries. There will be judgment accordingly for those sums.

Judgment for the plaintiff with costs.

Solicitors: *Dolland & Co.* (for the plaintiff); *William Eastman & Son* (for the defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

FLORENCE YOUNG *v.* MINISTER OF PENSIONS.

[King's Bench Division (Tucker, J.), **July 11, 1944.**]

Emergency Legislation—Compensation—Artificial menopause resulting in highly nervous and hysterical condition—Nervous and hysterical condition aggravated by sight of bombed home—"War injury"—Hysteria functional disorder but not organic disease—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 1, 2, 8 (1) (*b*)—*Pensions (Mercantile Marine) Act,* 1942 (*c.* 26), *s.* 5—*Pension, Personal Injuries (Civilians) Scheme, S.R. & O.,* 1944, *No.* 369, *Part IV, art.* 12 (2).

The applicant at the age of 16, underwent an X-ray treatment which caused an artificial menopause, as a result of which she became highly nervous and hysterical. She remained in that condition for some time thereafter. In September, 1940, while she was still affected, her residence at 67, Broadhurst Gardens was damaged by blast in an air raid. At that time she was not in the house, but had taken shelter in Finchley Road, some distance away. On returning home after the raid she suffered a shock at the sight of the damage and had to receive hospital treatment for hysteria. It was found as a fact that there had been an aggravation of her existing nervous condition resulting in hysteria, brought about by the sight of the damaged property, and it was further found that hysteria is a functional disorder and not an organic disease. The applicant claimed an injury allowance, contending that she was suffering from a war injury within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, (c. 82), *ss.* 1, 2 as amended by the Pensions (Mercantile Marine) Act, 1942 (c. 26), *s.* 5 and the Pension, Personal Injuries (Civilians) Scheme, S.R. & O., 1944, No. 369, Part IV, art 12 (2), which define war injuries as "... physical or mental injury or damage, or loss of physical or mental capacity, caused by that injury ... (including tuberculosis and any other organic disease and the aggravation thereof), caused by ... the impact on any person or property of any enemy aircraft ... or anything dropped from any such aircraft":—

Held: (i) applicant was not suffering from any physical or mental injury within the meaning of such definition.

(ii) mental disturbance and the aggravation of the nervous and hysterical condition brought about by the sight of bombed property were too remote to amount to a cause within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939.

[**EDITORIAL NOTE.** It is sufficient for the purposes of this case to construe the definitions in the Acts referred to, and it is not necessary to consider the authorities on remoteness of damage. It may be, however, that the precision of the definitions have prevented the application of these provisions to a case which would be within the wide principles established by the authorities relating to the recovery of damages in cases of shock.

As to Personal Injuries (Emergency Provisions) Act, 1939, ss. 1, 2, 8, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1061.]

Appeal by the applicant from a decision of No. 6 Pensions Appeal Tribunal on a case stated by the chairman of the tribunal. The facts are fully stated in the judgment.

H. C. Dickens for the appellant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Valentine Holmes* for the respondents.

Tucker, J.: This appeal is brought under the provisions of the Pensions Appeal Tribunals Act, 1943, which allows appeals by the leave of the tribunal or by the leave of the nominated judge on questions of law alone. In this case the tribunal granted the appellant leave to appeal and stated the facts and the questions of law which arise on the hearing of this appeal.

The applicant had applied to the Minister of Pensions for an award in respect of disablement concerning persons not gainfully occupied. That application was made under the Personal Injuries (Civilians) Scheme, which is a scheme made by the Minister pursuant to the powers granted to him under the Personal Injuries (Emergency Provisions) Act, 1939, s. 1, which provides that the Minister may make a scheme in accordance with the provisions of this Act:

> . . . providing for the making of payments in respect of the following injuries sustained during the period of the present emergency, namely—(*a*) war injuries sustained by gainfully occupied persons [with certain exceptions] and by persons of such other classes as may be so specified.

It further provides that the scheme may make provisions for payments to injured persons by way of pension or grant which shall be payable only where injury causes serious and prolonged disablement or death.

In this case the application was based upon the ground of disablement under part VI of the scheme. Part IV art. 12 sub-art. (2) defines "disablement" as:

> In this part of this scheme the following expressions have, unless the context otherwise requires, the meanings hereby respectively assigned to them, that is to say—(*a*) "disablement", in relation to a gainfully occupied person who has sustained a war injury or a civil defence volunteer who has sustained a war service injury, means physical or mental injury or damage, or loss of physical or mental capacity, caused by that injury, and "disabled" shall be construed accordingly.

That definition refers only to gainfully occupied persons but as a result of subsequent provisions of the scheme it applies in this case, although the appellant was not a gainfully occupied person.

The facts have been set out in the case stated. They show that this lady at the age of 16 underwent X-ray treatment which caused an artificial menopause and that as a result of it she was in a highly nervous and hysterical condition for some time thereafter and was still in that condition in the year 1940.

On Sept. 25, 1940, she was in an air raid shelter in Finchley Road during an air raid. In that raid 67, Broadhurst Gardens, Hampstead, the house where the lady was residing, was damaged by blast, but she was not there when the blast damage occurred. She was in the shelter some distance away. The case does not state the precise distance. The case finds that the shelter where the lady was was not hit by a bomb, but on returning to 67, Broadhurst Gardens after the air raid the lady was greatly shocked to find that 67, Broadhurst Gardens was damaged. The case states that this bomb incident aggravated the appellant's already existing bad nervous condition and she had to receive hospital treatment for hysteria thereafter. The tribunal finds that there had been an aggravation of her existing nervous condition.

The case clearly shows that that aggravation had been caused by the effect upon her mentally of observing the damage to the house where she had been living. In order to receive a disablement pension the tribunal had to be satisfied that the applicant was suffering from a war injury.

By the Personal Injuries (Emergency Provisions) Act, 1939, s. 1, the Minister is given power to make a scheme with respect to the payment for war injuries. In sect. 8 of that Act "war injuries" are defined as follows:

> "War injuries" means physical injuries (*a*) caused by—(i) the discharge of any missile (including liquids and gas); or (ii) the use of any weapon, explosive or other

> noxious thing; or (iii) the doing of any other injurious act; either by the enemy or in combating the enemy or in repelling an imagined attack by the enemy; or (*b*) caused by the impact on any person or property of any enemy aircraft, or any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty or any allied power, or any part of, or anything dropped from, any such aircraft.

That definition is enlarged by the Pensions (Mercantile Marine) Act, 1942, s. 5, which provides:

> For the removal of doubt it is hereby declared that the expression "physical injury," A in the principal act and in this act, and in the Personal Injuries (Emergency Provisions) Act, 1939, includes tuberculosis and any other organic disease, and the aggravation thereof.

The result is that the definition of "war injuries" will now read as follows: "War injuries" means physical injuries (including tuberculosis and any other organic disease and the aggravation thereof) caused by the matters which I have already enumerated. B

It is said that the tribunal have gone wrong in finding on these facts that there has been no aggravation of an organic disease. It is said that on the facts stated I must infer that this lady suffered from an organic disorder brought about by the X-ray treatment resulting in the artificial menopause, that that condition has been aggravated by the bombing incident and that the tribunal have come to a wrong decision, or alternatively, that they have not directed C their minds to the question whether the X-ray treatment caused an organic alteration and that, therefore, the case should be sent back to them to consider that matter and hear evidence about it.

I have come to the conclusion that on the facts set out in this case it is impossible to say that the tribunal have come to an erroneous decision on a question of law. I think it is clear from the facts stated that the lady has not suffered any physical injury within the meaning of the Personal Injuries (Emergency Provisions) D Act, 1939, as it stood before the amendment in the Pensions (Mercantile Marine) Act, 1942. Furthermore, I think it is clear that her aggravated condition was not caused by "the discharge of any missile . . . or the use of any weapon, explosive, or other noxious thing; or the doing of any other injurious act . . . or . . . by the impact on any person or property of any enemy aircraft" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939. E

I think that the mental disturbance brought about by the sight of bombed property is too remote to amount to a cause within the meaning of that definition. That is also an answer to the point raised that the lady was suffering from an organic disease aggravated by the bombing incident. Aggravation by the bombing incident would not be sufficient. It must be an aggravation caused by the matters in the definition that I have enumerated. If the aggravation was F due merely to the mental disturbance arising from the sight of the bombed property, that, in my view, would be too remote.

I think that there is another difficulty in the way of the applicant which renders it unnecessary for me to send the case back to the tribunal, namely, that as I read the case, and this is a finding of fact, the case finds that hysteria is a functional disorder and not an organic disease. I find it quite impossible to say that that is a finding at which the tribunal, which includes a medical G member, are not entitled to arrive without disturbance by me, and I do not read that as a finding that the X-ray treatment, which caused the artificial menopause, did not produce an organic change. If there had been such a finding it might have been necessary to send the case back for further consideration. What the case finds is that the hysteria, which was an after-effect of the treatment and the organic change, is not itself an organic disease but is a functional disorder, and I find it quite impossible to say that in coming to that finding H the tribunal have in any way erred in law. Therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *G. W. White* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

R. *v.* FREDERICK GRANT, ROBERT GOODACRE PEEL, WILFRED JOHN LEY, EDWARD PEARCE, JOSEPH TRUEMAN AND GEORGE HENRY CLARKSON.

[WARWICK SUMMER ASSIZES: BIRMINGHAM DIVISION (Birkett, J), **July 26, 1944.**]

Criminal Law—Evidence—Admissibility—Evidence by one prisoner against another jointly charged with same offence—Evidence by one prisoner against another charged on same indictment with different offence.

In proceedings before magistrates in which 5 persons were charged jointly and severally with various offences, 3 of them were called to give evidence for the prosecution on the charge in which they themselves were concerned. It was contended that, in these circumstances, the committal by the justices was unlawful and that the indictment based on that committal should be quashed. In a second indictment there was no joint charge, but 3 persons were charged with stealing and 1 person with receiving, and in the court below the persons who had been charged with stealing were called to give evidence in respect of the charge of receiving:—

HELD: (i) it was not competent for the prosecution to call as witnesses persons who were themselves concerned in the charge. The committal of all the persons charged was, therefore, unlawful and the first indictment must be quashed.

(ii) it was not in accordance with the fair administration of the criminal law that men who had been charged with an offence but not yet tried should be called as against another man to give evidence of that offence. The second indictment must, therefore, also be quashed.

[**EDITORIAL NOTE.** It is a fundamental principle of the common law, notwithstanding the Evidence Act, 1851, and the Criminal Evidence Act, 1898, that a person charged with an offence cannot be called as a witness for the prosecution. The principle is here applied in quashing an indictment charging several persons jointly and severally, where the committal upon which it was based was obtained by admitting the evidence of some of the parties charged. The court went somewhat further in quashing a second indictment which contained no joint charge, but a joinder of counts for stealing and receiving, evidence of receiving being admitted from the parties charged with stealing. This appears to be based only on the general desirability of avoiding unfairness and prejudice, and a proper solution would seem to be severance of the indictment. Reference may also be made to the observations on committals on several counts made in *R.* v. *Phillips, R.* v. *Quayle*, [1939] 1 K.B. 63; [1938] 3 All E.R. 674.

AS TO EVIDENCE OF DEFENDANTS IN CRIMINAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 213, 214, para. 299; and FOR CASES, see DIGEST, Supp., Vol. 14, Nos. 1720a, 4756a.]

Case referred to:

*(1) *R.* v. *Gee, R.* v. *Bibby, R.* v. *Dunscombe*, [1936] 2 K.B. 442; [1936] 2 All E.R. 89; 105 L.J.K.B. 739; 155 L.T. 31.

APPLICATION by defendants to quash two indictments on the ground that they were based upon unlawful committals. The facts are fully set out in the judgment.

W. Kelly Carter for the Crown.

T. Norman Winning for the defendant Grant.

Guy H. Dixon for the defendants Peel and Clarkson.

J. H. Moss for the defendants Ley, Pearce and Trueman.

BIRKETT, J.: The first indictment charges Grant, Peel, Ley, Pearce and Trueman with various offences. In the first count they are all charged with the offence of conspiracy to steal, a joint charge concerning them all. In the second charge, Pearce is charged with larceny of certain tea. In the third count, Grant and Peel are charged with receiving certain goods knowing them to be stolen. In the fourth count, Ley, Pearce and Trueman are charged jointly with stealing. There are many other counts in the indictment which number eleven, and the application is made that that indictment should be quashed. The ground of the application is that there has been no lawful committal by the justices in the court below, and, therefore, the bill of indictment which has been preferred and signed, based upon that unlawful committal, is, in fact, a nullity and there is, indeed, no bill of indictment before the court, and that no trial can take place.

In *R.* v. *Gee, Bibby and Dunscombe* (1), an application was made to quash the indictment and there were appeals against the conviction. The appellants in that case had been charged with shopbreaking, but before they were committed to the quarter sessions the depositions, which ought to be taken in accordance with the Indictable Offences Act, 1848, s. 17, had not been taken in conformity with that Act of Parliament; but they were committed for trial and they were in fact convicted. They appealed to the Court of Criminal Appeal against their convictions; and they took that objection and it was held by the court that the proceedings before the justices in that case were so defective by reason of the Act of Parliament not having been complied with that there had not been any lawful committal within the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), which is now the operative statute. Consequently, no bill of indictment could be preferred against the appellants. The document which purported to be an indictment was not an indictment and the appellants could not be tried upon it. In that case, the court quashed the convictions and made no order for a further trial. GODDARD, J., as he then was, gave the judgment of the Court of Criminal Appeal which consisted of LORD HEWART, L.C.J., DU PARCQ, J., as he then was, and GODDARD, J. He read to the court sect. 17 of the Act of 1848 and he read sect. 2 (2) of the Act of 1933, which is, in fact, the statute in this matter at this day, and he then proceeded:

> It is common ground that the proceedings before the magistrates in the present case were not in accordance with the above Act. What is the effect of that?

Then the judge read the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), which is as follows:

> Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either . . . (*a*) the person charged has been committed for trial for the offence; or (*b*) the bill is preferred by the direction or with the consent of a judge of the High Court . . .

Then certain provisions are made, but the essential condition is that the person charged has been committed for trial. At p. 445 GODDARD, J., continued:

> It is common ground that the proceedings before the magistrates in the present case were not in accordance with the above Act. What is the effect of that? The question here is whether the persons charged have been legally committed for trial. "Committed for trial" is defined in the Interpretation Act, 1889, s. 27. The expression "committed for trial" used in relation to any person shall, unless the contrary intention appears, mean . . . committed to prison with the view of being tried before a judge and jury . . . and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury." The magistrates purported to commit the appellants for trial by remanding them in custody until trial. It appears to the court that these proceedings were so defective that there was no lawful committal for trial, and consequently the provisions of sect. 2 (2) of the Act of 1933 were not complied with and no bill of indictment could be preferred against the appellants. The document purporting to be an indictment which was produced before the Recorder was not an indictment, and the appellants could not be tried on it.

Then he proceeded upon some matter which does not concern us about the learned Recorder, and continued:

> The result is that there has been what is sometimes called a mis-trial, though it would be more accurate to say that there had been no trial at all.

Then he went on to state the powers the court had to order the trial *de novo*. That was the answer the Court of Criminal Appeal made, quashing the convictions on the ground that there was no lawful committal because the depositions had not been taken in accordance with sect. 17 of the Act.

In this case, counsel for the prisoner Grant submits upon this indictment, and counsel for the prisoners Ley, Pearce and Trueman, adopts the argument on behalf of his clients, that there has been no lawful committal because of the fact that, when these men were all charged in the court below with conspiracy and other offences, three or four of the prisoners were called to give evidence for the prosecution on the charge in which they themselves were concerned. I said yesterday, and repeat, that this is new within my experience, and everybody, and in particular counsel for the prosecution, appears to agree that, in any event, it is most undesirable; and the submission of the counsel for the defence is that it is illegal and that it renders the committal by the justices a nullity.

In TAYLOR ON EVIDENCE, 10th Edn., Vol. 2, at p. 964, there is a passage which has considerable bearing on this matter :

> With regard to the first of these classes of persons, namely, defendants to indictments and persons charged before magistrates with minor offences, the Evidence Act, 1851, in making parties to the record admissible witnesses, expressly provided that nothing in this Act " shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself." A difficulty arose in the construction of this proviso, in that it did not say that the persons specified in it should not be rendered competent or compellable to give evidence at all, but merely that they should not be allowed or forced to testify for or against themselves. Consequently, where several persons were jointly indicted, it was for some years considered by many judges, though some doubted, that any one of them might . . . be called as a witness either for or against his co-defendants, excepting only in those few cases where the indictment was so framed as to give such person a direct interest in obtaining the discharge of his co-defendants. At last, in 1872, the Court of Crown Cases Reserved, after much discussion, decided that the Evidence Act, 1851, did not alter the ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial. The indirect effect of that decision was to establish that whenever it is desired to obtain the testimony of a defendant in a criminal trial as against his co-defendants, an end must be put to the proceedings against him, either by his pleading guilty on arraignment, or by the prosecution entering a *nolle prosequi*, or by an application for a verdict of acquittal being made before the case is opened ; though the court, in its discretion, will in ordinary course direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness. Nothing short of a formal judgment or a plea of guilty can, however, be considered, as, for this purpose an end of the matter.

The Act to amend the law of evidence in 1898 enacted for the first time :

> Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows : (*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application.

In the circumstances of this case Ley, Pearce and Trueman were called as witnesses for the prosecution although they themselves were then upon that charge. The view which I take is that it was not competent for the prosecution to do that in any event. I take the view, further, that it was quite contrary to the spirit in which the criminal law of this country is administered, and, so far as the men who were called are concerned, counsel for the prosecution says that he could not contend that the committal was otherwise than unlawful, and consequently, he was not prepared to contend the committal was good as against Grant. Quite apart from those submissions which were made by counsel, I take the view that this is a case in which I ought to exercise my powers, and I do exercise my powers, and I quash the indictment as against Grant, Peel, Ley, Pearce and Trueman. That disposes of the first indictment.

With regard to the second indictment, in which similar submissions are made, rather different considerations arise. That is the indictment against Pearce, Ley, Trueman, and Clarkson. There is no joint charge in that indictment. Pearce is charged with stealing ; Clarkson is charged with receiving. Ley and Trueman are charged with stealing ; Clarkson is charged with receiving. Ley and Trueman are charged with stealing ; and Clarkson is charged with receiving. There are six counts in which three counts are for receiving against Clarkson and three counts are there for stealing, but none of them is a joint charge as in the submission made on the last indictment.

It would appear from the depositions, and from information given to me by learned counsel, that what happened in the court below on July 6, two days after the other committal, was this : that evidence was first given of stealing by witnesses who were independent of the defence, police evidence saying that the prisoners had been interviewed and they had made these statements, and there were the charges of stealing against the men. Then the charge of receiving was entered upon and these men, who had in the same court been charged with stealing and presumably committed for trial, were called to give evidence. Counsel for the prosecution submitted to me, and cited the authorities, that they were, in fact, separate committals and that the argument which has prevailed in the last case ought not to prevail in this; that there was no technical flaw of any kind, namely, that there had been a separate committal upon the charges of stealing against the men and a separate committal upon the receiving against Clarkson.

The view I take, with regard to the charges against Clarkson of receiving, is that, whilst it may possibly be that the evidence of the men was called to prove the stealing, it is certainly contrary to practice that men who are charged with offences should be called in that capacity. At p. 438 of ARCHBOLD, the rule is put: A

> Where it is proposed to call an accomplice for the Crown [and obviously a man who has been committed on a charge of stealing a ham, and is called to give evidence of stealing a ham, on the same day in the same court, is an accomplice] it is the practice (*a*) to omit him from the indictment; or (*b*) to take his plea of guilty on arraignment; . . . or during the trial, if he withdraws his plea of not guilty; . . . or before calling him either (*c*) to offer no evidence and permit his acquittal; . . . or (*d*) to enter a *nolle prosequi*. B

That is following the language of the illustration laid down in the passage from TAYLOR ON EVIDENCE which I read, which is supported by the various authorities.

Similarly, at p. 441 of ARCHBOLD, under the heading "Charged Jointly," it is said:

> C In the case of an indictment against two or more prisoners, one prisoner may give evidence for the Crown against a co-prisoner in the following cases: (1) Where a *nolle prosequi* has been entered . . . (2) where a verdict of acquittal has been given . . . (3) where the prisoner in question has pleaded guilty on arraignment or during trial . . . (4) where, though jointly indicted, he is not being tried with the prisoner against whom he gives evidence.

I pointed out that in this case there is no joint charge; and it may very well be that counsel for the prosecution is right in saying that, so far as the committal of the men on the stealing is concerned, technically, no objection could be taken to it; but with regard to the receiving I entertain the gravest doubt as to whether there was a lawful committal in that case. In any event, I have to do my utmost to see that the law is administered fairly and properly, and the view I take about this indictment is this: that these three men were charged with the criminal offence of stealing; they were to be regarded as innocent people until they had been proved guilty in law; although they had made statements and although those statements were given in evidence their trial had still to take place when they were called in the court below as against another man, although not charged jointly with him, to give evidence of their own stealing, and then I find in the indictment before this court that all those offences are included in the same indictment. D E

I have power to sever the indictment, and no difficulty would arise upon that head, but, taking all the circumstances into consideration, I think, in accordance with the practice of the criminal law, that there shall be no suggestion of unfairness or prejudice, that the proper course for me to take in this case, and I do take this course, is to quash the indictment in the case of Pearce, Ley, Trueman and Clarkson. F

Indictments quashed. G

Solicitors: *Clifford Knight*, Leicester (for the Crown); *R. A. Young*, Nottingham (for the defendant Grant); *Richard Barker & Son*, Melton Mowbray (for the defendants Peel and Clarkson); *Bray & Bray*, Leicester (for the defendants Ley, Pearce and Trueman).

[*Reported by* GWYNEDD LEWIS, *Barrister-at-Law.*]

KINDER *v.* THE MAYOR, ALDERMEN AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF CAMBERWELL.

[King's Bench Division (Viscount Caldecote, L.C.J.), **July 20, 1944.**]

Factories and Workshops—Dangerous Machinery—Fencing—Unfenced hand-operated paper compressing machine—Criterion by which danger determined—"Adapting for sale . . ."—Factories Act, 1937 (*c.* 50), *s.* 151.

The plaintiff was employed by the defendants on their premises as an operator of a hand-operated machine for compressing waste paper into bales. Whilst working this machine the plaintiff was injured by a handle, attached to the machine, which unexpectedly sprang up. The machine was unfenced. There was no negligence on the part of the plaintiff. Evidence was adduced that the handle of this type of machine might spring up unexpectedly if the wiring was not properly done or if it happened to break or if too much paper was put into the machine. The questions for the determination of the court were (i) whether the premises were a factory within the meaning of the Factories Act, 1937, s. 151, and (ii) whether the machine was dangerous within the meaning of the Act:—

Held: (i) the compressing of waste paper was a process of adapting an article for sale and, therefore, the premises were a factory within the meaning of sect. 151 of the Act.

(ii) in the ordinary course of human affairs danger might reasonably be anticipated from the use of this machine without protection, it was therefore dangerous within the meaning of the Act.

[**EDITORIAL NOTE.** Of the two questions at issue in this case, that whether the machine was a dangerous one is probably the more difficult. The fact that a machine has been used for years without accident, or, on the contrary, has been the subject of accidents, is not finally decisive on the question of danger. Here the question of providing a guard has often been discussed but there was no evidence that one has been provided. The question is ultimately one of fact whether in the ordinary course danger can be reasonably expected from the use of the machine.

As to Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and for Cases, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to:

*(1) *Henderson* v. *Glasgow Corpn.* (1900), 2 F. 1127; 24 Digest 900, *p.*

(2) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; Digest Supp.

*(3) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192; 24 Digest 909, *71*; 76 L.T. 159; *sub nom. Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173.

Action to recover damages for personal injuries sustained through a breach of statutory duty imposed by the Factories Act, 1937. The facts are fully set out in the judgment.

Alban Gordon for the plaintiff.

S. R. Edgedale for the defendants.

Viscount Caldecote, L.C.J.: The plaintiff was an operator of a machine for compressing waste paper into bales. The operation on a particular day resulted in the plaintiff sustaining injuries which are not serious and have had no permanent result. The machine or piece of plant in question has been described to me by two very experienced people. The paper is put into a box with a moveable top, which has been described as a plunger, and as the box is filled the plunger is pressed down by hand, the additional power required to compress it being applied by means of a lever upon which the operator presses; as the paper is compressed, the plunger goes further down and is kept in position by cogs or studs, with the result that the lever is fixed until it is released. In order to fill up the box from time to time there is, by means of a second handle, a method of releasing the gear which holds the plunger in position. While attempting to release the gear so as to put some paper into the box, the release took place, not under the control of the operator, but quite suddenly, with the result that the handle suddenly flew up and struck the plaintiff, knocking out several teeth.

The claim is put upon a breach of statutory duty and, alternatively, as a breach of the duty which under common law the defendants owe to the plaintiff as their servant. The first way in which it is put is that this was a factory where this machine was being operated and that this machine was dangerous, it being not a properly fenced plant or machine, and for that purpose I have to consider, first of all, whether this was a factory. I can dispose of that question quite briefly. The words relied upon are in the Factories Act, 1937, s. 151. The expression "factory" means premises in which in any process for or incidental to any of the following purposes persons are employed, and the following purposes include these words: "the adapting for sale of any article." Quite apart from authority, taking those words in their ordinary signification, I should, I think, come to the conclusion that what was done in this case was adapting for sale the waste paper which the defendants desired to dispose of for the purpose of gain, but there have been certain decisions which help me to arrive at the same conclusion. In *Henderson* v. *Glasgow Corpn.* (1) it was held that separating saleable parts of town refuse from the unsaleable parts was an adapting for sale. I do not think I need really go further than that case. Sorting saleable parts of town refuse from the unsaleable parts is not precisely the same as baling this paper refuse, which is what was happening in the case before me, but I think that *Henderson* v. *Glasgow Corpn.* (1) must have been decided on principles which make it an authority for my guidance in the present case. On the facts in this case, I think this was a factory.

The next question is whether this plant was dangerous within the meaning of the Act. This, I find much more difficult. Anything, in a manner of speaking, is dangerous if either owing to negligence or owing to the fact that it is impossible for everybody on every occasion, however carefully they may conduct themselves, to avoid some mischance of hand or eye injury may be caused; and this particular piece of apparatus does not come within the class of cases where the moment a button is pressed or a handle is turned the machine begins to operate without the manhandling of the operator. To take an illustration which counsel for the defendants gave, it is not inherently more dangerous than the starting handle of a motor car which may become dangerous the moment it is operated by hand, but, at any rate, it does not come into the class of case where machinery is operated by power from without. This particular class of machine is well-known. The evidence was that it has been used for something like 20 years and that accidents have occurred. The question of providing some sort of fence or guard has been discussed from time to time, although neither on this occasion nor in any other place where the machine is used, of which there are hundreds in the country, has a fence or guard been provided. I am not aware of any act which the plaintiff is said to have done which could be attributed to negligence. If there were any such evidence different considerations, of course, might arise. There is a plea of contributory negligence on the record, but it is not every mischance which involves negligence. The eye or the hand, as I have said, may miscalculate the effort which is necessary to make a particular machine work, and an accident may take place without any inattention or negligence.

Here, therefore, I have to consider whether this machine was dangerous when used by a person acting reasonably. I have had cited to me a decision of du Parcq, J., as he then was, in *Walker* v. *Bletchley Flettons, Ltd.* (2), where he says (at p. 175) that the statement of Wills, J., in *Hindle* v. *Birtwistle* (3) was one which bound him and which he accepted:

> It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection.

That states a principle upon which a decision may be given, but it is not very easy to apply. If a machine has been used for a number of years and no fence has been required or used, and accidents have been very scarce, I suppose it might be said that in the ordinary course of human affairs it might be reasonably anticipated that the use of it without protection did not result in accidents.

On the whole I find that this machine was dangerous, since in the ordinary course of business danger may reasonably be expected from the use of it without protection. One reason why I come to that decision is that I was told that the handle would jump up or fly up if the wiring was improperly done or if the wire happened to break, or if too much paper were put into the machine. That seems to me to show that, even if the machine is used by a proper person without negligence, danger may be reasonably anticipated, though it does not often occur from the use of it without protection.

This decision that it is dangerous is one that depends on a refinement of words to some extent. Almost everything is dangerous from one point of view, but one has to see whether the danger should be reasonably anticipated from the use of things without protection, and here, as I have said, I think danger may be reasonably anticipated, and it is only the very great care of the operators which has prevented accidents happening of the sort which happened in this present case.

That conclusion makes it unnecessary to consider the question of common law negligence.

Judgment for the plaintiff for £50 with costs on the High Court scale.

Solicitors: *Mawby, Barrie & Letts* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

ARABIAN *v.* TUFFNALL & TAYLOR, LIMITED.

[KING'S BENCH DIVISION (Wrottesley, J.), **July 5, 1944.**]

Workmen's Compensation—Alternative remedies—Election between two remedies—Receipt of compensation—Recorded agreement for compensation—Benefit of infant—Estoppel by record—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 23, 25 (4), 29 (1).

An infant employee in a factory was injured while operating a horizontal milling machine. An agreement under the Workmen's Compensation Acts, 1925-1934, was entered into by the employers and the infant employee whereby the employers bound themselves to pay to the infant employee the maximum amount payable under the Workmen's Compensation Acts. The agreement was duly recorded at the Wandsworth County Court. Subsequently the infant employee commenced proceedings against the employers for negligence and breach of statutory duty. The defendants took the preliminary point that the recorded agreement estopped the plaintiff from bringing these proceedings:—

HELD: (i) since s. 25 of the Workmen's Compensation Act, 1925, does not require the county court to consider whether it is in the infant's interest that his common law rights should be precluded by a recorded agreement, the infant retains the benefit of the general law relating to infants' contracts and the right to repudiate such an agreement as not being for his benefit.

(ii) the estoppel by record relied upon by the defendants was limited to proceedings under the Workmen's Compensation Acts, and there was no estoppel in the circumstances of this case.

[**EDITORIAL NOTE.** Subject to the question of infancy, there was here within the authorities a clear case of election to accept workmen's compensation. A contract or agreement is not binding on an infant unless it is for his benefit and the question here is whether the court would ignore the recorded agreement and allow an action at common law to proceed. Obviously, if there was any prospect of such an action being successful, the agreement could not have been for the benefit of the infant and on these grounds the action was allowed to proceed.

AS TO ALTERNATIVE REMEDIES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 961-969, paras. 1318-1328; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071; see also WILLIS'S WORKMEN'S COMPENSATION, 35th Edn., pp. 484, 485, 520-527.]

Cases referred to:

*(1) *Murray* v. *Schwachman, Ltd.*, [1938] 1 K.B. 130; [1937] 2 All E.R. 68; Digest Supp.; 106 L.J.K.B. 354; 156 L.T. 407; 30 B.W.C.C. 466.

*(2) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 34 Digest 492, *4070*; 73 L.J.K.B. 739; 90 L.T. 838; 6 B.W.C.C. 48.

*(3) *Ware* v. *Whitlock*, [1923] 2 K.B. 418; 34 Digest 447, *3659*; 92 L.J.K.B. 763; 129 L.T. 595; 16 B.W.C.C. 100.

(4) *Rhodes* v. *Soothill Wood Colliery Co.*, [1909] 1 K.B. 191; 34 Digest 437, *3567*; 78 L.J.K.B. 141; 100 L.T. 14; 2 B.W.C.C. 377.

ACTION for damages for personal injuries suffered by the plaintiff in the course of his employment and for breach of statutory duty. The defendants took the preliminary point that, since the infant plaintiff had accepted workmen's compensation and had entered into a recorded agreement, he had elected to take such compensation and was barred from pursuing his common law remedy.

S. R. Edgedale for the plaintiff.
Humfrey Edmunds for the defendants.

Wrottesley, J.: The plaintiff in this case, when a boy of 17, was employed in a factory upon a horizontal milling machine, a kind of circular saw for cutting metal. He had the misfortune in the course of his work to rest his left hand in the wrong place. As a result he has lost all the fingers and most of the thumb of that hand. That happened in February, 1942. The boy was an orphan, and his father had left property to Barclays Bank as trustees for this boy and his sister. For one reason or another at one time, after the accident, the bank seems to have thought they were guardians to the boy, but later on they said they were only trustees of the father's estate. In fact, a widow lady, who acted as housekeeper to the father, looked after the two children; and the bank placed every confidence in her, doubtless rightly. I thought it right to read the correspondence between the bank on behalf of the infant plaintiff, and the defendant company's insurance company, though its admissibility was objected to by the defendant's counsel, on the ground that the negotiations eventuated in an agreement. They did end in an agreement. But since the court has had to consider the interest of an infant, who is said to be bound by the agreement, it has, I think, not merely a right but a duty to investigate all the circumstances surrounding this agreement.

From the correspondence it appears that the bank appears to have relied on the employers' claim agent or the insurers' solicitors for information both as to what had happened, and generally as to the infants' rights. As a result the housekeeper was proffered by the bank as a suitable next friend to sign an agreement in conjunction with the infant plaintiff. This agreement was an agreement under the Workmen's Compensation Acts, 1925 to 1934, and by it the employers (the defendants in the action before me) bound themselves to pay to the infant plaintiff the maximum amount payable under the Workmen's Compensation Acts. The plaintiff and the housekeeper signed the agreement on Oct. 25, 1942, and also the form applying to have it registered in the Wandsworth County Court in the special register provided for under sects. 23 and 25 of the 1925 Act. The agreement was accordingly duly recorded and became "for all purposes enforceable as a county court judgment" as from Oct. 19, 1942. From that moment the defendants have abided by the agreement and paid all that was due from them, namely, £1 4*s.* 0*d.* weekly.

However, some time prior to Oct. 12, 1943, someone seems to have wondered whether the infant plaintiff's rights in the matter of this permanent and serious mutilation had been properly safeguarded. The result was the writ in this action, followed by a statement of claim, which alleged that the infant's injuries were due to various acts of negligence and breaches of their statutory duty on the part of his employers. Among the defences raised to this claim is the one which was argued as a preliminary point, for the reason that, if it succeeds, it disposes of the infant's claim, and it will never be necessary for the courts to decide whether the injuries to the boy arose from a tort for which the defendants were liable to compensate him at common law.

The defence is simply that the plaintiff agreed to accept as compensation for his injuries the amount appearing in the recorded memorandum of agreement, or such amount as may from time to time be awarded upon a review of that agreement, and that there is, therefore, an estoppel by record. Considerable difficulties attend the matter, whether the court decides in favour of this contention or against it.

To look at the matter first from the view of the infant, it is clear from the above brief account of the facts that the infant was never really adequately advised by any competent person before entering into the agreement; nor was it any part of the duty of the registrar of the county court to consider whether this boy was wise to rely on his rights under the Workmen's Compensation Acts, rather than under the common law. The Act of 1925 and the rules are carefully framed to ensure that the infant's interests are considered by the registrar or judge, but only in order to see that he gets what is due to him under the Workmen's Compensation Act. If, therefore, the defendants' contention is right, the infant here must nurse his damaged hand as best he can, receiving for it only the compensation which a blameless employer must pay to a careless workman, though in fact the injury should turn out to be due to a neglect of the various safeguards which should, under the Factory Acts, surround all workmen, to say nothing of those particularly enacted to protect boys. This result would be particularly unfortunate, because I am satisfied that this agreement cannot have been for the infant's benefit, for the reasons set out by GREER, L.J., in *Murray* v. *Schwachman, Ltd.* (1), at p. 147; [1937] 2 All E.R. at p. 74.

On the other hand, if I decide that the contention shall not prevail, but that the action may proceed, I am in peril of giving a judgment to a plaintiff who is already entitled to enforce, as though it were a judgment, the agreement to pay him 24*s*. a week, until in the nature of things this payment is decreased as the plaintiff's capacity to earn is increased. No one suggests that I have any power to abate or annul this judgment. This state of affairs is not made less repugnant by the fact that s. 29 of the Workmen's Compensation Act, 1925, is aimed at preventing an employer not merely from having to pay twice over for the same accident, but also from being harassed by two sets of proceedings.

In this dilemma, which might conveniently be resolved by Parliament, I think that the governing principle is that laid down in *Stephens* v. *Dudbridge Ironworks* (2), that neither the exercise of an option nor the making of an agreement is binding in the case of an infant unless it is for his benefit. Parliament never meant by sect. 29 to alter the law relating to infants' contracts.

It is the interposition of the court, charged with the duty to watch over the infant's interests, that lends sanctity to a judgment for or against an infant, and binds him. In proceedings in the High Court the matter is taken care of by a rule and order. In Workmen's Compensation cases the same matter is taken care of by the provisions of sect. 25 of the 1925 Act; but nowhere is there anything to enable the county court, still less to compel it, to investigate the question whether it is in the infant's interest that his rights at common law should be put an end to by a recorded agreement. Until some such provision is made, I must give the infant the benefit of the general law, if I can without manifest injustice. In this case I can, for (i) I can allow for the amounts he has received in assessing his damages, should he succeed: and (ii) I can accept his counsel's undertaking not to take any steps after judgment to enforce his agreement, for the reason that I should, if he succeeds before me, be of opinion that on the whole it is in the infant's interest that he should abandon his rights under the Workmen's Compensation Acts, in order to assert his right at common law.

Ware v. *Whitlock* (3), following *Rhodes* v. *Soothill Wood Colliery Co.* (4), is authority for saying that, if an agreement signed by a next friend is recorded, it must stand like any other judgment, and is binding in the same way and to the same extent as if it were a formal agreement actually entered into by persons themselves competent to agree; for the formalities laid down in the Act for the protection of the infant had been complied with; it could, therefore, be impeached only on the ground of fraud or some improper means. At first sight this decision presents a real difficulty in the way of the plaintiff, but what was decided there was that, so far as his remedies under the Workmen's Compensation Acts were concerned, the infant was bound.

If it could be suggested that the county court before recording such an agreement had either the right or duty to consider whether the facts disclosed a case against the employers at common law, the case would be very different. But it is clear from sect. 25 (4) that the county court judge shall have regard to the question whether or not liability to pay compensation under the act is doubtful, and this by implication seems to me to disable the judge from considering the infant's rights at common law. In other words, the estoppel by record relied upon here is limited to proceedings under the Workmen's Compensation Acts, and the case must proceed.

Order that the case must proceed.

Solicitors: *W. H. Thompson* (for the plaintiff); *J. Lilly* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

PINNER & WILLIS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[King's Bench Division (Macnaghten, J.), **May 15, 1944.]**

Revenue –Excess profits tax—Computation of standard profits—Appointment of directors with transfers of shares to enable them to become "working proprietors"—Whether valid for purposes of excess profits tax—Finance Act, 1941 (*c.* 30), *s.* 35.

The appellant company was incorporated under the Companies Acts in 1922. In September, 1939, the capital of the company was £17,500 made up of 35,000 shares of 10*s.* each. There were two directors T. and G. who owned the bulk of the capital and were "working proprietors" within the meaning of the Finance (No. 2) Act, 1939, s. 13 (2) as substituted by the Finance Act, 1940, s. 31 (1). In June, 1940, T. who was an Italian national, returned to Italy and G. remained as the only director. On Nov. 4, 1940, N., who had been the secretary of the company since its inception, was appointed a director and was given by G. sufficient shares to enable him to qualify as a "working proprietor." On Apr. 21, 1941, K., who had been the indoor manager of the company from a date before 1922, bought from G. 1,760 shares which were 9 more than necessary for the purpose of becoming qualified as a "working proprietor" of the company. Three days later K. was appointed a director. On July 6, 1942, the Inland Revenue Commissioners notified the appellant company that they were of the opinion that the transactions in the shares were for the purpose of reducing liability to excess profits tax, and they directed, under the Finance Act, 1941, s. 35 (1), that K. and N. were not to be regarded as "working proprietors" of the company for the purpose of computing the company's standard profits. The company appealed under sect. 35 (3) of the Act to the Special Commissioners who affirmed the direction. The company appealed from the decision of the Special Commissioners. It was contended on behalf of the appellants that the transfer of the shares to N. was made merely for the purpose of restoring the position which had existed when the excess profits duty had been imposed :—

Held : there was evidence before the Special Commissioners which justified their rejection of the company's appeal and the court could not reverse or alter their decision.

[**EDITORIAL NOTE.** The question here is largely one of fact, but, at the same time, deals with a position where business men require to know where they stand and require some guide to the effect of the statutory provisions here in question.

For the Finance Act, 1941, s. 35, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 34, p. 131.]

Appeal by the taxpayer from a decision of the Special Commissioners affirming a direction of the commissioners that certain "working proprietors" of the appellant company should not be considered as such for the purpose of computing the company's standard profits. The facts are fully set out in the judgment.

Cyril King, K.C., and *J. S. Snowden* for the appellant company.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

Macnaghten, J. : The appellant in this case, Pinner & Willis, Ltd., was incorporated under the Companies Acts in 1922 to take over the business of stuff merchants which had been carried on by a partnership firm since 1845. It was registered with a nominal capital of £70,000 in £1 shares, and originally there were five shareholders who were all directors of the company. By September, 1939, the capital had been reduced to £17,500 of 35,000 shares of 10*s.* each, and there were two directors only, Tromben and Green. Of the other original directors one had died and two had retired.

Tromben and Green owned the bulk of the share capital, and, therefore, as directors, had a controlling interest in the appellant company. They were both "working proprietors" within the meaning of the Finance (No. 2) Act, 1939, s. 13 (2), as substituted by the Finance Act, 1940, s. 31 (1), which provides that, in the case of a business carried on by a company the directors whereof have a controlling interest therein, the "standard profits" of the company for the purposes of the excess profits tax should be £1,000 or such greater sum, not exceeding £6,000, as is arrived at by allowing £1,500 for each working proprietor in the trade or business :

> (*a*) The expression "working proprietor" means a proprietor who has, during more than one-half of the chargeable accounting period in question, worked full time in the actual management or conduct of the trade or business ; (*b*) the expression "proprietor" means, in the case of a trade or business carried on by a . . . company, any director thereof owning more than one-twentieth of the share capital of the company.

One-twentieth of the share capital of this company was 1,750 shares of 10*s.* each. Therefore, to be a working proprietor, the director must hold at least 1,751 shares.

Tromben is of Italian nationality, and in June, 1940, when Italy entered the war, he returned to his native land ; and Green was left in England as the only director.

Neish had been the secretary of the company since its inception, at a salary of £450 a year and he held 1,599 shares. On Nov. 4, 1940, he was appointed a director of the company ; but his shareholding was not sufficient to make him a working proprietor, so Green, who held 16,100 shares, was good enough to give Neish 200, thus bringing his shareholding up to more than the amount required to make him a working proprietor. Thus the company then had two working proprietors, and its standard profits became £3,000, £1,500 for each working proprietor. On Apr. 21, 1941, Kershaw, who had been the indoor manager of the business for a period which commenced before the formation of the limited company, bought from Green 1,760 shares, which were nine more than necessary for the purpose of becoming qualified as a working proprietor. Three days later, on Apr. 24, 1941, he was appointed a director. Thus the company then had three working proprietors and its standard profits rose to £4,500.

It is provided by the Finance Act, 1941, s. 35, that, where the Commissioners of Inland Revenue are of opinion that the main purpose for which any transaction or transactions was or were effected (whether before or after the passing of this Act), was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions. Subsect. (3) of that section provides that any person aggrieved by a direction of the Commissioners under that section may appeal to the Special Commissioners (i) on the ground that the main purpose of the transaction or transactions was not the avoidance or reduction of liability to tax ; or (ii) on the ground that no direction ought to have been given ; or (iii) on the ground that the adjustments directed to be made are inappropriate.

By notice dated July 6, 1942, the Commissioners of Inland Revenue informed the appellant that, as they were of opinion that the main purpose of the transactions by which Neish had been appointed a director and the transfer of 200 shares had been made to him, and by which 1,760 shares had been transferred to Kershaw, so that he could be appointed director of the company, was the avoidance or reduction of liability to excess profits tax, they had directed, by virtue of the powers conferred upon them by the Finance Act, 1941, s. 35 (1), that the excess profits tax liability of the company for the chargeable accounting period ending Dec. 31, 1941, should be computed on the basis "that Messrs. Kershaw and Neish are not to be regarded as working proprietors of the company for the purpose of computing the company's standard profits," which meant, in other words, that the standard profits of the company, instead of being £4,500, should only be £1,500.

The company, feeling themselves aggrieved by this direction of the commissioners, appealed to the Special Commissioners on all of the grounds set out in sect. 35 (3).

Green gave evidence before the Special Commissioners, and admitted that the main purpose of appointing Neish a director and transferring 200 shares to him was to restore the company's position for excess profits tax purposes, that is to say, to raise it from £1,500 to £3,000, and thereby reduce the liability to the excess profits tax. No such admission was made by Green with regard to the appointment of Kershaw. The case states, so far as that is concerned, that Green said that :

> . . . with regard to the main purpose in transferring 1,760 shares to Mr. Kershaw, he found it very difficult, at this stage, *i.e.*, at the time of giving his evidence, to say which factor was uppermost in his mind, namely, with a view to excess profits tax or to giving Mr. Kershaw a holding approximately equal to that of Mr. Neish.

Although Green found a difficulty in saying which factor was uppermost in his mind, I do not think that anyone else could have any doubt about the matter. It is quite plain that the sale of the shares to Kershaw and his appointment as director was with a view to the increase of the standard profits from £3,000 to £4,500, and thereby to reduce the amount payable in respect of the excess profits tax.

The Special Commissioners came to the conclusion that the main purpose of the transaction referred to was to effect a reduction of the excess profits duty, and they were unable to find either that no direction ought to have been given, or that the adjustments directed to be made were inappropriate.

From that decision of the Special Commissioners, appeal is brought by way of case stated to this court. So far as the question of what was the main purpose of the transfer of the shares to Kershaw and his appointment as director is concerned, counsel for the appellant did not seriously dispute the decision of the Special Commissioners. The argument in support of the appeal was mainly directed to the case of Neish. In his case a strong argument was advanced that, since the object of appointing Neish was merely to restore the position which had existed when the excess profits duty was imposed, it was a case in which no direction ought to have been given under sect. 30. Undoubtedly, there was some force in the contention put forward. But while the Special Commissioners on appeal to them, being entitled to hear evidence and to judge evidence, were able to substitute their own opinion on the matter, no such course is open to this court, for to this court an appeal can only be brought on questions of law. Though it is sometimes difficult to decide whether a question is a question of pure law or pure fact, as it is called, it is clear that, where there are facts on which the Special Commissioners could reasonably come to their decision, this court cannot reverse it, even if the judge thought that he himself, on the facts set out in the case, would have come to a different decision.

For the purposes of appeal, it was necessary for the appellant in this case to show to the satisfaction of the Special Commissioners that no direction ought to have been given, or that the adjustments directed to be made were inappropriate. The Special Commissioners came to the conclusion that there was no ground on which they could come to that conclusion. In their opinion, giving of the direction was proper and the adjustments directed were not inappropriate.

The case of Neish is, no doubt, somewhat different from that of Kershaw; but, since, on the evidence before them, the Special Commissioners were justified in rejecting the company's appeal, this court cannot reverse or alter their decision. The appeal must stand dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the appellant company); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

Re A DISPUTE BETWEEN N. G. NICOLAOU AND OTHERS AND THE MINISTER OF WAR TRANSPORT AND N. G. NICOLAOU AND OTHERS AND THE ADMIRALTY.

[King's Bench Division (Tucker, J.), **July 14, 1944.**]

Shipping—Emergency legislation—Compensation—Requisition—Ship ordered by Minister of Shipping to proceed from Belfast to Manchester to discharge requisitioned cargo—Whether requisitioning of cargo amounts to requisitioning of ship—Compensation (Defence) Act, 1939 (c. 75), *ss.* 4, 7—*Defence (General) Regulations, reg.* 53 (2).

In June, 1940, the Greek steamer Nicolaou Georgios, of 4108 tons gross, owned by the claimants and under charter to the Mission Francaise des Transports Maritimes (an agency of the French government) was proceeding with a full cargo in a British convoy from Bermuda to her port of destination, Brest. While the vessel was still on her voyage, Brest was occupied by the Germans. The Commodore of the convoy in which she was sailing ordered the ship to proceed to Belfast where she arrived on June 19. On that date the respondents directed the ship's master to wait for further orders, and on June 21 the Port and Transit Committee of the respondents decided that the vessel should go to Manchester. The order to proceed to Manchester was received by the master on June 26, and the vessel sailed from Belfast that day. On the same day the respondents instructed their agents in Manchester, the Manchester Liners, Limited, to send a representative to visit the ship and obtain details of her cargo with a view to requisitioning it, and on June 27 the claimants' agent in London was orally informed by the respondents that the cargo of the vessel would be requisitioned. The respondents offered to pay the expenses of discharge at Manchester and the port dues there. The vessel arrived in Manchester on June 28, and discharge of her cargo began that day at 1 p.m., and was completed on July 10. On June 29 the master was handed a requisition order, requisitioning all cargo on board the ship and directing its discharge at Manchester. The claimants contended that the ship was requisitioned by the respondents (*a*) for the period from June 19 to July 10, or alternatively (*b*) from June 26 to July 10, or alternatively (*c*) from June 28 to July 10, and they claimed compensation in respect of the requisition of the vessel under the Compensation (Defence) Act, 1939, s. 4 :—

HELD : there was no requisition of the vessel within the meaning of sect. 17 of the Compensation (Defence) Act, 1939. The mere giving of an order to discharge a requisitioned cargo does not necessarily involve the requisition of the ship.

[**EDITORIAL NOTE.** This case considers a small but important matter. When a cargo is requisitioned by the Government, such order necessarily involves some interference with the movements of the ship. It may, perhaps, in some cases amount to a requisition of the ship, but the decision herein shows that normally such an order does not involve requisition of the ship.

FOR THE DEFENCE (GENERAL) REGULATIONS, reg. 53, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1322 ; and for the COMPENSATION (DEFENCE) ACT, 1939, ss. 4, 7, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 1020, 1025.]

Case referred to :

*(1) *France Fenwick & Co.* v. *R.*, [1927] 1 K.B. 458 ; 41 Digest 987, *8733* ; 96 L.J.K.B. 144 ; 136 L.T. 358.

SPECIAL CASE STATED by the Shipping Claims Tribunal for the opinion of the High Court under the Compensation (Defence) Act, 1939, s. 7. The facts and the arguments are fully set out in the judgment of TUCKER, J.

P. A. Devlin for the claimants.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) for the respondents.

TUCKER, J. : The following special case was stated by the Shipping Claims Tribunal for the opinion of the High Court under the Compensation (Defence) Act, 1939, s. 7 :

(1) The claimants are the owners of the Greek steamer Nicolaou Georgios, a vessel of 4108 tons gross and 2467 tons net. They put forward a claim against the respondents for compensation in respect of an alleged requisition of that vessel. (2) By agreement of the parties the hearing before us was limited to the question of liability, and any question as to the amount of compensation if the claimants established a right to any was postponed. (3) The facts were mostly agreed. The only witness called before us was Thomas Gilmore Jenkins, now deputy director general of the Ministry of War Transport. Up to May, 1941, Mr. Jenkins was second secretary of the Ministry of Shipping. On May 9, 1941, the Ministry of War Transport was created and to it were transferred the duties and liabilities of the Ministry of Shipping. (4) On Apr. 30, 1940, a charterparty was signed between the Mission Francaise des Transports Maritimes (which was some agency of the French Government) as charterers, and the claimants as owners. Under this the Nicolaou Georgios was to load at one or two safe U.S. Gulf ports a full and complete cargo, and proceed therewith to a safe port between Bordeaux and Havre. The charterers were to bear the cost of loading and discharging the cargo. Freight was payable one half in New York on signing bills of lading, and the balance in London within 10 days of final sailing. (5) Under this charterparty a full cargo was loaded at Galveston and New Orleans. It included bales of cotton, cotton linters, cotton linters pulp, cases of tobacco, zinc, clay, hardwood billets, pine timber, and pine

tar in drums. Bills of lading were signed on May 24 for delivery at Brest. The vessel left New Orleans on May 25 under orders to go to Bermuda and there join a British convoy. She left Bermuda in this convoy on June 4. (6) Following upon the German invasion of France the French Government resigned on June 16. On June 17 Marshal Petain applied to the enemy for an armistice. On June 18 the Germans occupied Brest. (7) On June 17 the Commodore of the convoy ordered the Nicolaou Georgios to proceed to Plymouth. On June 18 he cancelled this order and directed the master to go to Belfast. On June 19 she arrived off Belfast and anchored. In the afternoon of that day the master entered in his log : " We have been ordered to wait for further orders." It is admitted by the respondents that such a direction was given, but it is not known who gave it. (8) On June 21 the Port and Transit committee of the Ministry of Transport decided that this vessel should go to Manchester. On June 22 a document intimating her prospective arrival at Manchester was issued by the committee to various officials. On June 22 the armistice with the Germans was concluded by Marshal Petain. (10) On June 24 the claimants' company in London wrote to their agents in Manchester : " We are today advised by the authorities that this vessel is being diverted to your port to discharge . . . We enclose copy of the charterparty . . . We assume the original bill of lading will have been forwarded to Paris . . . The position then arises as to the necessity of obtaining a proper form of indemnity against non-production of the bill of lading . . . We assume you will communicate with the local representative of the Ministry of Shipping and ask him to furnish you with the necessary indemnity so that delivery of the cargo can be effected without delay . . . The full freight has been collected." (11) On June 25 the Admiralty sent out this general order to H.M.'s ships : " All shipping of all nationalities is to be prevented from going to any port on the north and west coasts of France." (12) On June 26 the master of the Nicolaou Georgios recorded in his log : " We have been ordered by the control to sail for Manchester." She sailed from Belfast that day. (13) On June 26 the Ministry of Shipping wrote to Manchester Liners, Limited, their agents at Manchester : " As little information is available concerning the cargoes of vessels previously running for account of the French Mission and now requisitioned it is very urgent that your representative should visit the ship as soon as possible and obtain details of the cargo on board. The entire cargo will be requisitioned and will be taken over by the Ministry of Supply and/or the Ministry of Food." (14) On June 27 Mr. Burrell, of the Ministry of Shipping, orally informed the agent of the claimants in London that the cargo of the Nicolaou Georgios was to be requisitioned, whereupon the claimants telegraphed to their agents in Manchester : " Ministry advise cargo requisitioned under Defence (General) Regulations, reg. 53 which frees all maritime liens and instructions being given Manchester Liners regarding disposal cargo." (15) On the morning of June 28 the Nicolaou Georgios arrived at Manchester and berthed. Discharge of her cargo from all hatches began at 1 p.m. On June 29 the master was handed this document : " Ministry of Shipping, London, June 28, 1940. Requisition Order. Pursuant to the Defence (General) Regulations, reg. 53, all cargo on board the s.s. Nicholaou Georgios at Manchester is hereby requisitioned, and you are accordingly to place the same at the disposal of the Minister of Shipping. You are directed to deliver such cargo to or to the order of the agents of the Minister of Shipping at Manchester, who are Manchester Liners, Limited. Signed by the authority of the Minister of Shipping, T. G. Jenkins. To the master, s.s. Nicolaou Georgios, at Manchester." The discharge of all the cargo was completed on July 10. (16) The evidence of Mr. Jenkins, which we entirely accept, was that at the time in question the German occupation of Holland, Belgium and France had caused the arrival in British ports of great numbers of vessels bound with cargoes to those countries. There were 106 bound to ports in Holland, 31 to Belgium, and 151 to France, besides hundreds more loaded with British coal for those countries. The primary object of the Minister of Shipping was to enable the ships to get their cargoes discharged, and to terminate the congestion in our ports. The question of discharge was, of course, complicated by the desire of the masters for some form of indemnity where bills of lading could not be presented. The Belgian and Dutch Governments were in this country. The Ministry arranged with the Belgian Government that it should requisition the cargoes of Belgian consignees, and pay the price to the Belgian Government. Many of the Dutch cargoes belonged to the Dutch Government. These were not requisitioned. As to other cargoes for Dutch consignees the same arrangement was made with the Dutch as with the Belgian Government. The Dutch and Belgian vessels had, of course, been arriving in May. When, on the fall of France, French-bound ships arrived in June there was no French Government with whom any arrangement could be made. It was decided by the Ministry that the best method of procuring the speedy discharge of these ships, so as to end the embarrassment of their masters, and to free our ports, was to requisition their cargoes, as had been done with the Belgian and with some of the Dutch ships. Mr. Jenkins emphasised that this course was adopted not so much because our Government wanted the cargoes, but in order to get them landed and to free the ships. Cargo was not requisitioned when there was someone here in a position to give an indemnity to a master, *e.g.*, in the case of rubber the rubber growers association were willing to take delivery and give such an indemnity. They were allowed to do so, and no rubber was requisitioned. Mr. Jenkins added that, if any master had demurred to the order to discharge his cargo, and expressed a desire to take it back to America, or somewhere else, "We should have been delighted." The total amount of cargo in the ships bound for Belgium, Holland and France, brought into our ports, was over 2,000,000 tons, and its value over £50,000,000. Not a single vessel was lost, though in some ports (*e.g.*, Falmouth) they were dangerously congested, and liable to enemy attack from the air. (17) Mr. Jenkins also testified that in every case where freight was not prepaid, the Ministry paid it, and, if the bill of lading required consignees to bear the cost of discharge, the Ministry paid that also. Counsel for the claimants admitted that before the present claim was put forward the Ministry offered to pay the expenses of discharge at Manchester and the port dues there. (18) On these facts counsel for the claimants contended that the Nicolaou Georgios was "requisitioned" by the respondents (*a*) for the period from June 19 to July 10, or alternatively (*b*) from June 26 to July 10, or alternatively (*c*) from June 28 to July 10. And that the claimants were accordingly entitled, under the Compensation (Defence) Act, 1939, s. 4, to be awarded by us "Compensation in respect of the requisition of the vessel." (19) "Requisition" is a popular word rather than a term of art. Obviously its primary meaning involves taking possession, expropriation or compulsory bailment. But in regard to ships it has come to include a proceeding of a totally different legal character, namely, the compulsory requirement of a contract to render services or do work and labour. This extended use has no doubt arisen from the fact that the ordinary modern time charterparty (which is a contract for the rendering of services by the shipowner) retains language about "delivery" and "redelivery" of the ship taken from old forms of demise charterparties, now very rarely used (which were contracts of bailment). The essential difference between the two types of contract is, of course, the same as that between hiring a bicycle to ride and taking a taxicab. (20) There can be in this case no question of any taking possession of the Nicolaou Georgios by the Minister of Shipping. She remained at all times in the possession of the claimants by their master and crew. The only question is whether, under the extended and rather loose use of the word "requisition" the action of the Ministry was equivalent to its compulsory requirement that the claimants should enter into a charterparty for the rendering of services by the vessel for one or other of the periods ending on July 10, 1940. (21) Counsel for the claimants relied chiefly upon the judgment of WRIGHT, J., in *France Fenwick & Co.* v. *R.* (1), and his conclusion that the ship there in question was "requisitioned" for the two days, Apr. 22 and 23. In our view, the facts of that case were totally different from the facts in this case. In that case, but for the order of the customs on Apr. 2 forbidding her to discharge, and the order of the Mines Department on Apr. 22 to discharge at Erith, the ship was at perfect liberty to proceed to her chartered destination at Rotherhithe and there deliver her cargo to the expectant holders of the bills of lading. In this case the ship was utterly unable to proceed to her chartered destination, she was taking refuge in whatever British port she was allowed to enter, she was embarrassed by the possession of a cargo whose owners were no longer in existence or were unapproachable, and the bills of lading, so far as was surmised, were in Paris. (22) Counsel for the claimants also argued that, if the orders to the ship to proceed to Manchester and to discharge there were legally given that must have been by virtue of the Defence (General) Regulations, reg. 53, which deals with "Requisition of property other than land." As to that we are satisfied that under the urgent necessities of the time no one was much concerned to examine the legal question as to the sanction of the orders given to the ship, and whether the master was bound to obey them. And, if he, or the claimants, had questioned the legality and demurred to the orders, it is possible, if not probable, that the Ministry might have said: "Very well, if you do not want us to help you to get your ship discharged you can take her away with her cargo in her, and return to America, or be between the Germans and the deep sea. But you must get out of our ports." (23) Our decision is that the claimants have failed to establish that there was any requisition of their vessel within the meaning of the Compensation (Defence) Act, 1939, s. 4, and that the claimants shall in consequence pay to the respondents their costs of the proceedings in our tribunal to be taxed. (24) The claimants asked us, in the event of our decision being against them, to state a special case for the opinion of the High Court pursuant to the proviso to sect. 7 of the Compensation (Defence) Act, 1939. We have accordingly done so. (25) The question for the court is whether upon the facts we have found in paras. 4 to 17 above our decision in para. 23 is correct in law. If the court is of opinion that it is correct that decision is to stand. If the court is of opinion that upon the said facts the claimants are entitled to contend that there was a requisition of their vessel by the respondents (or by the Ministry of Shipping whom the respondent Ministry now represent) our decision in para. 23 is to be set aside, and we desire the court to indicate the period, or voyage, during or for which it holds that such requisition existed, and to remit the case to us for the assessment of compensation to the claimants in respect thereof.

The case is signed by the members of the tribunal.

There are two letters which the parties desire to be attached to the case. They are as follows. The first is dated Feb. 28, or rather it is an extract from the letter of that date, from the solicitors for the appellants to the Treasury Solicitor :

> With a view to saving the trouble and expense of calling evidence from Manchester, please let us know if you are prepared to admit that before 1 p.m. on June 28, 1940, the master of the Nicolaou Georgios was ordered by Manchester Liners, Limited, as agents for the Minister of Shipping, to discharge the cargo, as alleged in the particulars to para. 2 of the amended points of claim.

The reply, dated Feb. 29, 1944, is as follows :

> I am in receipt of your letter of Feb. 28 . . . The point upon which you ask me to make admission is, at any rate, in part, covered by the last phrase of para. 3 of the amended points of defence, but you may take it that the respondents are prepared to admit that at some time before 1 p.m. on June 28, 1940, the master of this vessel was ordered by Manchester Liners, Limited, acting as agents for the then Minister of Shipping, to discharge the cargo. I assume that you will wish your letter under reply and this letter to be included in the bundle of solicitors' correspondence.

Counsel for the claimants submits that the determination of the tribunal on the facts found was erroneous in law and arrived at by taking into consideration extraneous matters which are irrelevant, and by the tribunal substituting for the definition of "requisition" in the Compensation (Defence) Act, 1939, s. 17, a definition of its own. He does not now contend that there was a requisition as from June 19, but submits that the requisition took effect as from June 26, or alternatively as from some time prior to 1 p.m. on June 28, when the master was ordered to discharge.

The extraneous matters of which he complains are those set out in paras. 16, 17 and 21. I think he contended at first that everything in those paragraphs should be excluded, but, if I rightly understood him, his final submission was that in so far as those paragraphs contained matter going to show the purpose of the orders they were relevant, but in so far as they dealt with the motives of those who gave or caused the orders to be given, they were irrelevant. In this connection he relied on certain passages in the judgment of Wright, J. (as he then was) in *France Fenwick & Co.* v. *R.* (1). Wright, J., said, at pp. 464, 465 :

> "Requisition" so used in para. 25 [*i.e.*, the Emergency Regulations, 1921, para. 25] means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the Regulations. Thus, the order to proceed to Erith and discharge constituted such a requisition. The vessel no doubt remained in the possession of the suppliants by their master and crew, but she was required to be placed, and was placed, at the disposal of the department ; she was performing the service which the department ordered. The position is, in my judgment, different whilst she was merely prohibited from unloading under para. 11 (2). She was then not performing any service on the orders of the Government. There was no act which the owners were required to do or service to render. In effect, to attempt to unload the ship while under the prohibition, the validity of which is not questioned, would simply be to do an unlawful act, and it cannot have been intended that compensation would be paid to subjects for abstaining from doing unlawful acts. It is immaterial, in my opinion, that the ship waited where she was and was in fact available to discharge whenever and wherever the department required her. That was merely a collateral consequence. Indeed, the Government might never have needed the coal or taken possession of it or given any orders to the ship ; the strike might have suddenly ended and the emergency passed, or the coal might have been purchased by a voluntary arrangement from the consignees and voluntary arrangements made as to unloading. Whether there was a requisition depends, in my judgment, on the nature and quality of the order given, and not on collateral considerations.

Counsel for the claimants accordingly argues that the tribunal should have had regard only to the nature and quality of the order given, and should have excluded all the collateral considerations set out in the case upon which its decision is largely founded. I think it is necessary to examine the context in which Wright, J., at p. 465, used the words :

> Whether there was a requisition depends, in my judgment, on the nature and quality of the order given, and not on collateral considerations.

He had been dealing with the period during which the ship in question had merely been prohibited from unloading, and had pointed out that it was immaterial that the ship had waited where she was and was in fact available to discharge wherever and whenever the department required her. This he described as merely a collateral consequence. That was the context, and I do not think WRIGHT, J., was intending to say that, where the nature and quality of the order standing by itself may be uncertain or ambiguous, it is not permissible to consider all the surrounding circumstances for the purpose of determining its true nature and quality.

The circumstances of the present case as set out in the paragraphs referred to were most exceptional and, in my opinion, were necessarily and properly taken into consideration in determining the nature and quality of the orders of June 26 and June 28.

With regard to the definition of the word requisition, it is quite true that the case omits any reference to the definition contained in the Compensation (Defence) Act, 1939, s. 17, and states that requisition is a popular word rather than a term of art. The definition in sect. 17 (1) is as follows :

> . . . "requisition" means, in relation to any property, take possession of the property or require the property to be placed at the disposal of the requisition authority . . .

and it is, of course, the concluding words of that definition that are in point in the present case. Although that definition is not expressly referred to, paras. 19 and 20 of the case which explain the nature and incidents of a requisition as applied to a ship, appear to me to be beyond criticism, and I can find nothing in the case as a whole to indicate that the tribunal was unmindful of the matters essential to requisition as defined by the Act, or was substituting some different definition of its own.

For these reasons, it appears to me that the tribunal have not considered irrelevant matters or applied an erroneous definition.

It still remains to consider whether, in my opinion, on the facts stated the tribunal arrived at a correct decision as a matter of law. It is clear that when the order of June 26 to proceed to Manchester was given, a provisional decision had been arrived at to requisition the cargo on arrival, and the order was given so that effect could be given to this decision unless in the meantime it had been altered. Counsel for the claimants contended that this being the purpose of the order, the matter was really concluded in his favour. I agree that it is one of the considerations, and an important one, proper to be taken into account, but it is not, in my view, conclusive. The purpose of the order was not communicated to the master when it was given and acted upon on June 26, and there was nothing to prevent the department concerned from changing its mind up to the moment when the cargo was actually requisitioned. The position is materially different when, after cargo has been irrevocably requisitioned, an order is given to the master to proceed to a port for the purpose of discharge, as in *France Fenwick & Co.* v. *R.* (1). In my view, this is a ground additional to that stated in para. 21 of the case for distinguishing that case from the present.

The claimants further complain of para. 22 of the case. Counsel for the claimants contends that, as the case does not state or suggest any lawful authority for giving orders other than the Defence (General) Regulations, reg. 53, there is a presumption, which has not been rebutted, that the order was in fact made under that regulation. I agree with the argument of the Attorney-General on this point that the question is whether or not there has in fact been a requisition, and you cannot convert an order not otherwise amounting to a requisition even if made without lawful authority into a requisition merely by praying in aid a regulation which would have given it validity if it had been a requisition.

Finally, counsel for the claimant contends that, in any event, even if the order of June 26 was not a requisition, the order of June 28 to discharge fulfils all the requirements of a requisition. If this is correct, it would appear that, in every case the mere giving of an order to discharge a requisitioned cargo necessarily involves a requisition of the ship during the period of discharge. I do not think the mere giving of such an order to a ship already in port necessarily involves the requisition of the ship. The order must, I think, be considered in relation to all the other circumstances of the case, and it seems to me that in this case the order was clearly a mere incidental order "necessary or expedient in connection with the requisition" of the cargo within the meaning of the Defence (General) Regulations, reg. 53, which, under the Compensation (Defence) Act, 1939, s. 6 (3), gives a right to the recovery of expenses.

For these reasons I am of opinion that the decision of the tribunal as expressed in para. 23 of the case upon the facts found in paras. 4 to 17 of the case is correct in law, and I answer the question submitted in para. 25 accordingly.

Appeal dismissed with costs. Leave to appeal granted.

Solicitors: *Stokes & Mitcalfe* (for the appellants); *Treasury Solicitor* (for the respondents).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

GREAT WESTERN RY. CO. *v.* PORT TALBOT DRY DOCK CO., LTD.

[King's Bench Division (Tucker, J.), **July 27, 1944.**]

Guarantee and Indemnity—Contract by defendants to repair plaintiffs' ship—Indemnity clause—Whether applicable to subject-matter of contract.

The parties entered into agreement whereby the defendants undertook to effect certain repairs to the plaintiffs' ship. Cl. 15 of the contract provided that "the contractor [the defendants] shall be responsible for and shall save harmless and indemnify the company from and against all actions claims losses and expenses whatsoever in respect of loss of life or personal injury or loss of or damage to property howsoever caused arising out of or in any way attributable to the execution of the works . . ." Whilst the ship was in the care and custody of the defendants for the purpose of effecting the repairs it capsized. The plaintiffs brought an action against the defendants for the loss of the ship and for salvage expenses. The defendants counterclaimed alleging negligence on the part of the plaintiffs. It was held as a fact that the loss of the ship was due to the defendants' negligence and that there was no negligence on the part of the plaintiffs. Apart from the question of negligence it was contended on behalf of the defendants that cl. 15 of the contract only applied to third party claims and did not include damage to property which was the subject-matter of the contract:—

Held: the clause, upon its true construction, included loss arising from damage to the subject-matter of the contract and the loss of the vessel arose out of and was attributable to the execution of the repairs.

[**EDITORIAL NOTE.** The clause in question is usually inserted in contracts of this description with a view to securing an indemnity against third-party claims. It is always drawn in wide terms and it is here decided that in the form here used it is not confined to third-party claims but includes loss arising from damage to the subject-matter of the contract.

As to Interpretation of Guarantee and Indemnity Clauses, see HALSBURY, Hailsham Edn., Vol. 16, pp. 52-57, paras. 45-49; and for Cases, see DIGEST, Vol. 26, pp. 233-234, Nos. 1821-1827.]

Cases referred to:

(1) *Great Western Ry. Co.* v. *Durnford (James) & Sons, Ltd.* (1928), 139 L.T. 145; 33 Com. Cas. 251; Digest Supp.; *affg. S.C. sub nom. Durnford & Sons, Ltd.* v. *Great Western Ry. Co.* (1927), 138 L.T. 137.

(2) *The Carlton*, [1931] P. 186; Digest Supp.; 100 L.J.P. 100; 145 L.T. 423.

(3) *Furness Shipbuilding Co.* v. *London & North Eastern Ry.* (1934), 103 L.J.K.B. 180; Digest Supp.; *sub nom. London & North-Eastern Ry. Co.* v. *Furness Shipbuilding Co., Ltd.*, 150 L.T. 382.

Action and counterclaim to recover damages for loss suffered by the capsizing of the plaintiffs' ship whilst being repaired by the defendants. The facts are fully set out in the judgment.

John Morris, K.C., and *Carey Evans* for the plaintiffs.

Sir Robert Aske, K.C., and *A. J. Hodgson* for the defendants.

Tucker, J.: In this action the plaintiffs claim damages from the defendants for the loss of their dredger Don Federico on Sept. 25, 1941, and for salvage expenses in connection therewith. There is a counterclaim by the defendants for loss of use of their dry dock which they allege was caused by the negligence of the plaintiffs in the management, control and salvage of the vessel. It was agreed by the parties that I should deal only with the issues of liability and that the assessment of damages should, if necessary, be referred to an official referee. Counsel for the defendants stated that he did not ask me to deal with the allegation in the counterclaim that salvage operations were unreasonably delayed.

At the time of loss the Don Federico was undergoing repairs by the defendants in Port Talbot docks pursuant to a contract in writing dated Jan. 23, 1941.

The contract provided for the execution of works in accordance with a specification. Under the specification the vessel was to be placed in dry dock, but, at the date when the defendants were notified that she was available for repairs under the contract, namely, Sept. 19, 1941, another vessel, the Octane, was in the dry dock leased by the defendants from the plaintiffs, and accordingly, at the defendants' suggestion, the Don Federico was berthed outside the dry dock but alongside it and made fast thereto. She was placed in that position for the purpose of the execution of the repairs, which were begun on Sept. 22.

The general conditions of the contract contain the following clauses: Cl. 2:

> In this contract the word "company" means the Great Western Railway Co. and the word "manager" means the chief docks manager of the company.

It is not necessary to read the rest of that clause. Cl. 7:

> The contractor must satisfy himself of all the circumstances and conditions under which the works are to be carried out. Where sketches or dimensions are shown in or accompany the specification their accuracy is not guaranteed and the contractor must be responsible for their verification.

Cl. 12:

> The whole of the works contemplated by the contract shall be carried out under the supervision and direction and to the satisfaction of the manager.

Cl. 13:

> Nothing herein contained which shall involve the supervision or approval of any of the work whether temporary or permanent or of any portion thereof or of the means adopted in the carrying out of the contract shall relieve the contractor from his liability under the contract.

Cl. 15:

> The contractor shall be responsible for and shall save harmless and indemnify the company from and against all actions claims losses and expenses whatsoever in respect of loss of life or personal injury or loss of or damage to property howsoever caused arising out of or in any way attributable to the execution of the works including claims under the Workmen's Compensation Acts and the Employers' Liability Act.

The specification provided that the two independent circulating pumps of the main engines were to be opened out and certain repairs and replacements effected; also, that the air, feed and bilge pumps in main engines were to be opened out, cleaned, and all valves and seats ground in, reset and closed up as before, and all glands repacked. It further provided that all skin fittings, inlets and discharges were to be opened out, cleaned, machined, ground in, repacked and closed up as before. There was also a provision that all gear was to be removed from the storeroom on the port side and the whole of the space chipped, scaled and coated.

During the execution of the repairs the ship's engineer, Kyd, and a fireman remained on board during the day, and at night there were two firewatchers on duty from 4 p.m. to midnight, when they were relieved by two others, who were on duty until 8 a.m. the next day. The firewatchers were provided by the owners pursuant to the requirements of the Defence (General) Regulations, reg. 44B. It is a fact, however, that, apart from the provisions of that order, the owners would in the ordinary course have maintained a night watchman on board. The presence of the engineer by day was due to the fact that, under the contract, all work was to be done to the satisfaction of and under the supervision of the plaintiff's manager, and for this purpose the engineer was the manager's representative. The fireman was there to keep up steam, which was required for operating the winches. The duties of the firewatchers were to extinguish any incendiaries that dropped and keep a look-out all through the ship, and one of them in each relief was required to keep in the fires.

I am satisfied that precisely the same procedure was followed with regard to the persons who remained aboard as in the case of a ship in dry dock. In fact there was no alteration in any respect consequent on the ship having been berthed outside the dry dock.

In my view, on the evidence in this case, and having regard to the terms of the contract, the Don Federico was at all material times in the care and custody of the defendants for the purpose of effecting the contract repairs. There can, I think, be no question that she was in the defendants' care and custody by day, and I think the conduct of all their servants between 7.30 p.m. on Sept. 24 and 7.30 a.m. on Sept. 25 shows that the defendants recognised her as being in their custody by night as well. I think the position in this respect is exactly as it would have been if the vessel had been in the defendants' dry dock as was originally intended.

The Don Federico was berthed port side to the quay. On her starboard side, 3 ins. above the waterline, were four discharge orifices. We are only concerned in this case with two of them, namely, the main discharge from the circulating pump, which is 5½ ins. in diameter, and the air pump discharge, which is 3 ins. in diameter and situate about 3 ft. 6 ins. aft of the main discharge. It is common ground that, when the circulating pump casing is removed, water will enter by the main discharge if it goes below water level unless the valve is closed. Similarly with regard to the air pump, if the cover is removed water will enter unless the air pump discharge valve is closed. The main discharge valve is normally open, and kept open by a cotter. If the cotter is removed the valve should close automatically unless it has stuck. This very often happens, and in such case it requires to be tapped or struck to make it drop into the closed position. It is quite likely to be inclined to stick after the lapse of time since the ship was last overhauled. The air pump discharge is weight-loaded, and is normally closed. The pressure of air from inside lifts up the valve, which then closes with the weight on top. This valve comes into operation chiefly in starting up. In course of time it may become worn and admit sea water into the air pump. Both these discharge valves are skin fittings.

Before the defendants' men left the Don Federico on the evening of Sept. 24, the cover from the air pump and the casing from the circulating pump had both been removed, and before leaving the vessel in that condition the foreman engineer, Bate, the man in charge of this part of the work, had not inspected either of these discharge valves situated only 3 ins. above the waterline to ascertain that they were properly and securely closed. Furthermore, at some time between 4.30 and 6.30 that evening, the defendants' men had been engaged in removing the heavy gear from the storeroom on the port side in accordance with the requirements of the specification. There was between 25 and 30 tons of gear in that store. The witness Williams, called by the defendants, says that it was not all removed, and he estimates the quantity removed at 7 or 8 tons. I think that is probably an underestimate ; but, however that may be, by 6.30 the ship was listing slightly to starboard, and I have no doubt that this was caused by the removal of this heavy gear. Nor have I any doubt that the list brought the air pump discharge valve below water level, with the result that water entered the engine room.

This was discovered by the night watchman, Lewis, an excellent, and I think reliable, witness, about 7.30 p.m. There was then about 3 ft. 6 ins. of water from the ship's bottom, and it was bubbling in through some canvas that had been put over the air pump when the cover was removed. He promptly reported to the dry dock watchman, Matthews. Matthews went down and suggested sending for assistance. This was done, and at about 8.15 a man named Scourfield arrived. He is a machinist in the defendants' employ, and said he was not very conversant with the engine room valves. However, he observed that water was coming in and welling up out of the air pump chamber, and he went to the discharge valve. He gave it a turn, and he said it came down and made a click. It had been open before, which it should not have been. Scourfield did his best in the circumstances, and he thought the matter was rectified. He, however, very properly reported the matter to Bate, the man responsible. Bate, who had never inspected this valve when the pump was opened up and was never informed that it had in fact been open, and knowing that Scourfield was not highly skilled in these matters, did not consider it necessary to go to the ship and see whether the leak had been properly stopped, nor did he think it necessary to make sure that the main discharge was properly closed. What he did was to send a message to the night watchman that the water had stopped, but that they were to keep their eyes open and report to the dry dock watchman if there was any renewal.

On his return, Scourfield met Adams, the foreman boilermaker, who happened to be on home guard duty. He took him down to the engine room, and they were both satisfied that water was no longer coming in. This was about 9 o'clock. Bate's message was conveyed to the night watchmen, but I am satisfied that they were also told that everything had been put right and there was no cause for anxiety.

These instructions and this information were passed on at about 11.45 p.m. to the two relieving fire watchers. Everything then appeared to be in order, and they did not think that water was coming in. There was no apparent change at 12.30. At about 1.30 the dry dock watchman went on board and found everything to his satisfaction. He did not see the night watchmen and did not consider it necessary to look for them in the galley, where they would normally be.

By 6.30 the next morning water was all over the stokehold, and the night watchman, Taylor, realised that the position was serious. He reported to Meads, one of the defendants' men at the dry dock. I am satisfied that Taylor reported the position promptly, and I do not think any serious criticism can be made with regard to the acts or omissions of anyone thereafter ; but they were not able to get pumps working in time to save the vessel, and she capsized and sank shortly after 7.30 a.m., by which time there was water to a depth of about 7 ft. 6 ins. in the engine room. Before she went down McClure, a chargehand fitter working under Bate, had arrived, and the assistance of a man named Gully, an engineer from the Francis Gilbertson, had been obtained.

The evidence of these witnesses satisfies me that by 7.30 a.m. water was pouring in at both discharge valves. It is true that Gully, in very difficult circumstances and at considerable personal risk, got to the main discharge valve, and it appeared to him to be closed. The cotter was out, and he found it very stiff. He struck it and it seemed to be solid. I think it must have stuck, so that when the cotter had been removed the valve had not closed. The position in which Gully saw the water welling up points to this main discharge valve being open. McClure observed a movement of water one foot aft of the cylinders, which indicated to him that the water was also coming in through the air pump discharge valve. If he was right—and I think he was—it follows that either the valve had not been properly closed by Scourfield earlier in the evening or something had happened to open it again. It was suggested that, as the water from the engine room levelled out into the stokehold, as it would do when it reached a height of 4 ft., there would be a tendency for the list to starboard to increase, with the result that the pressure of water from within might open the air pump discharge. Water would then flow in again, and in a short time the main discharge would go below water level and, if open, the result would be an inrush of water through both fully open discharges. The evidence, in my view, is consistent with this theory, and I think it is highly probable that was the sequence of events.

In any case, I find that the effective cause of the sinking was the omission to take steps to ascertain that the discharge valves were properly closed before these pumps were dismantled and the gear removed from the store on the port side.

In this connection I prefer the evidence of Law, the expert witness for the plaintiffs, to that of the defendants' witnesses. I do not think it is necessary to decide whether it was negligent not to "blank off" these discharges ; it is sufficient for this case to say that, having regard to the nature of the repairs being executed, and the removal of the gear from the storeroom, coupled with the unusual proximity of these discharges to the waterline, it was incumbent upon the defendants to take proper steps to see that the discharge valves were securely closed. This was, in my view, clearly the duty of the defendants and not the responsibility of the ship's engineer.

I have omitted so far to mention what happened between 1.30 a.m. and 6.30 a.m., because that is really relevant to the issue of contributory negligence, to which I now turn.

It is said that, if there was negligence on the part of the defendants, the consequences of this negligence could have been avoided if the plaintiffs' night watchmen had exercised reasonable care and diligence in the performance of their duties and reported what they saw or should have seen before 6.30 or thereabouts.

According to the evidence of the fire watchers Taylor and Harrison, they visited the stokehold, after their first inspection on arrival on board, at about 12.30 to 1, again at about 2, again at about 4.20 and finally sometime shortly after 6.20. The time 6.20 is fixed by an inquiry made by Taylor from someone on the quay; the other times are very rough estimates, as neither man had a watch. Taylor, in cross-examination, also spoke of another visit about three-quarters of an hour after the 4.20 visit. They said that it was not until the visit shortly after 6.20 that they saw anything calling for report. At 4.20 Taylor heard some water trickling in the stokehold, and there was water beneath both boilers. They pulled the fires from back to front of the furnace so that steam should go down, but they formed the opinion that it was only due to the water levelling out from the engine room in the normal course and did not call for any report. They looked in the engine room, and the water appeared to be at the same level as before.

The defendants invite me to reject this evidence and to say that, having regard to the quantity of water which was in the engine room at 7.30 a.m., there must have been obvious indications of incoming water at 4.20. They rely on certain calculations made, at the request of counsel for the defendants, by the witness Henderson called by the plaintiffs, as a result of which it is said that it would require a continuous flow of water for 13 hours through one discharge valve fully open and one half open to produce the quantity of water sufficient to sink this vessel, namely, about 1,200 tons. Whether Henderson, in making these calculations, allowed sufficiently for the increasing list and the consequent increased water pressure, as well as the heavy superstructure of this vessel, I do not know; but the fact remains that his calculations are not consistent with the evidence as to the quantity of water that in fact came into the engine room through one discharge valve between 6 p.m. and 7.30 p.m., namely, to a height of 3 ft. 6 ins., compared with about 7 ft. 6 ins. by 7.30 a.m. next morning, even after allowing for the fact that the stokehold would have to be filled to a depth of 5 ft. before the water would rise above 4 ft. in the engine room, and bearing in mind that the vessel was listing and was 2 ft. down by the stern. Even if Henderson's calculations must be accepted, they are based on the assumption that, up to the very end, water did not come in at any other spot except through one discharge valve fully open and one half open; and I see no reason why I should make this assumption. The onus is upon the defendants to establish their plea of contributory negligence.

Having regard to the position and qualifications of these fire watchers, accepting their evidence as I do, and taking into consideration the circumstances existing when they came on duty and the instructions they received, coupled with the admitted position in the engine room at 1.30 a.m., I am not prepared to say that they failed to exercise that degree of care and skill to be expected from persons in their position.

It is to be remembered that, as a result of Bate's decision, no properly qualified person ever inspected the engine room between 9 p.m. on Sept. 24 and 7 a.m. the next morning. I think it is impossible for the defendants to shift their responsibility for this unfortunate accident on to these fire watchers.

These findings are sufficient to dispose of the issue of liability; but I think I ought to state my conclusion with regard to the construction of cl. 15 of the general conditions.

It is contended by the defendants that this clause only applies to third party claims and does not include damage to the property the subject-matter of the contract. I was referred to *Great Western Ry. Co.* v. *Durnford & Sons* (1), *The Carlton* (2), and *Furness Shipbuilding Co.* v. *London & North Eastern Ry. Co.* (3).

I have given careful consideration to these authorities, but, as the language of the clauses in question in each case differs materially from that contained in cl. 15 of these general conditions, I have not been able to derive much assistance therefrom.

Counsel for the plaintiffs says that the material words in this clause are as follows:

> The contractor shall be responsible for . . . all . . . losses and expenses whatsoever in respect of . . . loss of or damage to property howsoever caused arising out of or in any way attributable to the execution of the works . . .

He says there is no reason to exclude damage to property of the plaintiffs, whether that property is the ship under repair or any other property, provided always the damage arises out of or is attributable to the execution of the works.

In my view the words " be responsible for " govern all the words that follow, and as applied to losses and expenses extend the meaning which the clause would have had if the governing words had been words of indemnity only. I see no reason to restrict the clause to third party claims, and, unless it is so restricted, there is no ground for excluding loss arising from damage to the subject-matter of the contract.

For these reasons, if I had arrived at different conclusions with regard to negligence and contributory negligence, I should have found on the facts that the loss of this vessel arose out of and was attributable to the execution of the works, and should have held as a matter of law that it was within cl. 15 of the general conditions.

In the result, the counterclaim will be dismissed and the claim referred to an official referee to assess the damages and enter judgment accordingly. The defendants must pay the plaintiffs' costs of claim and counterclaim to date; the costs of the reference will, of course, be for the official referee.

Since writing the judgment that I have just read, but before delivering it, and after the case had been heard, an application was made to me by counsel for the plaintiffs to be allowed to mention the fact that it had been ascertained that Henderson's calculations upon which he had based the view that it would take 1,200 tons of water to sink this vessel were erroneous; and counsel for the defendants very properly, if I may say so, having regard to the instructions which he had, agreed that that was so.

I did not think it desirable to re-open the matter and consider what the position might be on the proper figures; but I thought it was sufficient, in view of the opinion to which I had already come with regard to this case, that it should be put on record that, for quite different reasons from those indicated in the judgment I have read, these calculations were in fact incorrect, and, therefore, nothing could be based upon them.

Claim allowed with costs. Counterclaim dismissed with costs.

Solicitors: *P. W. Pine* (for the plaintiffs); *Ince, Roscoe, Wilson & Glover*, agents for *Allen Pratt & Geldard*, Cardiff (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

R. *v.* ISAAC SORSKY, HERMAN BRESLER AND H. BRESLER & SONS, LTD.

[COURT OF CRIMINAL APPEAL (Viscount Caldecote, L.C.J., Humphreys and Oliver, JJ.), **July 4, 1944.**]

Emergency Legislation—Controlled goods—Quota—Agreement by registered person to sell goods to quota holder and then to sell goods as agent of quota holder—Goods supplied in excess of quota " supply "—Limitation of Supplies (Miscellaneous) Order, 1940 (*S.R. & O.*, 1940, *No.* 874), *art.* 2.

Criminal Law—Conspiracy to contravene provisions of statute Plea of absence of mens rea—Limitation of Supplies (Miscellaneous) Order, 1940 (*S.R. & O.*, 1940, *No.* 874).

The appellant company H.B. was controlled by the appellant B. and was a registered person within the Limitation of Supplies (Miscellaneous) Order, 1940, and held a certain quota for supplying controlled goods under the same Order. Most of the company's goods were destroyed by enemy action. The first appellant S. owned a similar business with stock but lacking the necessary quota. B. and S. entered into an agreement whereby S. sold to the company controlled goods and then sold, as the agent of the company, the same goods to the unregistered customers of S. In this way controlled goods were supplied in excess of the company's quota. On the first count the company was charged with supplying controlled goods contrary to art. 2 (1) of the Order and B. was charged with aiding and abetting. A second count charged the company and B. with a similar offence relating to a different period. The third and fourth counts charged all three appellants with a conspiracy. On the first and second counts it was contended that, by reason of the agreement between the company and S., the company had not " supplied " the goods within the meaning of the Order. On the third and fourth counts it was contended for S. that the charges involved a knowledge by S. that the amount of the quota had been or would be exceeded and that there was no proof of *mens rea* on S.'s part :—

Held : (i) upon the true construction of art. 2 (1) of the Order, the company was the supplier of the goods under the agreement.

(ii) on a charge of conspiracy to contravene the terms of the Order it is not necessary to prove *mens rea* on the part of the accused.

[**EDITORIAL NOTE.** This is an ingenious attempt to avoid the operation of the Limitation of Supplies (Miscellaneous) Order, 1940, and it is held that a party may "supply" goods in breach of the Order by a course of dealing such as is here in question, although he is not the vendor. It is further held that as the supply of controlled goods in excess of quota is an offence irrespective of the knowledge of the supplier, a charge of conspiring to supply contrary to the Order does not require proof of *mens rea*.

As to Conspiracy, see HALSBURY, Hailsham Edn., Vol. 9, pp. 43-46, paras. 43, 44 ; and for Cases, see DIGEST, Vol. 14, pp. 115-116, Nos. 844-848.]

Cases referred to :

*(1) *R.* v. *Clayton* (1943), unreported.

*(2) *R.* v. *Jacobs*, [1944] K.B. 417 ; [1944] 1 All E.R. 485.

Appeals from conviction for contraventions of the Limitation of Supplies (Miscellaneous) Order, 1940, art. 2. The facts are fully set out in the judgment of the court delivered by Humphreys, J.

R. T. Paget for the appellant Sorsky.

H. V. Lloyd-Jones for the appellants Herman Bresler and H. Bresler & Sons, Ltd.

C. L. Henderson, K.C., and *A. P. Marshall* for the Crown.

Humphreys, J. [delivering the judgment of the court] : The indictment in this matter contained four counts : The first count charged the limited company, H. Bresler & Sons, Ltd., with this offence, that during the period beginning with June 6, 1940, and ending with Nov. 30, 1940, at the city of Leicester, the company being a registered person within the meaning of the Limitation of Supplies (Miscellaneous) Order, 1940, in relation to a class of controlled goods, to wit class 3 in the Schedule to the said Order, unlawfully did supply a total quantity of that class of controlled goods exceeding in value by the sum of £7,017 two-thirds of the value of the total quantity of that class of controlled goods supplied by H. Bresler & Sons, Ltd., during the period beginning with June 1, 1939, and ending with Nov. 30, 1939. It further charged Herman Bresler, and another person who was acquitted and whose name need not be mentioned at all, with the offence of aiding and abetting the company to commit that offence. The second count charged a similar offence against the company and against Herman Bresler relating to a different period, at which date a different Order was in force. The third count charged all three appellants, the company, Herman Bresler and Isaac Sorsky, with this offence, that they conspired together that H. Bresler & Sons, Ltd., being a registered person, should supply during the period which is referred to in the first count controlled goods in contravention of the Limitation of Supplies (Miscellaneous) Order, 1940, art. 2 ; and the fourth count charged those same persons with similar offences, with a similar conspiracy, but related to the second period, at which time the second Order was in force.

The Orders in question are, first of all, the Limitation of Supplies (Miscellaneous) Order, 1940. By art. 1 of that Order it is provided that every person carrying on in the United Kingdom the business of supplying what may be shortly described as any class of controlled goods shall be registered in respect of that class of controlled goods. Art. 2 (1) of that Order provides as follows :

> Except under the authority of a licence granted by the Board of Trade . . . no person who at any time during the period beginning with June 6, 1940, and ending with Nov. 30, 1940, is a registered person in relation to any class of controlled goods, shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with June 1, 1939, and ending with Nov. 30, 1939.

The latter period is commonly known as the "standard period."

In art. 2 (2), we find that the word "supply" in relation to any class of controlled goods, is defined as meaning supply in pursuance of a contract of any description otherwise than supply to registered persons in respect of that class of controlled goods.

The second Order is the Limitation of Supplies (Miscellaneous) (No. 5) Order, 1940. It contains similar provisions, but as the result of art. 6, read together with Sched. 1 of the Order, an alteration is made in that the two-thirds, referred to in the previous Order in art. 2, is altered and the provision is made that a person may only supply during the period of this second Order an appropriate proportion of the value of the total quantity of controlled goods supplied during the standard period. As regards the class of goods dealt with in this case, which were clothing or apparel, 50 per cent. is the amount which was allowed. There is also art. 8 (2), which may perhaps have some little importance on this appeal, which provides that a registered person may by a note or memorandum in writing transfer his right in respect of the quantity of controlled goods in which he is entitled to deal, and that quantity of goods came to be known as the quota which a particular registered person had a right to. There is a proviso in that last paragraph which provides that no transfer shall have effect unless the consent of the Board of Trade shall previously have been obtained in writing, and a copy of the transfer document is to be supplied to the Board of Trade.

The effect, so far as this case is concerned, of those Orders appears to be this, put very shortly ; registered persons who are manufacturers or wholesalers are unrestricted in regard to their dealings with each other, but no supply is permitted by the registered person to be made to an unregistered person in excess of the quota held by the supplier.

The material facts were not in dispute at the trial. H. Bresler & Sons, Ltd., is a company controlled by Herman Bresler. It dealt in London in clothing and similar material. During 1940 much of their stock was destroyed by enemy action, and they moved to Leicester, where, again, they were the subject of loss by bombing, with the result that they were left with no stock of goods, but by virtue of their trading in the standard period, had the right to deal in goods to an amount in the period covered by the earlier of the two Orders referred to, of about £2,000, and in the second period of about £1,500. Those figures are referred to as the quota which was owned by the company.

Isaac Sorsky owned a similar business in Leicester, where he traded in the name of Elliot's Provincial Warehouses, Ltd. That company held large stocks of goods but lacked the necessary quota to enable it to sell to its unregistered customers as it desired. In October, 1940, Herman Bresler and Sorsky met and agreed that Sorsky should sell to Bresler controlled goods, and should then sell as the agent of Bresler those same goods to Sorsky's customers. That agreement was carried out. Sorsky invoiced the goods to Bresler, Ltd., and then, as the selling agent of Bresler, resold those goods to his customers. Under the agreement Bresler provided Sorsky with blank invoices in his own name, or the name of his company, to be filled in as and when Sorsky delivered consignments of those goods to his customers. They were paid for by the customers by cheques drawn to Bresler, which cheques were dealt with by Sorsky who cleared them through a bank. From time to time Sorsky remitted sums of money to Bresler as his share of the proceeds, the total amount being a little over £3,000. In this way controlled goods were in fact supplied to unregistered persons in excess of Bresler's quota to the extent of £7,017 in the first period, and £14,912 in the second period.

The only question raised on behalf of the company and Herman Bresler in this appeal was whether this course of dealing amounted in law to a supplying by Bresler to the unregistered persons. If it did so, it was conceded by their counsel that neither of these appellants had any defence to the charges contained in counts 1 and 2. It was argued that as the goods physically remained in the custody of Sorsky until they were delivered to the customers, it was Sorsky and not Bresler who supplied the goods. CHARLES, J., after full argument, held that the course of dealing did amount in law to a supplying by Bresler, and we agree with his ruling. The judge founded himself upon the Sale of Goods Act, 1893, s. 18, r. 5, which reads as follows :

> Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with

the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

If, therefore, at the time of the delivery of the goods the property in those goods had already passed to Bresler, Ltd., as the result of the sale to Bresler, Ltd., then in law the goods were sold by Bresler, and it is immaterial whether the delivery was made direct by Bresler, or through an agent.

It may well be that, if Sorsky had been charged in counts 1 and 2, he might also have been convicted. We see no reason for holding that to constitute a person a supplier of goods it is essential to prove that he is the vendor, but for the purpose of this case it is sufficient to say that, in our opinion, H. Bresler & Sons, Ltd., were rightly convicted of supplying, and Herman Bresler of aiding and abetting.

Passing next to counts 3 and 4, upon which all three appellants were convicted, counsel for Sorsky was bold enough to contend that the person supplying in these circumstances could not be convicted of an offence against the Order unless there was proof of a *mens rea* on his part and that a charge of conspiracy to supply contrary to the Order therefore involved knowledge by the accused that the amount of the quota of the supplier had been or would be exceeded.

The all sufficient answer to that argument is to be found in the wording of the Orders in question which makes it abundantly plain that the supply of controlled goods contrary to the Order is an offence irrespective of any knowledge or state of mind of the supplier. If authority is required in support of that proposition it will be found in the judgment of this court in *R.* v. *Clayton* (1). That case is also an authority for the proposition that conspiracy to contravene the terms of these Orders does not require proof of that knowledge on the part of the accused indicated by the expression *mens rea*. To the same effect is *R.* v. *Jacobs and Others* (2), in which it was contended for the appellants (who had been convicted of conspiring to contravene the provisions of the Price of Goods Act, 1939, by selling price controlled goods at a price in excess of the permitted price) that the conviction was wrong in that there was no evidence that the vendors were aware that the permitted price had been exceeded. That argument was rejected by this court, it being pointed out in the judgment that a criminal conspiracy consists in the agreement to do an unlawful act without reference to the knowledge on the part of the accused of its illegality.

Counsel endeavoured to support his argument by reference to the statement to be found in many text books and said to have originated in SIR MATTHEW HALE'S TREATISE ON THE PLEAS OF THE CROWN to the effect that it is a good answer to a charge of having committed a misdemeanour at common law to show that the accused acted under the belief in the existence of a state of facts which, if true, would have exonerated him. We are in no way controverting that general proposition of law. If it is to be applied to a charge of conspiracy and to the facts of the present case, it may be said that, if there had been evidence upon which a jury could find that the agreement entered into by Sorsky was an agreement to deal only in goods covered by the quota to which Bresler was entitled, it would have been proper to leave that question to the jury since such an agreement would not have been an agreement to do an unlawful act. On the evidence, however, it is plain that this was not the defence put forward by the only person who gave evidence upon the subject, *viz.*, Sorsky himself. His case was that he sold the goods lawfully to Bresler, having satisfied himself that Bresler was a registered person. Thereafter his view was that the amount of Bresler's quota was a matter for Bresler and the Board of Trade, but did not concern him, Sorsky, as the selling agent of Bresler. A few quotations from his evidence make this abundantly clear.

In the evidence-in-chief of Sorsky, who was asked by his counsel to explain exactly what the agreement was, he stated it in terms which have already been referred to in this judgment. Then this question was put:

> *Q.*—Would you have arranged for the purchase of goods unless you had thought Breslers had got quota to use, or that they could sell? Would you have paid £3,200? *A.*—I do not think for a moment that the question as to whether Bresler had got quota or not really concerned me. I simply supplied those goods, which I contend I was entitled to do, and I resold them in a perfectly legitimate and legal manner, as it was understood at that time by everybody in the trade. I had not altered my course, or anybody else's course, in the whole procedure at this particular period.

Everybody in the trade did the same thing absolutely—they sold on these sort of non-existent quotas that we are aware of to-day.

He was then later on cross-examined about that, and these questions and answers appear :

Q.—And you were using Bresler's name for what purpose ? *A.*—I was selling for him, and using the invoices on his authority and on his instructions.

Q.—You did not examine the books ? *A.*—No, I never saw them.

Q.—You were concerned, were you not, before you entered into these transactions, to see that Breslers were registered ? *A.*—Yes.

Q.—If you were concerned to see that, you would also be concerned to know what the amount of quota was ? *A.*—Yes.

Q.—What steps did you take to verify Bresler's figure as his statement of quota ? *A.*—I will answer that in two ways.

Q.—Answer it now ? *A.*—I could have done like everybody else in the trade did, and take no steps at all. But I had asked him what his position was, and I knew he was in a very substantial way of business. I knew he was a Government contractor, and I had every right and every reason to believe he had quota. I believed him honestly and truly.

Q.—And you made no independent enquiries at all ? *A.*—I could not make independent enquiries—it was a matter of impossibility to make independent enquiries.

Q.—Why did you not ask to see Form Miscellaneous 1 ? [I interpolate the statement that that form is the one which has to be filled up by the registered person and sent to the Board of Trade, stating his previous dealing in controlled goods, which would show the amount of the quota]. *A.*—That is the Board of Trade's business, not mine.

Q.—But it was his business ? *A.*—It is for them to call for returns, not me.

Q.—Why did not you ask Mr. Bresler to let you know what returns he had made ? *A.*—Why did the Board of Trade put him on the register if he had nothing to do ? [that means he had no quota].

Q.—Never mind about that. Why did you not ask for either Form Miscellaneous 1 or Form Miscellaneous 5 ? *A.*—Because I considered myself a good business man. I could not think of every little detail like that ; and that is a thing nobody would have thought of—not one business man in a million.

In the light of those answers, we think it would have been absurd to leave to the jury the question whether Sorsky had honestly believed in a state of facts of which he said himself : "I did not think about it, it was nothing to do with me at all, it was not my business."

It follows that, if Sorsky did act under any mistake at all, it was a mistake of law and not of fact, and ignorance of law affords no excuse.

The case, therefore, became, as the judge observed, an undefended one.

We are satisfied that these appellants were rightly convicted. On the question of sentence it is sufficient to say that the courts are bound to treat breaches of these Orders as serious offences, and the only form of punishment likely to deter such persons as these appellants is a substantial sentence of imprisonment.

The appeals are dismissed.

Appeals dismissed.

Solicitors : *Phœnix, Levinson, Walters & Shane* (for the first appellant) ; *Maltz, Mitchell & Co.* (for the second and third appellants) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

R. *v.* ALFRED GEORGE JOHN CUTTER.

[COURT OF CRIMINAL APPEAL (Humphreys, Wrottesley and Tucker, JJ.), **August 23, 1944.**]

Criminal Law—Appeal—Reference to previous conviction on indictment given to jury—Counsel given opportunity to ask for discharge of jury—Counsel electing to appeal—Appellant deprived of right to appeal—Criminal Appeal Act, 1907 (*c.* 23), *s.* 4 (1).

The appellant was charged and convicted of an offence. On retiring to consider their verdict the jury were provided with a copy of the indictment which contained a reference to a previous conviction. The court informed counsel for the appellant that he could appeal to the Court of Appeal or ask for the jury to be discharged. Counsel for the appellant elected to appeal. The appeal against conviction was made on the ground that the reference to the previous conviction was not admissible and that there had been a miscarriage of justice within the meaning of the Criminal Appeal Act, 1907, s. 4 (1) :—

Held : the course adopted by counsel for the appellant at the trial deprived the appellant of his right to appeal against the irregularity in question.

[**EDITORIAL NOTE.** In *Stirland* v. *Director of Public Prosecutions* (1) it was held that a conviction may be quashed on appeal for improper admission of evidence although no application has been made by counsel for trial before another jury. Viscount A Simon, L.C., observed that the failure of counsel to object might have a bearing on the question whether the accused was really prejudiced, and in this case the court, in accordance with that view, dismiss the appeal on the ground that counsel, being given an opportunity to apply for a fresh trial, deliberately elected not to do so, in order to apply to the Court of Criminal Appeal instead.

As to Quashing Conviction on the Ground of Miscarriage of Justice, see HALSBURY, Hailsham Edn., Vol. 9, pp. 276, 277, para. 403 ; and for Cases, see DIGEST, Vol. 14, pp. 521-526, Nos. 5856-5908.] B

Cases referred to :

*(1) *Stirland* v. *Director of Public Prosecutions*, [1944] 2 All E.R. 13.
(2) *R.* v. *Wattam*, [1942] 1 All E.R. 178 ; 28 Cr. App. Rep. 80.
(3) *R.* v. *Firth*, [1938] 3 All E.R. 783 ; Digest Supp. ; 26 Cr. App. Rep. 148.
(4) *R.* v. *Ellis*, [1910] 2 K.B. 746 ; 14 Digest 361, *3819* ; 79 L.J.K.B. 841 ; 102 L.T. 922.

Appeal from a conviction by the Hertfordshire Quarter Sessions. The facts C are fully set out in the judgment of the court delivered by Tucker, J.

W. G. Carmichael for the appellant.

F. D. Levy for the Crown.

Tucker, J. [delivering the judgment of the court] : This is an appeal by Alfred George John Cutter from a verdict of guilty on a number of counts, eight in all, in an indictment which charged him together with another man D named Spencer with stealing and receiving a quantity of goods consisting chiefly of clothing which had been stolen from the London and North Eastern Railway Co. On this indictment both men were found guilty. There was a general finding of guilty on the whole indictment, and the appeal is now brought before this court pursuant to a certificate given by the chairman of the Hertfordshire Quarter Sessions, His Honour Judge McClure, on the ground that the case was a fit one for appeal because the jury on retiring to consider their verdict E were provided with a copy of the indictment which contained a reference to a previous conviction.

It is the fact that very unfortunately, through some oversight on the part of some court official, the jury were handed a copy of the indictment which contained an averment against Cutter of a previous conviction. Having brought back their verdict of guilty, the chairman asked to look at the indictment, which F was handed to him, and he then said, noticing no doubt the averment of the previous conviction : "Members of the jury, when I look at the indictment, I should ask you this : Did you notice that fact ?" That was said after the previous conviction in the indictment had been put to the prisoner and he had admitted it. The foreman of the jury said : "No, my Lord," and another juror said "No, my Lord."

Then the matter proceeded. Counsel for the appellant said that he felt a G grave injustice had been done, and then the foreman of the jury said :

> My Lord, it is said by some of the jury that that was noticed. But that was not discussed at all. It was not mentioned.

The chairman then said that nothing had been given about it in evidence, and he said : "The fact remains it may have influenced your minds." He then asked counsel for the appellant this question : H

> You could, of course, go to the Court of Criminal Appeal and let them decide this matter. Or I suppose I could take the course of saying that I am afraid I cannot accept the verdict as the jury have given it and discharge them from giving a verdict. But I would hesitate to do that.
>
> [Counsel for the appellant] : Subject to any instructions I receive, my Lord, I should be inclined to reserve my right to appeal.
>
> [The chairman] : You certainly should have the right to appeal, and I think, in the circumstances, I should grant you a certificate.

Then another matter was mentioned, and the chairman said that he would accept the verdict of the jury. He said :

> It was an unfortunate matter. But it is difficult for anyone to say, speaking for all of you, that your minds may not have been affected by that, but at any rate there it is. The conviction must stand.

In those circumstances counsel for the appellant now asks us to quash this conviction on the ground of this admitted irregularity. The position with regard to that is this : This court has certain powers which are conferred upon it by statute with regard to appeals, and they appear, so far as relevant to this case, in the Criminal Appeal Act, 1907, s. 4 (1), which provides that :

> The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

Those are the provisions of sect. 4 (1), apart altogether from the proviso ; I do not refer to the proviso for this purpose. This case does not fall within any of the earlier provisions of that section, but comes under those concluding words " or that on any ground there was a miscarriage of justice " ; so that the appellant in a case like this has to show, first of all, that there has been some irregularity of this kind, and that it has resulted in fact in a miscarriage of justice.

In that connection, this court has often had to consider to what extent, if at all, the rights of an appellant on appeal are affected in matters of this kind by the course taken by counsel at the trial. It was suggested at one time, dealing with cases where there had been some irregularity with regard to the evidence, where questions had been asked which resulted in answers revealing a man's previous conviction emerging during the trial, that, if the prisoner, being represented by counsel, did not there and then apply to have the jury discharged, he could not thereafter complain with regard to the admission of such evidence.

That matter and kindred matters of that kind have recently been dealt with in *Stirland* v. *The Director of Public Prosecutions* (1). In that case Viscount Simon, L.C., dealing with this matter, says as follows, at pp. 18, 19 :

> A further question was raised in the present appeal which can be briefly disposed of. Atkinson, J., in delivering the judgment of the Court of Criminal Appeal, called attention to the decision of that court in *R.* v. *Wattam* (2), where Viscount Caldecote, L.C.J., quoted the observation of Lord Hewart, L.C.J., in *R.* v. *Firth* (3), and treated that observation as amounting to a ruling that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made by counsel for the prisoner for the trial to be begun again before another jury. No such application was made in the present case. I doubt whether Lord Hewart's words require so strict a construction, but, in any case, it seems to me that there cannot be a universal rule to this effect. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself : see *R.* v. *Ellis* (4), at p. 764. If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said, at p. 763, in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal.

In this case we have to look and see whether in the circumstances that took place after the jury had given their verdict, counsel for the prisoner used his discretion, knowing what had happened, with a view to preserving a right of objection on a possible appeal. Sympathising, as I think we all do, with the position of counsel in a matter of this kind which arises very suddenly and unexpectedly, none the less we have to look and see what he did ; and in this case our view is that he was clearly given by the chairman, although perhaps not encouraged, but clearly given an opportunity of applying to have the jury discharged and a fresh trial before another jury. He deliberately, having asked for an opportunity to take instructions on the matter, elected not to take that course, avowedly for the purpose of and with the intention of coming to this court instead. In our view, he was there doing the precise thing that

Viscount Simon, L.C., was referring to in *Stirland's* case (1), saying that such a course would be a matter which this court might think resulted in depriving the appellant of the right to complain of any such irregularity as occurred in this case. Of course, it would always be open to the appellant on other grounds to argue or maintain that the verdict was unreasonable or could not be supported having regard to the evidence; but no such grounds are brought before us and, this being the only ground, for those reasons this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *W. H. Hanscombe* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

INLAND REVENUE COMRS. *v.* ROLLS-ROYCE, LTD.

[King's Bench Division (Macnaghten, J.), **May 15, 1944.**]

Revenue—Excess profits tax—Royalties received from licences of patented inventions—Inventions made by research department—"Income received from investments"—Finance (No. 2) Act, 1939 (c. 109), *Sched. VII, para.* 6 (1) (2).

The respondents were the registered proprietors of letters patent covering inventions of (i) an aluminium alloy known as R.R.50, and (ii) resilient pipe joints, which inventions were made by workers employed in a research department maintained by the respondents. In January, 1930, the respondents granted an exclusive licence to High Duty Alloys, Ltd., to manufacture and sell the alloy R.R.50, and in August, 1940, the respondents and High Duty Alloys, Ltd., granted to Wellworthy Piston Rings, Ltd., a limited licence to manufacture and sell that alloy. In October, 1939, the respondents granted to Avimo, Ltd., an exclusive licence to manufacture and sell resilient pipe joints. Each of these licences provided for the payment of a royalty to the respondents. The question was whether, for the purposes of excess profits tax, the royalties received by the respondents from the licences was "income received from investments" within the meaning of the Finance (No. 2) Act, 1939, Sched. VII, para. 6 (1):—

Held: upon the true construction of para. 6 (1) the word "investment" ought to be construed as investments acquired by the laying out of money, and the respondents did not purchase the patents by the laying out of money but acquired them by reason of the fact that its research workers had made the inventions.

[**EDITORAL NOTE** The primary meaning of "invest" is the laying out of money for the acquisition of property. It is held that the employment of workers in connection with a research department and in the making of inventions is not a laying out of money within this meaning. Accordingly royalties received under licences for the manufacture and sale of inventions made by employees of the licensor are receipts in trade and have to be included in computing the excess profits tax liability of the licensor.

As to the Finance (No. 2) Act, 1939, Sched. VII, Para. 6, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1220.]

Cases referred to:

*(1) *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.* (1941), L. (N.D.C.) 5; 58 T.L.R. 73.

(2) *Inland Revenue Comrs.* v. *Sangster*, [1920] 1 K.B. 587; Digest Supp.; 89 L.J.K.B. 673; 122 L.T. 374; 12 Tax Cas. 208.

Appeal by the Crown on a point of construction of the Finance (No. 2) Act, 1939, Sched. VII, para. 6 (1) and (2). The facts are fully set out in the judgment.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Reginald P. Hills* for the appellants.

J. Millard Tucker, K.C., and *Heyworth Talbot* for the respondents.

Macnaghten, J.: The respondent in this case, Rolls-Royce, Ltd., a company incorporated in 1906 and carrying on business as manufacturers of motor chassis and aero engines, is the registered proprietor of letters patent covering inventions of (i) an aluminium alloy known as R.R.50, and (ii) resilient pipe joints. In January, 1930, the respondent granted an exclusive licence to manufacture and sell the alloy R.R.50 to a company called High Duty Alloys, Ltd.; and in August, 1940, the respondent and High Duty Alloys, Ltd., granted a limited licence to manufacture and sell that alloy to a company called Wellworthy Piston Rings, Ltd. In October, 1939, the respondent granted an exclusive licence to manufacture and sell resilient pipe joints made in accordance with its patent to a company called Avimo, Ltd. Each of these licences provided for the payment of a royalty to the respondent. The question at issue on this appeal is whether the royalties received by the respondent ought to be excluded from the computation of its profits for the purposes of the Excess Profits Tax. The Special Commissioners have decided that issue in favour of the respondent.

The Finance (No. 2) Act, 1939, Sched. VII, provides for the computation of profits for the purpose of the excess profits tax imposed by Pt. III of that Act; and by para. 6 (1) of that Schedule it is provided that:

> Income received from investments shall be included in the profits in the cases and to the extent provided in subpara. (2) of this paragraph and not otherwise.

Subpara. (2) provides as follows:

> In the case of the business of a building society, or of a banking business, assurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, being income to which the persons carrying on the business are beneficially entitled.

The respondent does not come within the provisions of subpara. (2) and, therefore, if the royalties received by the respondent from its licensees are income received from "investments" within the meaning of subpara. (1), they are not to be included in the computation of its profits for the purposes of the excess profits tax. The word "investment," though it primarily means the act of investing, is in common use as meaning that which is thereby acquired; and the primary meaning of the transitive verb "to invest" is to lay out money in the acquisition of some species of property; consequently, letters patent, which are undoubtedly a species of property, may properly be described as an investment.

It is said on behalf of the Crown that the word "investment" as used in para. 1 (2) is confined to property acquired by the laying out of money. There is no authority directly on this—but it so happens that a point akin to it with regard to the royalties received by the respondent in respect of the alloy R.R.50 arose in *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.* (1).

The Finance Act, 1937, imposes the national defence contribution, and para. 7 of Sched. IV to that Act deals with the adaptation of the provisions as to computation of profits for the purposes of that tax and provides that "income received from investments or other property" should be included in the profits in the cases and to the extent therein provided but not otherwise"; and then follow provisions similar to the provisions to be found in the Finance (No. 2) Act, 1939, Sched. VII, para. 6 (2).

That case came before LAWRENCE, J., and he held that the royalties were "income received from investments or other property" within the meaning of para. 7. In the course of his judgment he said, at p. 3:

> *Sangster's* case (2) is a clear authority that a patent is property and that the royalty payable under the licence to use the property is income from property.

It was not necessary for him to decide whether the royalties were income from investments or from "other property," but the Attorney-General relies, in support of the case for the Crown, on the omission of the words "or other property" from the later Act.

Some light on the true interpretation of the word "investment" in the Finance (No. 2) Act, 1939, Sched. VII, para. 6 (1), may, I think, be obtained from consideration of the provisions of subpara. (2). The income which is to be included in the profits under subpara. (1) is, it will be observed, income received from investments in the case of a building society, of a banking business, assurance business, and a business concerned, wholly or mainly, in dealing in or holding of investments. In all those cases the investments would be investments acquired by the laying out of money. A banking business has nothing but money for investment; so, too, in the case of a building society which receives money from its shareholders and depositors: and an assurance business which receives premiums on the policies of insurance which it issues and has to create a fund for the purpose of meeting its obligations under the policies. It is the money which such businesses receive that is laid out in the purchase of investments. Businesses consisting wholly or mainly in dealing in or holding investments would, as a general rule, be businesses where money, and nothing but money, is laid out in acquiring the investments.

The conclusion at which I arrive, not without some doubt, is that the word "investments" in para. 6 (1), ought to be construed as investments acquired by the laying out of money.

It was argued by counsel for the respondents that, if this be the meaning of the word "investments" in subpara. (1), the respondent did acquire its patents by the laying out of money.

It appears from *Inland Revenue Comrs.* v. *Rolls-Royce, Ltd.* (1), that the respondent maintains a research department and that the invention in question was made by workers employed in that department. They, no doubt, received remuneration for their services, and the respondent, when the letters patent were granted to it, no doubt, had to pay the prescribed fees. But I do not think that that was a "laying out of money" in the sense in which it is used in connection with the word "investments." Where it is used in connection with the word "investments," the money is laid out for the purchase of the investment. The respondent company did not purchase the patents. It did not acquire them by the laying out of money. It acquired them by reason of the fact that its research workers had made the inventions. They having made the inventions, the respondent had to pay the fees which were necessary for the purpose of obtaining patents.

The result is, in my opinion, the appeal succeeds and must be allowed with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Claremont, Haynes & Co.* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

MARTIN *v.* NOLAN AND ANOTHER.

[King's Bench Division Tucker, J., and a Special Jury), **June 20, 1944.**]

Magistrates—Quarter sessions—Borstal prosecutions—Offender previously convicted or previously discharged on probation—Offender placed on probation—Failure to observe recognisance—Conviction for offence for which offender placed on probation—Whether liable to be sent to Borstal—Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10—*Criminal Justice Act,* 1925 (*c.* 86), *s.* 46 (1).

In July, 1941, a young girl, B.W., was charged with stealing a £1 note, but was conditionally discharged under the Probation of Offenders' Act, 1907. In December, 1942, having failed to observe one of the conditions upon which she was placed on probation, she was again brought before the justices who then recorded a conviction against her for the theft in July, 1941, and committed her to quarter sessions with a view to her being sent to a Borstal institution. It was contended that the justices had no jurisdiction to commit B.W. to quarter sessions, since under the provisions of the Criminal Justice Administration Act, 1914, s. 10, as amended by the Criminal Justice Act, 1925, s. 46 (1), two convictions were necessary:—

Held: the requirements of the Criminal Justice Administration Act, 1914, s. 10 (as amended) had been complied with since B.W. had been convicted of an offence of the kind specified in the section and had failed to observe a condition of her recognisance.

[**EDITORIAL NOTE.** This case considers the essential conditions for the committal of a young person to quarter sessions under the Criminal Justice Administration Act, 1914, s. 10. It is held that two convictions are not necessary, as, in the view of the court, the purpose of the section is to see how young offenders react to probation and to provide power for them to be sent to Borstal where such reaction is unsatisfactory. It is, therefore, held that the terms of the section are complied with where there was a probation order with which the accused has failed to comply and subsequently a conviction for the same offence as that in respect of which the probation order was made.

As to Committal with a view to Borstal, see HALSBURY, Hailsham Edn., Vol. 21, p. 627, para. 1085; and for the Criminal Justice Administration Act, 1914, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 375.]

ACTION for damages for libel. In the course of the hearing a point arose relating to the construction of the Criminal Justice Administration Act, 1914, s. 10, as amended by the Criminal Justice Act, 1925, s. 46 (1). The relevant facts are fully set out in the judge's summing up.

Eric Neve, K.C., and *Geoffrey Lawrence* for the plaintiff.

J. F. F. Platts Mills for the first defendant.

E. Ryder Richardson for the second defendants.

The judge dealt with the law on the point reported in the following terms in summing up to the jury :

TUCKER, J. : I pass now to Question No. 4, which is the foundation of the whole trouble that we are concerned with here to-day. It started because this girl Betty White had been sent to be dealt with by quarter sessions for Borstal. That matter depends entirely upon the proper construction of an Act of Parliament, the Criminal Justice Administration Act, 1914, s. 10, as amended by the Criminal Justice Act, 1925, s. 46 (1). I need only read the part relevant to this question :

> (1) Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine . . .

That is the first thing. There is no dispute about this : Betty White had been convicted of an offence in respect of which there was power to impose a sentence of one month or upwards without the option of a fine ; she had been convicted on Dec. 18, 1942, of stealing. She had been previously charged with that in July, 1941, but had been conditionally discharged under the Probation of Offenders Act, 1907, and no conviction had been recorded. It had been said to her :

> Go home, and if you are of good behaviour for three years you will never hear another word about this, but if you do not behave yourself you may be brought back here again and a conviction will then, and only then, be recorded for your having stolen this £1 note.

Eventually, after a somewhat chequered career, she came back again on Dec. 18, 1942, and the justices of Hereford then recorded a conviction against her for stealing this £1 note some 18 months before. Thus the first part of the requirements under the Act has, beyond dispute, been complied with. Then come the words referring to one of the things that has to be proved before the girl can be sent to quarter sessions in order that quarter sessions may decide whether it is a suitable case for Borstal, because quarter sessions are not bound to send her to Borstal ; they can deal with her in any way they think fit. It has to be proved :

> (*b*) . . . that the offender has previously been convicted of any offence [this girl had not been convicted of any offence previous to Dec. 18, 1942] or, that having been previously discharged on probation, [she] failed to observe a condition of [her] recognisance . . .

Now was that requirement fulfilled or was it not ? She had been discharged on probation previously, in July or August 1941, and she had failed to observe a condition of her recognisances. There is no dispute about that. There is a dispute as to whether she did so on the first occasion when there was an adjournment from July 10 to July 14, but there is no dispute that by December 1942, she had been previously put on probation, and she had failed to observe a condition of her recognisances. In my view, having given the matter full consideration and having consulted two of my brother judges most experienced in this matter, I do not hesitate to say that I have arrived at the conclusion that the advice which the clerk to the magistrates gave was perfectly correct advice. This was a case which the recorder at the quarter sessions at Hereford was competent to deal with by Borstal treatment, if he thought it right.

The matter is not altogether clear, because of the use of the words " previous conviction." It may be argued, as it is argued in this case, that the object of the Act was to deal only with people who have been twice convicted of some criminal offence. My view, however, is that the whole object of the Act is to provide for and to cover circumstances in which a person who has got into trouble is being tried out to see how he will react to leniency. When it is found that he does not satisfactorily react to probation, then the court is given this power to send him to Borstal.

Solicitors: *Haslewood, Hare & Co.*, agents for *Bosley & Co.*, Brighton (for the plaintiff); *Harold Miller* (for the first defendant); *Willis & Willis*, agents for *Charles France Drinkwater*, Gloucester (for the second defendants).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

SIM *v.* SIM.

[Probate, Divorce and Admiralty Division (Pilcher, J.), **July 28, 1944.**]

Divorce—Judicial separation—Jurisdiction—Domicil—Residence—Wife petitioner—Both parties domiciled in Scotland—Wife resident in Scotland—Husband resident in England.

The petitioner wife and the respondent were born in Scotland and on Feb. 1917, were married in Scotland. From that date they continued for the most part to reside in Scotland until Feb., 1937, when respondent went to live in England because he was able to obtain more satisfactory employment there. In August, 1937, the respondent wrote to the petitioner stating that he did not intend to share a home with her although the petitioner was at all times willing to reside with her husband. In December, 1942, the petitioner filed a petition for judicial separation on the ground of the respondent's desertion. The court found that both parties were at all material times domiciled in Scotland, that the petitioner was physically resident in Scotland and that the respondent was resident in England. It was contended on behalf of the petitioner that the court had jurisdiction to entertain the matter notwithstanding that at the material time both parties were not resident within the jurisdiction and, alternatively, that the residence of a wife not judicially separated from her husband was the residence of her husband:—

Held: (i) in a suit for judicial separation on the ground of desertion brought by a wife the court has jurisdiction to hear the matter notwithstanding the fact that the petitioner is not resident within the jurisdiction.

(ii) a wife who is not judicially separated from her husband is *prima facie* resident with her husband.

[**EDITORIAL NOTE.** In divorce cases it is necessary that the husband be domiciled in England, but it has been held that in petitions for judicial separation, it is sufficient if both parties are resident within the jurisdiction. In the present case, the husband only was actually resident within the jurisdiction. To the objection that the wife was resident elsewhere, two answers are given. First, that a wife not judicially separated from her husband is resident where her husband resides. Secondly, that she was the petitioner and had, therefore, submitted to the jurisdiction.

As to Effect of Domicil and Residence on Suit for Judicial Separation, see HALSBURY, Hailsham Edn., Vol. 10, pp. 691,692, para. 1027; and for Cases, see DIGEST, Vol. 11, pp. 426-427, Nos. 916-920.]

Cases referred to:

*(1) *Armytage* v. *Armytage*, [1898] P. 178; 11 Digest 426, *917*; 67 L.J.P. 90; 78 L.T. 689.

(2) *Anghinelli* v. *Anghinelli*, [1918] P. 247; 11 Digest 427, *918*; 87 L.J.P. 175; 119 L.T. 227.

(3) *Von Eckhardstein* (*Baroness*) v. *Von Eckhardstein* (*Baron*) (1907), 23 T.L.R. 593; 11 Digest 427, *920*.

*(4) *Chetti* v. *Chetti*, [1909] P. 67; 11 Digest 416, *827*; *sub nom. Venugopal Chetti* v. *Venugopal Chetti*, 78 L.J.P. 23; 99 L.T. 885.

(5) *Donegal* v. *Donegal* (1821), 3 Phillim. 597; 16 Digest 117, *157*; *sub nom. Chichester* v. *Donegal*, 6 Madd. 375; *subsequent proceedings* (1822) 1 Add. 5.

(6) *Williams* v. *Dormer* (1852), 2 Rob. Eccl. 505; 11 Digest 334, *225*.

(7) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; 11 Digest 423, *895*; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194.

Adjourned Summons by respondent to petition for judicial separation on ground of desertion asking that the petition be dismissed for want of jurisdiction. The facts are fully set out in the judgment.

H. Clifford Mortimer for the petitioner.

L. F. Sturge for the respondent.

PILCHER, J.: On Dec. 7, 1942, Mrs. Elizabeth Farquhar Inglis Sim filed a petition against her husband, Alexander Sim, asking for a judicial separation on the ground of her husband's desertion. On June 1, 1943, an issue was directed to be tried as to the domicil of the parties on the material dates, namely, February, 1937, when the alleged desertion took place, and Dec. 7, 1942, when the suit was instituted. This issue came before me on Apr. 25, 1944, and, after hearing evidence, I decided that on the material dates the husband was domiciled in Scotland. During the course of the argument, counsel for the petitioner, indicated that, even if the issue of domicil should be decided in favour of the respondent, he proposed to contend that in a suit for judicial separation this court had jurisdiction, provided that the husband, even though domiciled abroad, was resident within the jurisdiction. Accordingly, having decided the issue which was then before me in favour of the husband, I adjourned the case in order that the further point which counsel for the petitioner desired to argue might be formulated with more precision. Having heard the evidence on the issue, I reserved the further hearing to myself.

I heard no more of the matter until July 4, 1944, when the case again came before me on a summons taken out by the husband. This summons was expressed in very general terms and it called upon the wife to show cause why the petition and the suit should not be dismissed for want of jurisdiction and why she should not pay the costs of the issue as to domicil in which she had been unsuccessful. As the point which counsel for the petitioner desired to argue seemed a somewhat novel one and appeared to be of some general importance, I adjourned the summons into court.

The facts of the case, as far as they are material, are as follows. The husband and wife were born and bred in Scotland and were married at Aberdeen on Feb. 10, 1917. There are four children of the marriage, whose ages range from 21 to 12. At the time of the marriage the husband's occupation was that of a drapers' and house furnishers' assistant, and he carried on this occupation, in Aberdeen and elsewhere in Scotland, until the year 1929. From 1929 to 1933 he was employed in Dublin, where he lived with his wife and children. He thereafter went to Glasgow with his family, and after a short period of employment there, he was, in 1935, engaged by a firm of house furnishers to open a branch in Edinburgh. In 1936 he took a house in Ladysmith Road, Edinburgh, and shortly after this time his wife noticed a change in his manner. The respondent and his wife ceased to occupy the same bedroom, and it is quite clear that at about this time they became estranged. In 1937 the husband was offered employment in Newcastle at an enhanced salary, and he accordingly went to Newcastle, leaving his wife and family in Edinburgh.

It is from this date that the husband's desertion is alleged by his wife to have commenced. At first the husband lived in lodgings in Newcastle, visiting his family for short periods at holiday times. On Aug. 9, 1937, he wrote his wife a letter making it clear that he would not have her to live with him at Newcastle, and there is very little doubt that from the date of that letter, if not from some earlier date, the husband was in desertion. Since he left his wife the husband has paid her substantial sums for her own maintenance and for that of the children. In April, 1938, the wife visited her husband at Newcastle. His attitude to her was hostile and he told her that his plans did not include her. He subsequently leased a house at Newcastle and in July, 1942, removed all his furniture from Edinburgh to Newcastle. On Dec. 7, 1942, the wife filed her petition for a judicial separation on the ground of her husband's desertion.

Having listened to the evidence in the case I was satisfied that the husband had merely removed his residence to Newcastle because he was able to obtain more satisfactory employment there than he could obtain in Scotland. All his relations are still in Scotland, and I was satisfied that he still regards Scotland as his home. On the evidence I was satisfied that the husband had never abandoned his Scottish domicil of origin or acquired an English domicil of choice. It follows, therefore, that both husband and wife are domiciled in Scotland. The wife has, moreover, at all material times been resident in Scotland; whereas the husband has for the last seven years been resident in England. In spite of their estrangement the wife was at all material times willing to join her husband at Newcastle.

The jurisdiction of this court to entertain suits for judicial separation is stated in the textbooks to depend upon (*a*) domicil within the jurisdiction, or (*b*) residence of both parties within the jurisdiction at the time of the institution of the suit, or (*c*) the existence of a matrimonial home within the jurisdiction at the time when the events occurred upon which the claim for judicial separation is based or at the time when cohabitation ceased: see Dicey, 5th Edn., r. 64 (1), at p. 288. The requirements of (*a*) and (*c*) above referred to are clearly not fulfilled on the facts of the present case. It is also clear that at the time of the institution of the present suit whilst the husband was resident in England the wife was not.

Counsel for the petitioner argued first that the requirements set out in (*b*), that both parties should at the material time be physically resident within the jurisdiction, was not justified by the authorities; and secondly that, if it was correct to say that both parties must be resident within the jurisdiction, the residence of a wife not judicially separated from her husband was in the eyes of the law the residence of her husband, and that consequently both husband and wife must in the present case be regarded as resident in Newcastle and thus within the jurisdiction.

So far as I am aware, this is the first occasion upon which this particular point has come up for consideration by this court. I may, therefore, perhaps be forgiven for making a few general observations on the matter. It is well recognised that in suits for judicial separation it is the duty of this court to act and grant relief upon principles which conform as closely as possible to the principles acted upon by the ecclesiastical courts. In suits for divorce *a mensa et thoro* instituted in the ecclesiastical courts the residence of the party against whom relief was sought within the geographical area of the particular ecclesiastical court was a *sine qua non* to found jurisdiction. Such party had to be described in the citation as resident within the jurisdiction of the ecclesiastical court in which the suit was instituted. If the party cited was not in fact so resident and took no point on jurisdiction it seems that the suit proceeded. If, however, such party wished to question the jurisdiction of the court to entertain the suit on the ground of residence an appearance was entered under protest and the matter was gone into and determined. The principal parties to suits in the ecclesiastical courts were usually husbands and wives unseparated by any judicial decree. Counsel for the petitioner informed me that he knew of no case in which a wife who had in fact taken up a residence separate from that of her husband had encountered any difficulty on the ground of jurisdiction, because she was herself normally resident at the time of the institution of her suit outside the jurisdiction of the ecclesiastical court in which she had cited her husband to appear.

Such research as I have been able to conduct into the matter appears to support the statement of counsel for the petitioner on this point. That no such case can be found is not perhaps surprising when it is remembered that the ecclesiastical courts took no account of voluntary separations between husband and wife, even though made under a formal deed. The residence of a wife unseparated from her husband by judicial decree was apparently regarded as the residence of her husband: see Shelford on Marriage and Divorce, 1841, p. 488, where the following passage occurs:

> It may be questionable whether a citation of the wife at the domicil of her husband is not sufficient to found the jurisdiction of the court even in a suit of nullity of marriage against the wife wherever the wife may be actually resident. A party may have two domiciles: the one actual, the other legal: and *prima facie* at least the husband's actual domicil is the wife's legal domicil wheresoever the wife may be personally resident. Upon the principle of the domicil of the husband being the legal domicil of the wife it seems that the citation of the wife at the domicil of the husband is clearly sufficient to found the jurisdiction of the ecclesiastical court in a suit for separation *a mensa et thoro* by reason of adultery, the wife being fixed with notice of the suit.

In the above passage it is clear that by "actual domicil" is meant a *bona fide* established residence and not domicil in the strict legal sense. It would seem therefore, that the practice of the ecclesiastical courts affords no ground for saying that the jurisdiction of this court in suits for judicial separation depends upon the physical residence of both parties to the suit within the jurisdiction. The proposition stated in the text books that the residence of both parties in this country is necessary to found jurisdiction in this type of suit is no doubt derived from certain observations of Gorell Barnes, J., in *Armytage* v.

Armytage (1). In that case the husband was a domiciled Australian and his wife an English woman who on marriage had, of course, taken her husband's domicil. The wife petitioned for a judicial separation in this court on the ground of acts of cruelty committed by her husband in Naples. As a result of her husband's alleged cruelty in Naples the wife came to this country, bringing the children of the marriage with her. Her husband, who desired to obtain the custody of the children, followed her to England and instituted proceedings A in the chancery court to have the children made wards of court. His visit to England was quite temporary, and he intended apparently to return to Australia when he had settled his affairs. At the time of the institution of the wife's suit the husband was, however, in England. It was argued for the husband that the court had no jurisdiction to entertain the wife's suit because the parties were domiciled Australians and the alleged acts of cruelty had been committed out of the jurisdiction. GORELL BARNES, J., in the course of a long B judgment in which he recites the opinions of a number of well known international jurists, said at p. 192 :

> I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party.

C At p. 195 he said :

> Though legally domiciled in Australia, as a matter of fact she [the wife] has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction.

At p. 196 he said :

> . . . in my opinion, no valid reason can be urged against the courts of the country, in which a husband and wife are actually living, pronouncing a decree which will protect D the one against the other so long as they remain within the jurisdiction.

Armytage v. *Armytage* (1) was approved and followed by the Court of Appeal in *Anghinelli* v. *Anghinelli* (2). In that case both parties, although not domiciled, were in fact resident at the actual time within the jurisdiction.

Although these two cases support the proposition stated in the textbooks that the court has jurisdiction to entertain a suit for judicial separation where E both parties are resident in England at the time of the institution of the suit, in both cases the principal points relied upon by the respondent was that the court had no jurisdiction owing to the fact that the parties were domiciled abroad. It is thus that in *Armytage* v. *Armytage* (1), and also in *Von Eckhardstein* v. *Von Eckhardstein* (3), the residence of the petitioner wife in this country was stressed to some extent as a reason for assuming jurisdiction. Both these cases were suits for judicial separation grounded on the husband's cruelty, and the F fact that the wife petitioner was actually resident within the jurisdiction and was, therefore entitled to the protection of the competent court of this country against molestation by her husband was taken into account as one of the reasons for assuming jurisdiction.

No such consideration arises, of course, on the facts of the present case. It is to be observed, however, that in *Armytage* v. *Armytage* (1) the acts of cruelty G were committed abroad, and there does not appear to have been any serious danger that the husband would have repeated them in this country where the wife was residing under the protection of her relatives. In *Chetti* v. *Chetti* (4) the husband left his wife in 1890 and went to India, where he was domiciled. His wife remained resident at all times in England. The husband never thereafter cohabited with his wife, but apparently returned to England temporarily, so that he was physically in this country some 17 years later when served with H the wife's petition for judicial separation on the ground of desertion. It was held that desertion commenced to take place from about 1894, and the husband thereafter seems to have remained in India out of the jurisdiction until he visited this country and was served with the petition. The wife was granted her decree although the husband's desertion had commenced and continued out of the jurisdiction. In that case, at the conclusion of the judgment, after mentioning *Armytage* v. *Armytage* (1) SIR GORELL BARNES, P., said, at p. 88 :

> Both parties to the present suit were within the jurisdiction at the time of its commencement, and in my opinion the petitioner is entitled to a decree of judicial separation.

In *Chetti* v. *Chetti* (4) there was no question of the wife requiring any protection from molestation in this country by the husband, and the materiality, if any, of his physical presence within the jurisdiction at the time of the institution of the suit was not considered.

I am not, therefore, inclined to attach undue importance to the fact that in suits for judicial separation founded upon cruelty the residence of the petitioner in this country who may require the protection of the courts of this country seems to have been regarded as a material matter when dealing with questions of jurisdiction.

Counsel for the petitioner referred me to two cases decided in the ecclesiastical courts, *Chichester* v. *Donegal* (5), and *Williams* v. *Dormer* (6), and also to *Yelverton* v. *Yelverton* (7). Each of these cases contains passages helpful to his argument, but I do not find it necessary to refer to those cases in detail, because I am satisfied that the submission of counsel for the petitioner is correct, namely, that the ecclesiastical courts regarded an unseparated wife as *prima facie* physically resident where her husband was resident, and also that whilst the residence of the party against whom relief was sought was regarded by the ecclesiastical courts as all-important, the actual residence of the party seeking relief never seems to have been regarded as important or inquired into, probably because an unseparated wife was regarded as resident in law where the husband was resident. In this case the party against whom relief is sought, namely, the husband, is resident in this country.

I was satisfied by the evidence called at the hearing of the issue before me that but for his refusal to receive his wife in his Newcastle house she would have come and lived with him at Newcastle, in which case the husband and wife would both have been physically resident within the jurisdiction.

I am not satisfied that the ecclesiastical courts attached any importance to the actual residence within the jurisdiction of a wife seeking relief against her husband, and I see no reason why this court, acting on principles which conform to the principles acted upon by the ecclesiastical courts, should attach any importance in a suit for judicial separation to the actual residence of a wife who has herself invoked the process of the court and so submitted to its jurisdiction.

I therefore hold that the court has jurisdiction to entertain the petitioner's suit for judicial separation.

Order accordingly.

Solicitors: *Percy Haseldine & Co.* (for the petitioner); *Hyde, Mahon & Pascall*, agents for *Wilkinson & Marshall*, Newcastle (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

In the Estate of BEAN.

[Probate, Divorce and Admiralty Division (Hodson, J.), **May 25, 1944.**]

Executors—Probate—Dispositive document attested but not signed—Document enclosed in envelope signed by intending testator—Wills Act, 1837 (c. 26), *s.* 9—*Wills Act Amendment Act*, 1852 (c. 24), *s.* 1.

An intending testator wrote his will on a printed will form and omitted to sign his name next to the attestation clause. The will was enclosed in an envelope provided for containing the will form, and this was signed by the testator:—

Held: this was not a signature of the will within the Wills Act, 1837, s. 9, and the document could not be admitted to probate.

In the Goods of Mann (1) *distinguished.*

[**EDITORIAL NOTE.** In *In the Goods of Mann* (1), Langton, J., made it clear that in admitting a document to probate in circumstances very similar to these he did so because the facts peculiar to that case precluded the possibility of fraud. Here it was clear that the signature on the envelope was never intended as a signature of the will and accordingly the document was unsigned and could not be admitted.

As to Signature of Will, see HALSBURY, Hailsham Edn., Vol. 34, pp. 58-60, paras. 71-74; and for Cases, see DIGEST, Vol. 44, pp. 253-255, Nos. 803-813.]

Case referred to:

*(1) *In the Goods of Mann*, [1942] P. 146; 111 L.J. (P.) 86; 167 L.T. 189; 58 T.L.R. 400; *sub nom. In the Estate of Mann*, [1942] 2 All E.R. 193.

MOTION to admit to probate in common form a will attested but not signed and an envelope signed but not attested containing the will. The facts are fully set out in the judgment.

P. R. Hollins for the applicant, the widow.

G. Cross for the infant daughter interested on intestacy.

HODSON, J.: The will was written on a printed form completed in the deceased's handwriting down to and including the attestation clause. The will itself was not signed by the deceased. When the deceased had filled in the form he wrote his name and address and the date on the back of it and also filled in spaces on the envelope by writing his name and address, the name of the executrix and the date. The attesting witnesses then signed their names and added their addresses at the foot of the second page of the will in the space provided for the purpose.

The question is whether the requirements of the Wills Act, 1837, s. 9, have been satisfied. The Wills Act, 1837, s. 9, provides as follows:

> No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

By the Wills Act Amendment Act, 1852, a very wide construction was put on the words "at the foot of the will" in s. 9 of the Act of 1837. The executrix has put forward the will and the envelope as together forming the true last will of the deceased. It is, therefore, necessary to determine, first, whether the name "George Bean," written on the envelope, is a signature at all. If this question is answered in the affirmative, then it is necessary to determine whether or not it makes any difference that the signature was written on a separate piece of paper.

The executrix has contended that the facts in this case are so near to those which were considered by LANGTON, J., in *In the Goods of Mann* (1) as to be virtually indistinguishable. In that case an unsigned will and an envelope were together admitted to probate. The evidence, as in this case, was given on affidavit, and I have had an opportunity of seeing the original documents and the evidence then under consideration. The will was all written in the handwriting of the deceased and there were no introductory words leading up to the point where a signature was to be placed. At the end of the dispositive part of the will the deceased added the words "in the presence of witnesses" and then the attesting witnesses signed. There was no material difference in the writing on the envelope from that which appears in this case. The attesting witnesses both deposed to the fact that the deceased, having written on the envelope the words "The last will and testament of Catherine Mann," pointed out to them both that the documents which she had written were her will. LANGTON, J., found that the signature on the envelope was the signature to the will, and then dealt at some length with the second question, namely, whether or not there was any difficulty in admitting both documents to probate as together constituting the last will of the deceased.

On the facts of the case which I have to consider I find it impossible to answer the first question in the affirmative. The executrix has sworn that she did not know that the deceased had not signed the will form, and it appears to me to be plain that this omission on the part of the deceased was purely accidental in that he failed to sign his name in the space provided for the purpose. The writing on the envelope was equally clearly, I think, put there for the purpose of identifying the contents of the envelope and not as a signature at all. The deceased never indicated that the testamentary document and the envelope together constituted his will. He had written his name not only on the envelope, but also on the indorsement which appears on the back sheet. It is true that the indorsement was not visible to the attesting witness whereas the writing on the envelope was seen. Nevertheless, in my opinion, it is impossible to be satisfied that the deceased intended to give effect to the will by writing on the envelope since in all probability, he, like the executrix, was under the impression that he had already signed the will on the form itself.

The motion, therefore, fails on the ground that the name "George Bean" on the envelope is not the signature to the will. I should add that, had it been possible here to find as a fact that the name on the envelope was put there as the signature to the will, I should have regarded the facts in this case as indistinguishable from those in *In the Goods of Mann* (1).

Documents not admitted to probate.

Solicitors: *Corbin, Greener & Cook,* agents for *Ward & Co.*, Doncaster (for both parties).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

ROTHWELL *v.* CAVERSWALL STONE CO., LTD.

[Court of Appeal (Scott, Luxmoore and du Parcq, L.JJ.), **July 20, 21, September 25, 1944.**]

Workmen's Compensation—Injury due to accident—Defective medical treatment—Injury not discovered until too late for successful treatment—Incapacity due to defective medical treatment—Novus actus interveniens—Workman not entitled to compensation—Workmen's Compensation Act, 1925 (c. 84), *ss.* 9 (1), 12 (3), 19 (4).

In March, 1943, during and in the course of his employment, a workman met with an accident resulting in personal injuries. Owing to the negligence of the doctor at the hospital which the workman attended, it was not discovered at the time that the workman was suffering from a fractured dislocation of the right shoulder. In June, 1943, when the dislocation was discovered, it was too late for treatment to be successful. On an application by the workman for compensation under the Workmen's Compensation Act, 1925, the county court judge held that the workman's incapacity was due not to the original injury but to the negligence of the hospital which constituted a *novus actus interveniens.* The judge, therefore, dismissed the application since he considered himself bound by the decisions of the Court of Appeal in the *Humber* case (1) and in the *Rocca* (2) and *Lakey* (3) cases. On appeal, it was contended on behalf of the workman that the decisions in the above cases were inconsistent with other decisions of the Court of Appeal which should have been preferred by the judge:—

Held [Scott, L.J., *dissenting*]: (i) the decisions in the two different lines of cases were not irreconcilable and, on the findings of the county court judge, the Court of Appeal was bound to follow the decision in the *Humber* (1) line of cases.

(ii) [*per* du Parcq, L.J.] having found that the workman's incapacity was due to the negligence of the doctor and not to the original injury, the county court judge was right in holding that such negligence constituted a *novus actus interveniens* and that the workman was, therefore, not entitled to compensation.

[**EDITORIAL NOTE.** This case considers at length the question of how far medical negligence amounts to a *novus actus interveniens* so as to disentitle an injured workman to recover compensation. In a dissenting judgment Scott, L.J., exhaustively reviews the authorities, and arrives at the conclusion that the two lines of cases represented by *Humber* (1) and *Dunham* (4) are in conflict. The court being thus free to choose between them, according to the principles recently laid down in *Young* v. *Bristol Aeroplane Co.* (5), he holds that *Dunham* (4) applied, and the workman should recover. In his view, any other decision would make the recovery of compensation dependent upon the skill of the medical attendant, a position wholly inconsistent with the social policy upon which the Workmen's Compensation legislation is based. The majority of the court, however, hold otherwise. In the view of du Parcq, L.J., the two lines of cases are not irreconcilable. The question to be determined is whether the existing incapacity "results from" the original injury or from a supervening cause; whether the supervening cause is blood-poisoning as in *Dunham* (4) or bad medical treatment as in *Humber* (1) and the case under consideration, it is equally a question of fact for the arbitrator to decide if the new cause has resulted in the existing incapacity or whether it has merely aggravated the effects of the original injury.

As to Incapacity increased by Defective Medical Treatment, see HALSBURY, Hailsham Edn., Vol. 34, p. 864, para. 1183; and for Cases, see DIGEST, Vol. 34, p. 351, Nos. 2824-2828. See also WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., pp. 272, 273.]

Cases referred to:

*(1) *Humber Towing Co., Ltd.* v. *Barclay* (1911), 5 B.W.C.C. 142; 34 Digest 351, *2824.*

Observations of du Parcq, L.J., at p. 365, *approved.* Hogan *v.* Bentinck West Hartley Collieries, Ltd. [1949] 1 All E.R. 588.

*(2) *Rocca* v. *Jones (Stanley) & Co., Ltd.* (1914), 7 B.W.C.C. 101; 34 Digest 351, *2825.*
*(3) *Lakey* v. *Blair & Co., Ltd.* (1916), 10 B.W.C.C. 58; 34 Digest 351, *2828.*
*(4) *Dunham* v. *Clare*, [1902] 2 K.B. 292; 34 Digest 341, *2759*; 71 L.J.K.B. 683; 86 L.T. 751; 4 W.C.C. 102.
*(5) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293.
*(6) *Costello* v. *Pigeon (Owners)*, [1913] A.C. 407; 34 Digest 243, *2069*; *sub nom. Costello* v. *Kelsall Brothers*, 82 L.J.K.B. 873; 108 L.T. 929; 6 B.W.C.C. 480.
*(7) *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667; 34 Digest 270, *2300*; 83 L.J.P.C. 220; 111 L.T. 305; 7 B.W.C.C. 274.
*(8) *King* v. *Port of London Authority*, [1920] A.C. 1; 34 Digest 434, *3548*; 88 L.J.K.B. 889; 121 L.T. 587; 12 B.W.C.C. 260.
(9) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 34 Digest 266, *2264*; 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1.
(10) *Clover Clayton & Co.* v. *Hughes*, [1910] A.C. 242; 34 Digest 273, *2316*; 79 L.J.K.B. 470; 102 L.T. 340; 3 B.W.C.C. 275.
(11) *M'Geechan* v. *Glasgow Iron & Steel Co., Ltd.*, [1926] S.C. 4; 34 Digest 389, *l.*
(12) *Steele* v. *Robert George & Co. (1937), Ltd.*, [1942] A.C. 497; [1942] 1 All E.R. 447; 111 L.J.P.C. 9; 167 L.T. 1; 35 B.W.C.C. 38.
(13) *Malone* v. *Cayzer, Irvine & Co.*, [1908] S.C. 479; 34 Digest 352, *2834 i*; 1 B.W.C.C. 27.
(14) *Ystradowen Colliery Co., Ltd.* v. *Griffiths*, [1909] 2 K.B. 533; 34 Digest 342, *2760*; 78 L.J.K.B. 1044; 100 L.T. 869; 2 B.W.C.C. 357.
*(15) *Harwood* v. *Wyken Colliery Co.*, [1913] 2 K.B. 158; 34 Digest 348, *2803*; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225.
*(16) *Brown* v. *Kent (George), Ltd.*, [1913] 3 K.B. 624; 34 Digest 347, *2795*; 82 L.J.K.B. 1039; 109 L.T. 293; 6 B.W.C.C. 745.
*(17) *Saddington* v. *Inslip Iron Co., Ltd.* (1917), 10 B.W.C.C. 624; 34 Digest 272, *2307*; 87 L.J.K.B. 184; 118 L.T. 138.
*(18) *Laverick* v. *Gray (William) & Co., Ltd.* (1919), 121 L.T. 289; 34 Digest 345, *2783*; 12 B.W.C.C. 177.
*(19) *Williams* v. *Graigola Merthyr Co., Ltd.* (1924), 17 B.W.C.C. 202; 132 L.T. 227; 34 Digest 348, *2804.*
*(20) *Doolan* v. *Hope (Henry) & Sons, Ltd.* (1918), 87 L.J.K.B. 671; 34 Digest 345, *2782*; 119 L.T. 14; 11 B.W.C.C. 93.
*(21) *Bower* v. *Meggitt & Jones* (1916), 86 L.J.K.B. 463; 34 Digest 343, *2773*; 116 L.T. 178; 10 B.W.C.C. 146.
(22) *Grime* v. *Fletcher*, [1915] 1 K.B. 734; 34 Digest 331, *2691*; 84 L.J.K.B. 847; 112 L.T. 840; 8 B.W.C.C. 69.
(23) *Tutton* v. *Majestic (Owners)*, [1909] 2 K.B. 54; 34 Digest 349, *2808*; 78 L.J.K.B. 530; 100 L.T. 644; 2 B.W.C.C. 346.

APPEAL by the workman from an award of His Honour JUDGE FINNEMORE, made at the Hanley County Court, and dated Mar. 27, 1944. The facts are fully set out in the judgment of SCOTT, L.J. LUXMOORE, L.J., died shortly before the judgments were delivered, but all three judgments had been written before his death and each member of the court had knowledge of the contents of the judgments of the other two. Following the procedure adopted by the court in *Polurrian S.S. Co.* v. *Young*, [1915] 1 K.B. 922, the judgment would be dated as at a time prior to the death of LUXMOORE, L.J. As he was sitting in the Court of Appeal on Sept. 25, 1944, that date would be the date of the judgment.

Phineas Quass for the appellant.

F. A. Sellers, K.C., and *A. A. Pereira* for the respondents.

SCOTT, L.J.: The appellant (to whom I will refer as the workman) met with an accident which dislocated his right shoulder and caused there a small fracture. It admittedly arose "out of and in the course of the employment" and the injuries admittedly caused incapacity for work, which continued for some time. The question in the case is whether the county court judge was right in holding, as he conceived himself bound in law to hold, that none the less the workman's incapacity for work did not at the time of the arbitration entitle him to any compensation, because at that time the then existing incapacity was, in his opinion, due to medical negligence in the treatment he had received at the time of the injury and subsequently at the hands of doctors and surgeons. The judge evidently arrived at that legal conclusion with regret, and I think would have decided in favour of the workman but for three decisions of this court: *Humber Towing Co., Ltd.* v. *Barclay* (1), *Rocca* v. *Stanley Jones & Co.* (2), and *Lakey* v. *Blair & Co.* (3). Counsel for the workman submitted to us that those decisions are inconsistent with an earlier decision of this court, *Dunham* v.

Clare (4), which was expressly approved and followed by this court in later decisions; that the interpretation there put upon the relevant statutory provisions is applicable to the facts of the present case; and that we are free to choose between the two inconsistent views previously taken. Since this appeal was argued, the judgment of the full Court of Appeal has been delivered in *Young* v. *Bristol Aeroplane Co., Ltd.* (5). We there stated both the general rule that the court is bound by its own previous decisions, and also the exceptions to the rule, of which one is that, where there is inconsistency between two or more previous decisions, the court is not bound by either view, and is free to decide as it thinks right. That is, in my opinion, the position in which we find ourselves in the present case; but to establish that position will require a careful examination of the two lines of authority.

Before doing so, however, I think it will be convenient to consider the interpretation of the Workmen's Compensation Act, 1925, on the provisional assumption that the court is free. For the moment I content myself with the preliminary observation that there is no difference of language as between the Acts of 1897 and 1906 to account for the differing interpretations adopted by the Court of Appeal in the two lines of cases to which I have referred: nor is there any difference between those Acts and the Act of 1925 under which the present case falls. The language of all the Workmen's Compensation Acts ought to be construed in its broad popular sense: see the citations from decided cases printed in Willis's Workmen's Compensation, 36th Edn., pp. 3-5; and note in particular, having regard to the remedial nature of the legislation, what Earl Loreburn said in his dissenting judgment in *Costello* v. *Pigeon* (*Owners*) (6), at p. 413: "we ought not to read into it an exception without bearing in mind the nature of the remedy which is proposed by the Act itself" and what Viscount Haldane, L.C., said in *Trim Joint District School* v. *Kelly* (7), at p. 680: "having regard to the conflict which exists between judicial opinions expressed in some of the decided cases, the only safe guide appears to me to be the language of the Act of Parliament itself." The vital words in all the Acts are "where death" or "total or partial incapacity . . . results from the injury": see Sched. I, para. (1) of both the 1897 and 1906 Acts: and sect. 8 of the 1925 Act, "where death results," and sect. 9 (1) "where total or partial incapacity results": see also the new subsect. (4) of sect. 9 of the Act of 1925 introduced by the Act of 1931, with its reference to "the continuing *effects* of the injury." Lord Birkenhead, L.C., in *King* v. *Port of London Authority* (8), at pp. 10-13, discussed the question of "results" not apparent at the time of arbitration, and said that a common sense view must be taken of the meaning of the Act: his draft form of order on pp. 12, 13, expresses that view. It is unnecessary to discuss the provisions about industrial diseases both because they are presumed to be "accidents" for the purpose of the Acts; and because the provisions relating to them do not seem to me to throw any additional light on the problems under consideration in the appeal.

The two words "results from" obviously raise the problem of causation, the solution of which in one form or another underlay all the cases in each of the two lines of decision which I regard as inconsistent. In the *Humber* case (1), it may be that the idea of the "proximate cause," appropriate in marine insurance, influenced the court's decision; if it did, it was wrong for the court to be so influenced. The insurance maxim, that in a contract of insurance the parties must be presumed to intend to concern themselves only with the proximate cause of loss, can have no application to the interpretation of a statute which creates rights and imposes duties on workman and employer, regardless of any question of intention: see *Fenton* v. *Thorley* (9), *per* Lord Macnaghten, at p. 447, and *per* Lord Lindley, at pp. 454, 455; and *Clover Clayton & Co.* v. *Hughes* (10), *per* Lord Loreburn, L.C., at p. 245. In our system of workmen's compensation as enacted by Parliament the *causa causans* may be, and often must be, more material than the *causa proxima*: see *per* Lord Lindley in *Fenton* v. *Thorley* (9). The legislation was addressed to the man in the street. If he sees that his friend is lame, asks what caused the lameness, and is told that the cause was an injury by an accident at a factory, he will not cease to regard the answer as any the less true because he is also told that with better medical treatment his friend might have already got well; or that improper medical treatment has aggravated the incapacity. In many cases complications supervene as the result of external causes, and produce aggravation: but at any given moment the present condition may still quite properly be ascribed to the original injury. As DU PARCQ, L.J., pointed out during the argument, the human body is continually changing under the varying influences of external and internal factors; and, whenever its natural processes are upset by either injury or disease, a new set of physical changes is set in operation. In every case of incapacity which comes before the arbitrator in workmen's compensation, A a complete historical diagnosis from the time of the accident would inevitably disclose innumerable new causes thus coming in to contribute to the condition of the workman, as it is at the time of the arbitration. An imaginary illustration may help to explain my meaning. A and B, both employed at the same factory, both get a right leg broken by the same accident, with apparently identical compound fractures; both are treated in the same way at the same hospital. A makes a good recovery; B makes a bad recovery because sepsis supervenes; B and his condition in the end is far worse and involves much greater disability than that of more fortunate A, who has made a good recovery and ended up with only a slight incapacity for work. The disability in each is in ordinary parlance said to "result from" the original injury: and conversely the injury would be spoken of as the cause. Nobody could with propriety of language speak of the injury by accident being the cause of A's final incapacity, but not of C B's final incapacity: all that would be said would be that A had recovered from the results of his injury much better than B.

These are the facts. On Mar. 23, 1943, by an accident within the Act, the workman got caught in machinery and fell from a platform, whereby his shoulder was dislocated, and a small fracture was caused at the top of the humerus close to the dislocation. Severe bruising and swelling appeared in the middle part of the upper arm, and much pain resulted in the swollen part, though not in the D shoulder. He was taken to a neighbouring cottage hospital, and there examined by the house surgeon. An X-ray was taken of the swollen and bruised part of the arm, but not of the shoulder, as no damage was in fact suspected there. An elastoplast bandage was put on the swollen part of the arm. He was, when then examined, able to turn his hand over, a movement not normally possible with a dislocated shoulder. He attended daily at the hospital, the bandage was sometimes changed, but nothing further was done. By Apr. 18, pain had developed E in the shoulder and chest, and poultices were applied. During the whole period of his attendance at the cottage hospital he was able to take his shirt off without help, and he received medical instruction to use his arm so as to exercise it. On May 2, he was discharged by the hospital, with an elasto dressing; the entry in the hospital books said that he had been suffering from "injuries to the right arm and shoulder." At the arbitration in Feb., 1944, unfortunately the house F surgeon was not available to give evidence. In June the pain in the arm and shoulder got worse and he went to his own doctor, who sent him to an orthopaedic hospital where he was examined by a highly skilled surgeon, Mr. Wainwright, who on June 15 sent him to the former hospital for another X-ray. It showed "a fracture dislocation of the right shoulder." Mr. Wainwright then tried to reduce the dislocation, but failed as it was "too late," and advised the workman not to have any further attempt made at reduction. The county court judge G finds as a fact that by then the arm had become fixed and the dislocation irreducible. There was some evidence that the dislocation might have occurred at a later date but the judge found as a fact that it did occur in the accident, and we are bound by that finding. He further found (i) that the dislocation could have been reduced and the man cured completely before the date of the arbitration, if the cottage hospital had diagnosed it at the outset, and (ii) that their failure to do so throughout the time the workman was attending there as H an out-patient constituted negligence—meaning actionable negligence. In all his findings he had the benefit of evidence given by four doctors altogether. The company paid weekly compensation without any recorded agreement, acknowledging that the workman was "entitled to it, down to Aug. 6, or, alternatively, Dec. 10, 1943"; and thereafter, without prejudice to their answer, they continued to pay it till the award on Mar. 23, 1944. The judge delivered a written judgment, holding that the negligence of the cottage hospital constituted a *novus actus interveniens*, and that the company was entitled to succeed, on the ground that:

> . . . the workman's present incapacity was due substantially to bad medical treatment and not to the original injury.

The workman's application for compensation was thus dismissed finally.

Before discussing the previous decisions of this court—for the question has not come before the House of Lords—there are certain general considerations preliminary to that discussion which ought, I think, to be borne in mind. (i) If we dismiss the appeal, we construe the Act as meaning that the injured workman's right to compensation under the Act is dependent on the degree of skill or care of the doctors to whom he goes for treatment of his injury: for if the doctors—and presumably nurses—make a mistake and fail to effect a cure the workman's incapacity for work will necessarily be said to "result," wholly or partially, not "from the injury," but from the failure by the doctors to effect a cure. Such an interpretation shocks me as inconsistent with the fundamental provisions of the whole series of Workmen's Compensation Acts; and it is very far-reaching. (ii) In the present case the offender—the doctor—was tried and found guilty, in his absence, on a charge of professional negligence. By "negligence" I understand the judge to mean actionable negligence by conduct of omission or commission. Whether his conduct had that quality or not is, in my opinion, irrelevant to the issue before the court. The only question was whether the incapacity resulted "from the injury." If medical treatment could, within the meaning of the Act, be a cause of the injury, it is the mere causal *nexus* and not the actionable quality of the doctor's conduct which matters. In truth two separate questions are raised by the judgment. The first is, whether it can be said truly that any treatment for an existing injury, which fails to effect a successful cure, constitutes a *novus actus interveniens*, so as to take the place of the injury and itself to become the cause of the incapacity. To my mind, that is a sheer misuse of language. Failure to effect a cure of an injury is not the same thing as the elimination of the injury as the cause of the incapacity. The second question is whether, in relation to cause and effect, the addition of the legal concept of negligence makes any relevant difference. In my mind, it does not. That common law topic has nothing to do with the issue of causation, which alone is introduced by the phrase in the Acts, "death" or "incapacity" which "results from the injury." It can no more be truly said to cause the incapacity than can treatment, which is not negligent but (*a*) is merely mistaken; or (*b*) in a difficult type of injury, is consciously experimental; or (*c*) itself being on right lines is interfered with in course of ministration by some extrinsic cause, such as a cold draught, bad food, shortage in the hospital of a particular drug, an accident to the patient in the hospital, a germ infection, or an enemy bomb. If such external possibilities were relevant to the consideration of causation under the Act, where would the process of investigation stop? It is impossible to draw any line. (iii) There is a further difficulty. In the inventory of possible new causes thus opening up—an endless vista—there can be no logical distinction between total and partial incapacity; if a new cause can so take the workman's total incapacity out of the Act, it must equally be possible for it to reduce total to partial incapacity, or major to minor partial incapacity; for the weekly payment may, under sect. 11 (1) of the 1925 Act, not only be "ended," but "diminished." I cannot believe that any such inquiry was ever intended by the Acts. There is not a hint of any such condition being attached to or implied in the words "results from the injury"; or for any appropriate procedure for dealing with such a difficult and delicate issue, involving, as it must, not only the compensation of the wholly innocent workman, but also putting in jeopardy a professional man's reputation without special provision for him to be heard in self-defence. On the contrary, there is at least one definite indication of the positive intention of Parliament to exclude such inquiries. (iv) Under the combined effect of sect. 12 (3) and sect. 19 (4), the medical referee is given power to issue a conclusive certificate, stating "to what extent the incapacity of the workman is due to the accident." It is utterly inconsistent with the general scheme of the Act that the medical referee, who has no jurisdiction to hear evidence (see *M'Geechan* v. *Glasgow Iron Co.* (11)), should make final findings on an issue which, if justice under sects. 1, 8 and 9 of the Act is to be done, would call for the most thoroughgoing investigation with oral evidence, often going into the whole clinical history of the workman since his accident. At the end of such an inquiry the medical referee would have to issue his certificate, which the Act makes conclusive of the whole of its contents. Whether it mentioned the cause to which the incapacity was *ex hypothesi* due, with or without the name of the hospital, doctor or nurse whose negligence was found by the referee to be the cause of the incapacity, it is inconceivable that Parliament should have intended him to have any such jurisdiction. And yet his jurisdiction is to deal with precisely the same issue as that left to the judge under sect. 9 (1). On the question of interpretation this reason seems to me conclusive, just because the language of sect. 19 (4) is, in regard to the question of causation, identical in effect with sect. 9 (1). If on the issue referred under sect. 19 (4) inquiry into the clinical history of the workman since his accident is ruled out, I can see no reason why sect. 9 (1) should be construed as including it. (v) Under the Act the incapacity which creates the workman's right to weekly compensation is that which " results from the injury " : every other cause is thus foreign to the Act. I will call the former " the statutory cause " and every other " a foreign cause " : for the Act knows no gradation : everything which is not white, the Act deems to be black ; and the foreign causes are all black. So regarded, I can see no difference in principle between the following two typical examples of foreign causes : (*a*) an act done to the workman by a doctor, or a nurse, each equally done for the purpose of curing his injury, which in fact retards or prevents his recovery (whether the act be done with or without skill, with care or with actionable negligence) ; and (*b*) a noxious bacillus invading the workman through mouth, nose or wound, whilst he is undergoing curative treatment ; (*a*) and (*b*) appear to me to be equally foreign and, so far as the Act is concerned, to be equally black in their statutory colour. (vi) Apart from any other criticism, I doubt whether the interpretation of the Act adopted by the county court judge, in deference to the three decisions of this court which I mentioned at the outset of my judgment, is capable of logical, or consistent application in practice. (vii) I have known an argument put forward on behalf of the employer that it would not be fair to him to make him pay for the negligence of the workman's doctor. There is nothing in it. It cannot under this legislation be truly said that, if we reverse the decision of the judge and allow the workman his compensation, we are placing a hardship on the employer. The underlying policy of Parliament, as embodied in the legislation, seems to me to dispose of that suggestion. The new compensation burden of industrial casualties was originally put upon selected industries by the Act of 1897, but now it is put upon industry as a whole. By the legislation, industry is left with an untrammelled right either to insure its workmen's compensation risk or to carry its own insurance, just as it chooses ; but in either case the expense of workmen's compensation is an item in the costs of production, recoverable from the community at large in the price of the article sold or service rendered. It is common knowledge that the risk is and always was almost universally insured. No question of fairness to the employer, therefore, enters into the arbitration of claims. On the other hand, the workman's right to compensation is independent of any blame upon the employer for breach of a duty. The liability to pay compensation is, in that sense, on both sides equally unconcerned with fault. Originally something of the nature of contributory negligence on the part of the workman was included in the principles of the scheme ; but that has very largely been eliminated from the language of the statutes (for the exceptions, see sects. 1 (1) (*b*) and 1 (2) of the Act of 1925). What remains of the legal idea of fault in the workman is largely the result of judicial legislation. It survives, for instance, in the rule that a workman who unreasonably refuses to submit to a simple remedial operation by the surgeon, being free from danger to the workman, is deprived *pro tanto* of the right to contend that his incapacity still " results from the injury " ; and that principle, as has been pointed out incidentally in the cases which I am about to discuss, has nothing whatever to do with the very important question of law raised by the present appeal. Possibly it had an unconscious survival in the *Humber* case (1), where the workman was punished for going to a quack bonesetter instead of to a qualified doctor. As the House of Lords said in *Steele* v. *Robert George & Co., Ltd.* (12), the practice of penalising a workman who refuses unreasonably to undergo an operation was sanctioned by what was really judicial legislation before the Act of 1906, and then and later silently accepted by Parliament. It is difficult to find any logically consistent home for it in the natural interpretation of the Acts.

(viii) There is one further consideration of a general order that appears to me to be germane. Parliament must be taken to have assumed that the workman, when injured, would go to the doctors for remedial treatment, and would want to get well as soon as he could ; but it has deliberately abstained from saying one word about the possibility of the medical treatment being mistaken ; still less, of its being negligent. It seems to me—if the decisions of this court which I am about to discuss permit me to say it—that on the interpretation of the Act we must treat the obvious contingency of medical failure to effect a cure, whether of the curable or the incurable injury, as having been present to the mind of Parliament when it omitted to make any express provision in the legislation for the effects of medical treatment upon the incapacity of the workman, or its corresponding compensation. To have enacted that the amount of compensation should be generally dependent upon the degree of skill or want of skill of the doctors would have been irrational or even ridiculous. If in the course of treatment a noxious bacillus gets a foothold and necessitates an amputation, that, in common sense, is (at any rate from the workman's point of view), a mere incident of the injury. If a nurse is the negligent cause of the bacillus getting in, the same comment still applies : equally, if the surgeon is negligent. Negligence of those to whom the treatment of the patient is entrusted is wholly irrelevant to the social policy on which the legislation is based. In other words, it has, in my humble opinion, nothing to do with statutory workmen's compensation.

I now come to the decisions of this court, three of which the county court judge thought bound him to decide as he did. I do not criticise him for so thinking, as I do not think he was at liberty to treat them otherwise. None the less, in my opinion, there is a disagreement of principle between the two lines of decision which sets the matter at large so far as the Court of Appeal is concerned, and enables us to choose between the two, or, differing from both, to find a third solution. Fortunately, in the present case, it is not, in my view, necessary to embark on the latter and more arduous task, since, for the reasons I have already indicated, the line of decisions which the judge did not follow commands my complete assent and also covers this present case. And for emphasis I repeat that the difference I am discussing is merely one of interpretation turning primarily on the statutory words " incapacity " which " results from the injury." The series of decisions, which propound what, in my judgment, is the right interpretation, begins with *Dunham* v. *Clare* (4). In that case a statutory accident injured the workman's toe. Fifteen days later erysipelas supervened and the resultant blood-poisoning caused his death. The medical evidence was that erysipelas was not either a natural or a probable consequence of such a wound, but was very unusual ; that probably the wound had been reopened in the course of walking to or from the hospital within the fortnight before the erysipelas appeared and had then let in the germ. The county court judge held that the death did not result from the injury, apparently on the medical evidence that such a consequence was neither natural nor probable. The Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.), set aside his judgment on the ground that the Act was concerned only with the question whether in fact death results from the injury and not whether that consequence is either probable or natural. In support of the rejected view it was argued that the employer's liability under the Act could not be put higher than a liability arising from a tort. At p. 296, Collins, M.R., said :

> If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the Act, we are not dealing with a case of contract or tort or with a liability of a criminal nature.

Lower on p. 296 he added, in regard to the comparison with a tort :

> That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity in fact result from the injury ? The county court judge, by inquiring whether death was the natural or probable con-

> sequence of the injury, has applied the wrong standard to the solution of the question. It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it. If no new cause, no *novus actus*, intervenes, death has in fact resulted from the injury.

That decision was approved by this court in *Malone* v. *Cayzer* (13), and its principle was applied in *Ystradowen Colliery Co.* v. *Griffiths* (14).

Harwood v. *Wyken Colliery Co.* (15) is a typical case of concurrent causes. It affirms the principle that the concurrence of another cause, itself producing incapacity, does not prevent the incapacity still resulting from the statutory injury. *Dunham* v. *Clare* (4) was not cited, but the court (COZENS-HARDY, M.R., BUCKLEY and HAMILTON, L.JJ.), unanimously affirmed the above principle in language almost identical with that used by the court in that case eleven years before. In Oct., 1909, the workman had been hurt by a fall of coal which broke two ribs and caused a lesion in his right knee. The employers paid compensation till Feb., 1910, when they found him light work. In 1911 he had another accident to the same knee and again the employers paid compensation. In May, 1912, they ceased to pay on the grounds that he had recovered from the effects of the first accident, and that no incapacity remained as a result of the second. In June, 1912, the workman commenced proceedings. At the hearing medical evidence established that he had heart disease, first observed in the previous April. The judge found that the workman was incapacitated from work both by the original injury and by heart disease, each cause being by itself enough to cause the incapacity. On those findings he gave judgment for the employers. In the Court of Appeal not only was *Dunham* v. *Clare* (4) not cited, but the leading authority on the other line of decision, *Humber* v. *Barclay* (1), was also not cited. COZENS-HARDY, M.R., expressing complete agreement with the written judgment of HAMILTON, L.J., drew special attention, at p. 163, to the omission from the Act of any hint that a supervening infirmity might affect the *quantum* of a redemption payment. The illustration by BUCKLEY, L.J., in the lower half of p. 165 and his reasoning from there to the end of his judgment strongly support the principle of *Dunham* v. *Clare* (4), namely, that concurrence of a new cause was not enough; the presence of the old cause must have ceased. At p. 168 he said:

> Therefore it is said he is not under incapacity to earn wages resulting from the injury and is not entitled to compensation under the Act. If this argument be correct the appeal must be dismissed. But, if the sounder argument be, as I think it is, that the consequences of the first injury still continue, because it resulted in his standing at the date of the second injury in such a position that that second injury did him less pecuniary damage than it would otherwise have occasioned, then the appeal must succeed. This, I think, is right. In a sentence, my conclusion is that while the compensation is only for the continuing consequences of the injury measured by diminished capacity to earn wages, still a subsequent supervening cause leaves the consequence of that diminished capacity still existent and only adds a further diminished capacity. I think, therefore, that the appeal must be allowed.

On the view that a contributory cause of incapacity cannot affect the workman's right to compensation for the incapacity resulting from the injury, HAMILTON, L.J., said this, at p. 169:

> In my opinion, the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart. It cannot be said of him that partial incapacity for work has not resulted and is not still resulting from the injury. All that can be said is that such partial incapacity is not still resulting "solely" from the injury. To read the word "solely" into the Act after the word "injury" is not interpretation but is legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the legislature so intended.

At p. 170 he endorsed what the other members of the court had said about the statutory calculation of redemption payments, and then said this:

> The period of continuance of the weekly payment is during "the incapacity," that is, the incapacity resulting from the injury, and no reference is made to the possible supervention of other causes of incapacity. The object of the Act is to give an injured workman a livelihood so long as an injury incapacitates him from getting his living. That the employer provides the compensation, and not the Exchequer, is for this purpose immaterial. The Act is a guarantee of workmen against the risk of accident. It is not founded on indemnity, and the ideas of retribution for wrong-doing and of *restoratio in integrum* are foreign to it.

This decision is very important because the court arrives independently at exactly the same conclusion as in *Dunham's* case (4) without being led there by authority.

The next case is a decision six months later in the same year, *Brown* v. *Kent* (16). There the workman had an accident to his knee. He was sent to hospital and there underwent an operation, which caused a wound. Three days after the operation scarlet fever showed itself and he was removed to an isolation hospital. Suppuration became very bad; and he was removed to a London hospital, where a severe operation was performed, the knee joint being excised. This shortened his leg permanently by half an inch, and also left him with a stiff knee joint. The county court judge held that the workman's injured state had no causal connection with his getting scarlet fever, and gave judgment for the employer, terminating the weekly payments. In the course of the argument, Cozens-Hardy, M.R., himself called attention to *Dunham* v. *Clare* (4), and pointed out that the principle applicable was not in dispute as it had been there laid down that, for a *novus actus interveniens* to break the chain of causation, not only must the new cause come in but the old cause must go. Swinfen Eady, L.J., delivering the judgment of the court (Cozens-Hardy, M.R., Swinfen Eady and Kennedy, L.JJ.), said, at p. 628:

> The result is necessarily that the incapacity is the result of the accident to the knee—although probably aggravated by the scarlet fever. This entitles the workman to compensation for the accident, on the footing that the incapacity caused by it is continuing. The county court judge has, in our opinion, misdirected himself on the law . . . If the incapacity is the result of the accident, the chain of causation remains unbroken, although a fresh cause arising casually and "uninvited" by any special condition of the workman may have aggravated the original injury. Whether there existed any lowered vitality of the workman in the present case, or whether such condition did or did not invite the scarlet fever, is not material, when once it is established that the incapacity is the result of the original accident, from the direct effects of which the workman never recovered; and if the scarlet fever germ encouraged the suppuration of the wounded knee, it matters not whether the germ entered the man's body through the wound, or through his mouth. In our opinion, this appeal should be allowed and the matter remitted to the county court judge.

The next case in this series is *Saddington* v. *Inslip Iron Co., Ltd.* (17), before Swinfen Eady, Warrington and Scrutton, L.JJ. The workman was a furnace labourer and his duty included shovelling calcined iron ore containing dust. In February the skin of his hand had become cracked by working in frosty weather; a frost crack came open one evening in his work and caused such bleeding that he got a fellow workman to bind it up with his handkerchief. Either through the dust or the handkerchief germs got in and set up septic poisoning. The judge held that this was an accident in the course of the employment but not arising out of it. In the course of the argument in this court Scrutton, L.J., said to counsel for the employer, at p. 628:

> Do not the cases come to this: Establish an accident which renders a weakness, then it makes no difference that a fresh cause arising casually and uninvited by any special condition of the workman may have aggravated the injury. The subsequent incapacity is attributable to the original accident.

Although the primary question in the appeal was whether the accident arose out of the employment, Scrutton, L.J., dealt with the present question also as essential to the decision. At p. 633 he said:

> Having got so far the learned judge has next to ascertain whether the partial incapacity resulted from that accident. He has found that incapacity did result from microbes entering that frost-crack but that he does not know exactly where the microbes came from.

After reference to the *Dunham* case (4) and the *Ystradowen* case (14), he sums up the legal principle thus, at p. 634:

> It is enough that it results, although it was not the natural and probable consequence, nor was it the sole and unassisted consequence, for if the accident partially causes the incapacity it does not matter that some other cause has come in and increased the incapacity by acting on the incapacity caused by the accident.

In *Laverick* v. *Gray* (*William*) & *Co.* (18), a crushed finger had after three weeks become septic and been amputated. The condition of the finger was aggravated by an attack of syphilis contracted at a date subsequent to the accident. The court acted on the principle that aggravation of the incapacity by what I have for brevity called a foreign cause does not affect the workman's right to compensation.

The last in the list of direct decisions in the *Dunham* v. *Clare* (4) line is, I think, *Williams* v. *Graigola Merthyr Co., Ltd.* (19). A miner was certified as suffering from an industrial disease within the Act which affected his knee. The disablement was certified as having begun on Oct. 1, 1923, which under the current Act (as now under the 1925 Act) was deemed to be "the happening of the accident"; the incapacity resulting from the disease carrying the right to compensation as if resulting from an injury. For this disease the workman was undergoing medical treatment in his home by his own doctor, by linseed poultices and iodine. On Oct. 6, his wife on the advice of a friend applied an old wives' remedy of a cow-manure poultice. The employer's doctor examined the workman that day, expressed his disapproval and had that poultice removed. On Oct. 8, the workman's own doctor came, but knew nothing about the cow-manure poulticing. Finding the knee worse he lanced it. Tetanus germs entered through the wound and six days later the workman died of tetanus. The judge found that the infection came from germs left on the knee by the cow-manure and held that the entry of the germs was connected with the treatment of the disease and so caused or contributed to the death. He, therefore, held that the death resulted from the disease within sect. 8. The employer appealed on the ground of misdirection. The Court of Appeal (SIR ERNEST POLLOCK, M.R., WARRINGTON and ATKIN, L.JJ.), without calling on counsel for the workman's dependant, dismissed the appeal. The *Dunham* v. *Clare* (4) line of cases were before the court and, at p. 208, WARRINGTON, L.J., said:

> In my opinion, the further evidence merely supplies information (which would otherwise be wanting) as to the source of the subsequent fatal result. Therefore the facts do not establish a new cause of the death in the sense that they remove the old cause and substantiate a new one. Unless that is the case the old cause remains. In my opinion, the county court judge had ample material for his decision, and the appeal fails.

For over twenty years *Dunham* v. *Clare* (4) had been accepted law and expressly followed when the 1925 Act was passed in that knowledge. The only decision which, it might be argued, involves a departure in principle from it is that in *Doolan* v. *Henry Hope & Sons, Ltd.* (20). There the workman was slightly injured by being struck by a chip, in the course of his work, in or over the eye. Subsequently the eye became infected by a venereal disease. The county court judge found as a fact that the disease was the sole cause, and the Court of Appeal thought it was a decision of fact, and did not interfere. I confess to doubting whether there really was sufficient evidence to support a finding that the entry of the disease was not through the eye injury; without that finding it would be impossible to justify the conclusion that the injury caused by the accident had entirely ceased so as to satisfy the principle of *Dunham* v. *Clare* (4); but the case is distinguishable on the ground that the finding of fact was not so challenged.

There is one other case I should mention in connection with the *Dunham* (4) series. In *Bower* v. *Meggitt and Jones* (21), the Court of Appeal laid it down categorically that the onus of proving a clear break in the causal connection between the injury by statutory accident and the incapacity, so as to justify the conclusion of fact that, as a cause, the injury (in LORD COLLIN'S phrase) had gone, lay on the employer; and that, if the evidence left that issue in doubt judgment must be for the workman. The decision does not touch the distinction between the two lines of decision which I am discussing, but there is an aspect of that case which is worth noting. The present Lord Chief Justice, VISCOUNT CALDECOTE, L.C.J., and LORD PORTER, were counsel for the workman and in argument asked primarily for a final decision in favour of the workman —stating the proposition as I think it ought to be stated. They only argued the question of onus as a second string to their bow. *Rocca's* case (2) was very properly mentioned by them as the authority against them; but the court (composed of LORD COZENS-HARDY, M.R., WARRINGTON and SCRUTTON, L.JJ. exactly as in *Lakey's* case (3)), only decided the question of onus. None the less, the opening sentences of the judgment of LORD COZENS-HARDY, M.R., and several passages in that of SCRUTTON, L.J., seem to me to indicate the presence of doubt in their minds as to the soundness of the rule in *Rocca's* case (2), although as they were remitting the case to the county court, they said no more.

I now come to the three cases decided the other way, which the county court judge followed. The first was in 1911, *Humber Towing Co.* v. *Barclay* (1). It is so important to have the facts in mind that I repeat the judge's findings, at p. 143:

> The workman broke both the bones of his forearm in Sept., 1910. A local bonesetter set the arm; this he did so negligently that the union was a vicious one, and the arm became practically useless. The employers admitted liability, and a memorandum of agreement was filed. In Mar., 1911, the workman brought an action for negligence in the county court against the bonesetter, which was compromised for £90, the allegations of negligence being withdrawn. In July, 1911, the employers applied for a review, on the ground that the incapacity was no longer due to the injury, but to the refusal to have the arm broken and reset, or to the negligent treatment by the bonesetter. The county court judge found on the medical evidence that it was reasonable of the workman to refuse the operation, as the operation was difficult and uncertain of success, the vicious union being a very bad one. He did not deal with the question whether the incapacity was due to the negligence of the bonesetter, and awarded for the workman.

Dunham v. *Clare* (4) was not cited. The court sent the case back because the judge had not considered:

> . . . whether the condition of the man when he came before him was or was not due substantially to the original accident or to the mismanagement of the bonesetter.

In my opinion, that course was not consistent with the application of the principle of *Dunham* v. *Clare* (4); had that case been cited, I cannot but think the court would have applied the principle there laid down that the mere concurrence of another cause is wholly irrelevant. To take an incapacity originally within the Act out of it, the causal continuance of the injury by accident must be proved by the employer to have wholly ceased. On the above facts the court ought, in my opinion, to have held that the mismanagement of the bonesetter had aggravated the injury and prolonged the incapacity, but had not caused the injury.

The next case in the line is *Rocca* v. *Stanley Jones & Co., Ltd.* (2), before Cozens-Hardy, M.R., Evans, P., and Eve, J. The *Humber* case (1) was cited and followed, but not one of the three cases of *Dunham* v. *Clare* (4), *Harwood* v. *Wyken* (15), and *Brown* v. *Kent* (16), was cited. The findings of the county court judge are quoted at length in the report but so far as material to the present appeal amount to these: that the workman broke his arm; that the hospital doctor failed to set the broken bones properly or at all; that as a result the bones reunited in a way which caused a permanent disability; that the doctor's failure amounted to gross negligence; lastly, that, but for that negligence, the workman would have completely recovered before the date of the arbitration. Counsel for the workman evidently felt unable to attack the decision in the *Humber* case (1), and tried to distinguish it as resting on the view that the workman there by resorting to a bonesetter instead of going to a properly qualified doctor had acted unreasonably: failing success in this submission he tried to get a new trial on the ground of surprise, because the judge had not apportioned the incapacity between the two causes—the injury and the negligence. Evans, P., who delivered the main judgment, rejected both contentions, and simply held that the case was covered by the *Humber* case (1). Eve, J., repeated that view and Cozens-Hardy, M.R., merely concurred. The real question was never considered. To my mind, it appears a shocking result. The workman had done everything he could do, by putting himself under properly qualified medical treatment. It failed to cure him. How can it be said that his incapacity did not result from his injury?

The last of the trio of decisions is *Lakey* v. *Blair & Co., Ltd.* (3). The facts are that in Feb., 1914, the workman's great toe was injured. He put himself in the hands of his own doctor, in whom he evidently had implicit faith. Liability was admitted and compensation paid. He remained under his own doctor's care without complete recovery for two years, having at intervals to remain in bed for a fortnight at a time. In Oct. and Dec., 1915, two doctors on behalf of the employers examined the toe and took the view that with exercise it would soon be well. His own doctor disagreed, and diagnosed disease of the bone, as inflammation returned as soon as the workman tried to walk, and he advised amputation. An independent expert agreed to by the workman's doctor was called in to advise: he agreed substantially with the employers' doctors. The workman's own doctor, however, adhered to his opinion and amputated; he found erosion of the cartilage and disease of the bone. The employers gave notice to discontinue the weekly payment, and the workman applied for arbitration. The judge sat with a medical assessor and agreed with the employers' doctor, holding the amputation unnecessary and improper and that the workman was then "suffering from the effects of the operation, and not from the effects of the accident," and terminated the compensation. The Court of Appeal consisted of Lord Cozens-Hardy, M.R., Warrington and Scrutton, L.JJ. Counsel for the workman submitted that there was no evidence to support the finding that the incapacity did not result from the injury; that the decision to amputate was taken by the man's own doctor, who had had the workman under his care for over two years, and was supported in his opinion by another doctor (a fact not mentioned in the report of the facts). He apparently thought that the case made against the workman was unreasonable conduct by the workman in refusing to follow the advice of the employers' doctors and the independent expert, as he cited *Grime* v. *Fletcher* (22), a suicide case, and *Tutton* v. *Majestic* (*Owners*) (23), a surgical operation case, where the court said that the test was not whether the medical advice was reasonable, but whether the workman's conduct was unreasonable. It is, however, important to note that counsel for the workman did not make the real point—which I regard as vital—that, where a workman puts himself in the hands of a qualified doctor and follows his advice, a failure of that doctor to effect a cure does not create a break in the chain of causation between the injury and the incapacity. The latter is still the result of the former. It is presumably because counsel for the workman did not appreciate the force of this answer to the employers' case, accepted by the county court judge, that he did not rely on the *Dunham* case (4), and the other cases in that line which had then been already decided. These cases not being called to the attention of the court, and judgment not being reserved, it is not surprising that with the *Humber* case (1) and *Rocca's* case (2) in front of it, the court forgot the uncited cases and dismissed the appeal, without calling on the employers. In spite of this, Lord Cozens-Hardy, M.R., began his judgment with a doubt as to whether he would have decided the facts as the judge did, and more than once during his recital of the medical evidence in the case repeated that doubt. He pointed out in a long passage beginning at the bottom of p. 63 that the issue of the reasonableness of the workman's conduct, which may arise if he refuses to undergo a surgical operation, has nothing to do with the question of causation which they were considering, but on that question held that the court was bound by its own decisions in the *Humber* case (1) and *Rocca's* case (2), as there was evidence to support the judge's finding. Warrington, L.J., simply concurred, but Scrutton, L.J., although concurring, seems to me to have felt uncomfortable about the court's decision to follow the *Humber* case (1) and *Rocca's* case (2): see two passages at p. 66 and one at p. 67. I cannot believe that, if the *Dunham* case (4), the *Harwood* case (15), and the *Brown* case (16), had been properly put before that court, the result would not have been different. The curious thing about the judicial history of the present problem is that, so far as I know, with the exception of *Rocca's* case (2) and *Bower* v. *Meggitt* (21), where the decision was only the question of onus, the three *Humber* (1) line cases have not come up for comparison with the *Dunham* (4) line decisions—either in this court, or the Court of Session, or the House of Lords. That a workman acting in all respects reasonably, going straight for medical help, obeying the advice that he receives and following it throughout, should be told by the court that because of the failure of professional skill to effect a remedy of his disability he is to be deprived of his statutory *solatium*, seems to me contrary to the very essence of the Acts of Parliament.

Since writing the preceding judgment I have read the judgments of my brethren. Luxmoore, L.J., thinks the three cases against my view are distinguishable and for that reason says we are bound to follow them. He expresses no opinion of his own. du Parcq, L.J., thinks that on the decisions the judgment below was one of fact and for that reason dismisses the appeal. I have again thought over my judgment and as I still find myself unable to agree with either of their views, I will add one final reflection in justification of my own view. It is that the present case illustrates the danger that often lurks for an appellate tribunal in what is loosely called a finding of fact. To confer upon the tribunal of first instance statutory finality in the field of fact is often a natural and proper policy for Parliament; but the splitting of jurisdiction has its drawbacks. One is illustrated by the subject-matter of the present appeal. The question of whether and to what extent the incapacity of a workman results from an injury within the Act is obviously very often what is loosely called a mixed question of law and fact; Willis's Workmen's Compensation, 36th Edn., pp. 263-317, is packed with a vast number of appellate decisions in which the courts have sometimes thought the decision of the county court judge (or his Scottish counterpart) was a decision of pure fact and refused relief, but in the great majority have discerned a mixed question of law and fact susceptible of appeal. In the latter event it means that the appellate court has analysed the decision of first instance and seen that behind the factual form there has lurked a question of law—often a principle of high importance in the interpretation of the Act. But where the analysis is difficult and it is hard to see exactly what the point of law really is, there is a terrible temptation—to which I am sure my brethren will at least theoretically confess, and to which I am equally sure that I have myself succumbed before now—to shirk the intellectual task and take refuge in the view that the judgment under appeal was a finding of fact, with which we are forbidden to interfere. du Parcq and Luxmoore, L.JJ., think that the judgment below in the present appeal was all fact: and that the difference between the two lines of decision (which I have in this judgment tried to show is really one of law) is not law, but fact. The question for decision was, in both the lines of authority which I have discussed, one of causation—whether in the sense of the statute the "incapacity" resulted "from the injury." The divergence of judicial conclusion is that in the *Dunham* (4) line the answer was "Yes" and in the *Humber* (1) line "No." For the court on the facts of those two sets of cases to have reached such contradictory conclusions, it appears to me that there must, almost of logical necessity, have been a difference of legal premises in the interpretation of the statutory words. The findings of fact seem to me necessarily to have contained, whilst at the same time they concealed, propositions of law.

In my opinion, the appeal ought to be allowed with costs here and below, but will be dismissed in accordance with the judgments of my brethren.

Luxmoore, L.J. [read by du Parcq, L.J.]: I have had the opportunity of considering the judgment which has been delivered by Scott, L.J., and find myself unable to agree with his conclusion.

It was common ground that the workman suffered an injury at his work and that that injury was the result of an accident arising out of and in the course of his employment. The injury was a dislocation of the right shoulder coupled with a small fracture of the upper part of the right arm known as the tuberosity. The workman was attended by a doctor at the local cottage hospital. The doctor failed to discover the dislocation at any time while the workman was under his care. Some weeks after the workman was discharged he consulted his own doctor as his shoulder continued to give him pain. The workman was sent to a hospital and X-ray photographs were taken. These disclosed a fractured dislocation of the right shoulder. The county court judge has found that the workman went to the orthopaedic hospital and came under the extremely skilled care of Mr. Wainwright, who:

> . . . tried to reduce the fracture but it was too late. Having made one unsuccessful attempt he advised the man not to have other attempts made as they would probably fail.

The county court judge heard the evidence of four medical men including Mr. Wainwright, but the doctor at the cottage hospital who attended the workman in the first instance was for some reason or other not called. The county court judge in his careful judgment, after reviewing the medical evidence, said:

> On the evidence before me I am driven to the conclusion, and I do not see how I can avoid it, that this man's stiff arm now is the direct result of the ineffective and negligent treatment which was given him at the hospital . . . I think on the evidence that there is no other way out of this case.

I do not think that there was any quarrel at the hearing before us with these findings of fact. Had there been I should have felt bound to express the opinion that there was ample evidence to support them, and, indeed, I think I should have come to precisely the same conclusion as that arrived at by the county court judge. Having found the facts as stated the judge proceeded to deal with the law. He said :

> On the legal point the respondents say " There is no liability on us because the man would have recovered long ago but for the bad treatment. What he is suffering from now is not an injury caused by the accident but a disability due to defective medical treatment." They say, therefore, that there is here what is called a *novus actus interveniens*, that is, a new cause which has taken the place of the old cause of the disability.

A He then proceeded to consider a number of the cases which had been cited to him in argument and these included *Dunham* v. *Clare* (4), *Humber Towing Co.* v. *Barclay* (1), *Rocca* v. *Stanley Jones & Co.* (2), and *Lakey* v. *Blair* (3).

Omitting for the moment the decision in *Dunham* v. *Clare* (4), it is plain that the facts in the other three cases are substantially indistinguishable from those in the present case. The judge put to himself the crucial question formulated by the Court of Appeal in the *Humber Towing Co.'s* case (1), namely, " Is or is B not the condition of this man due substantially to the original accident or to the mismanagement of the medical man ? " He answered it by saying :

> Judging the house surgeon by the ordinary standard of care in a medical man, there is no doubt, in my view, he failed, and because he failed the unfortunate applicant, Rothwell, has this stiff right shoulder, and will have it always. The lamentable result of all that from his point of view is that it disentitles him, in my opinion, in view of these C cases, from recovering compensation. It may be that elsewhere in other proceedings, if proceedings are necessary, he will be able to recover some compensation. That has nothing to do with me. I cannot decide that in this court. On the evidence before me I am satisfied that his present incapacity is due substantially to bad medical treatment and not to the original injury. The original injury was one which, had it been diagnosed in a reasonable time, would have been almost certainly cured. That it has not been cured and is now persisting is due to the fact that it was not diagnosed for a long time and was not properly treated.

D Plainly, if the decisions referred to by the county court judge other than *Dunham* v. *Clare* (4) stood alone, they were as much binding on him as they would be on this court and it would be impossible for this court to interfere with the decision. It was argued that neither the judge nor this court is bound by these decisions because they are at variance with other decisions of this court and that those other decisions ought to have been preferred by the county court E judge and that he was in error in not so doing. The decisions in question begin with *Dunham* v. *Clare* (4), to which I have already referred. SCOTT, L.J., has referred to this case and the other cases which follow it in his judgment. There is no need for me to attempt to restate the facts in those cases. It seems to me sufficient to say that, in my opinion, they are all distinguishable from the decisions followed by the judge. In the last mentioned decisions it was established as a matter of fact that the condition of the workman at the material date F was substantially due to the negligent treatment of the injury by the person consulted, whereas in the other line of decisions there was no question of negligence on the part of the medical man. In WILLIS'S WORKMEN'S COMPENSATION, 36th Edn., p. 245, under the heading " *Novus Actus Interveniens*," the following passage is quoted from the judgment of COLLINS, M.R., in *Dunham* v. *Clare* (4), at p. 296 :

> G The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences.

The learned author adds :

> Instances of a new cause intervening to bring about death or incapacity will be found : where incapacity has been caused by defective medical treatment . . .

H He goes on to enumerate a number of other instances. He treats the instances relating to defective medical treatment as a distinct class and deals with the reported cases relating to them separately under the heading " Incapacity from Defective Medical Treatment " (36th Edn., p. 272), although he deals with the cases relating to the other instances of " *novus actus interveniens*," including most of those to which SCOTT, L.J., has referred, under that heading on p. 245. It is to be observed that the learned author nowhere suggests that there is any conflict between these two lines of decisions.

In my judgment, the two classes of cases can properly stand together, but whether this be the correct view or not it seems to me that the Court of Appeal has accepted this view and acted on it, for it has been said more than once by this court that the decisions in the *Humber Towing Co.'s* case (1) and *Rocca's* case (2), were binding on this court. In my judgment, those decisions are so binding and we are bound to follow them and, with all respect to Scott, L.J., I am unable to agree that in the present case those decisions can be put on one side on any of the permissible grounds enumerated in the recent decision of this court in *Young* v. *Bristol Aeroplane Co., Ltd.* (5). If this view be correct, the decisions cannot be reviewed in this court, and I have, therefore, refrained from expressing any personal opinion as to the probability or otherwise of the result of such a review in another place.

In the result, notwithstanding the contrary conclusion come to by Scott, L.J., I am of opinion that the county court judge was bound by authority to come to the conclusion he did on the facts as found by him and that this court is in the like situation. I, therefore, am of opinion that this appeal should be dismissed.

du Parcq, L.J.: The workman, Edgar Rothwell, met with an accident when working for the respondents, his employers, on Mar. 23, 1943. The accident, which caused the dislocation of his right shoulder, arose out of and in the course of his employment. He was treated by a doctor at a hospital, where he was justified in expecting to receive skilled and careful treatment. If his injury had been correctly diagnosed and properly treated, he would probably have recovered completely in from six to eight weeks. Unhappily, the doctor who attended him failed to discover that the shoulder was dislocated. When later an experienced surgeon correctly diagnosed the case, it was too late for effective treatment. The affected shoulder and arm have become stiff. The workman remains, and will apparently remain for the rest of his life, partially, and seriously, incapacitated.

Having found the facts as I have stated them, the county court judge had to decide whether or not the workman's incapacity for work resulted "from the injury": see the Workmen's Compensation Act, 1925, s. 9. He was not without the aid of authority. In *Humber Towing Co., Ltd.* v. *Barclay* (1), where the workman had broken his arm, and the unskilful intervention of a bonesetter had brought about a vicious union and permanently crippled him, it was said by Cozens-Hardy, M.R., at p. 144, that it was the judge's duty to find one way or the other:

> . . . whether the condition of the man when he came before him was or was not due substantially to the original accident or to the mismanagement of the bonesetter.

In the present case the county court judge has put to himself the exact question suggested by Cozens-Hardy, M.R., except that he has substituted for the words "the mismanagement of the bonesetter" the words appropriate to this case, "bad medical treatment." His answer was that the existing incapacity was due substantially to the bad treatment. He found that, but for that bad treatment, the workman would have been back at work before the date from which he was claiming to be paid compensation, which was Dec. 20, 1943. The necessary result of these findings was, in the judge's view, an award in favour of the employers.

In the *Humber Towing Co.'s* case (1), the maladroit interference of the bonesetter might be said to have created a new cause of incapacity. Where, as in the present case, the error of the professional man is one of omission so that the injury is left to take the course which nature, unassisted by art, prescribes, it might be thought, were the point free from authority, that the last state of the patient could only be attributed to the original injury, or (to follow the words of the section), that the "incapacity" resulted "from the injury." The point is, however, not bare of authority. It was decided in *Rocca* v. *Stanley Jones & Co., Ltd.* (2), on facts very similar to those of the present case, that the judge was justified in holding that the incapacity was due, not to the accident, but to the want of skilful treatment. There the judge had found that if the workman had been properly treated at the hospital he would have recovered. The question was treated as one of fact. If *Rocca's* case (2) is to be treated as a binding authority, there can be no doubt that the finding of the judge in the present case, which must also be treated as a finding of fact, is amply supported by the evidence.

It was submitted on behalf of the appellant that the decision in *Rocca's* case (2) was inconsistent with other decisions of this court, that we were accordingly not bound to follow it, and that we ought to make our own choice, according to sound principle, between what were said to be conflicting and irreconcilable decisions. It therefore became necessary to examine with care the cases to which our attention was directed. Having done so, I have come to the conclusion that the cases are not contradictory or irreconcilable in principle, and that we are not entitled to disregard *Rocca's* case (2).

In my opinion, the following propositions may be formulated upon the authorities as they stand: first, an existing incapacity "results from" the original injury if it follows, and is caused by, that injury, and may properly be held so to result even if some supervening cause has aggravated the effects of the original injury and prolonged the period of incapacity. If, however, the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury, even though, but for the original injury, there would have been no incapacity. Secondly, negligent or inefficient treatment by a doctor or other person may amount to a new cause and the circumstances may justify a finding of fact that the existing incapacity results from the new cause, and does not result from the original injury. This is so even if the negligence or inefficient treatment consists of an error of omission whereby the original incapacity is prolonged. In such a case, if the arbitrator is satisfied that the incapacity would have wholly ceased but for the omission, a finding of fact that the existing incapacity results from the new cause, and not from the injury, will be justified.

In stating these propositions I am far from seeking to lay down any new principles of construction. I have sought only to collect, by a process of induction, such general, and necessarily vague, rules as seem to emerge from the decided cases. Such rules do no more than indicate the bounds within which an arbitrator is free to decide—the province of fact. It is constantly being said, and must always be remembered, that the arbitrator is the sole judge of the facts. There is no field of law which has been enriched, or perhaps I should say flooded, by a more copious stream of reported cases than that of workmen's compensation. Of the vast number of decisions which, owing to the assiduity of reporters and the enterprise of publishers, have been printed for the enlightenment of the legal profession, many have decided nothing more than that there was evidence in the particular instance to support the arbitrator's finding of fact. When it is suggested that the reported decisions cannot be reconciled, it is essential to have this fact in mind. If it is forgotten, the citation of authorities may only darken counsel, and precedents like *Doolan* v. *Hope* (20), on the one hand, and *Laverick* v. *Gray* (18), on the other, will confuse rather than clarify.

It is apparent that the line between those cases where a "supervening cause" aggravates the injury and yet is not to be regarded as superseding the injury as the cause from which the incapacity results, and those others in which the cause is "new" and the existing injury can be held to result from it alone, is a line which can only be drawn after a full examination of all the relevant facts, and then not with well-defined precision. No rule can be laid down by reference to which the arbitrator, having ascertained the facts, will be enabled to put the case infallibly on the right side of the line. If, however, he confines himself to the question formulated by Lord Cozens-Hardy, M.R., in the *Humber Towing Co.'s* case (1), his own intelligence will be his surest guide, and he will, I think be all the more likely to come to a right decision if he refuses to be drawn into a discussion of the more subtle refinements of the theory of causation.

If I am right in the conclusions which I have drawn from the authorities, it follows that the county court judge's decision must stand. I must, however, deal in a little detail with those cases which are said to conflict in principle with the decision in the *Rocca* case (2). It is convenient and helpful to deal with them in chronological order. It is noteworthy that in all but the last two of the cases to which I shall now refer Lord Cozens-Hardy, M.R., was a member of the court and a party to its decision, as he had been in the *Humber Towing Co.'s* case (1), which was heard in 1911. This fact alone makes it unlikely that they will be found to be irreconcilable.

The first case to which special reference must be made is that of *Dunham* v. *Clare* (4). The headnote correctly states the point of the decision :

> . . . death may be the result of the injury . . . even though in fact it may not be the natural or probable consequence thereof.

Cozens-Hardy, L.J. (as he then was), put the point succinctly, at p. 297 :

> The question is, From what in fact has death resulted ? The answer to that question does not depend upon what was at first thought to be reasonable and probable.

A In the course of his judgment Sir Richard Henn Collins, M.R., used words, not necessary to the decision, to which importance has been attached in some of the later decisions. He said, at p. 296 :

> If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences.

B Counsel for the workman placed much reliance on the words "so that the old cause goes and a new one is substituted for it." With the greatest respect, I think that, although those words may sometimes be a helpful guide, there are many cases in which an attempt to apply them will only complicate the arbitrator's task. When, for instance, a piece of grit enters a workman's eye and causes mild inflammation, which is followed by the invasion of the germs of some grave and incapacitating disease, it is not very easy to say whether or not the old cause has gone. C Such questions would be well suited for the debates of logicians and of schoolmen. Arbitrations under the Workmen's Compensation Act ought to be settled by more practical, if rougher, tests.

The *Humber Towing Co.'s* case (1) was decided, as I have said, in 1911. In Feb., 1913, it was laid down in *Harwood* v. *Wyken* (15), that a workman's incapacity must be held to result from the injury caused by the accident if it did in fact so result, though only partially, and notwithstanding the fact that supervening disease would, in any case, have incapacitated him. D In July of the same year, in *Brown* v. *George Kent, Ltd.* (16), there was an appeal to this court by a workman who had caught scarlet fever while in hospital after an operation to his knee which had been necessitated by the accident. The old cause of complaint had not disappeared, but apparently the fever had contributed to cause suppuration in the knee so that another and graver operation became necessary. E The arbitrator had found against the workman on the ground that the accident had not rendered him more liable to catch scarlet fever. This court remitted the case to the arbitrator, in order that he might put to himself the proper question. The judgment of the court was delivered by Swinfen Eady, L.J., who said, at p. 628 :

> If the incapacity is the result of the accident, the chain of causation remains unbroken, although a fresh cause arising casually and "uninvited" by any special condition of the workman may have aggravated the original injury.

F *Rocca's* case (2) was decided eleven months later, in Jan., 1914. As I have said, the Court of Appeal then saw no reason to disturb a finding that the incapacity resulted not from the injury caused by the original accident, but solely from the negligence of a medical man. In Dec., 1916, the decision in *Rocca's* case (2) was cited to the court in *Lakey* v. *Blair* (3). The distinction between *Rocca's* case (2) and *Lakey's* case (3) was that in the latter case there G had been not merely passive neglect but a negligent, or at any rate an "improper and unnecessary" act, on the part of a surgeon. The arbitrator, in *Lakey's* case (3), found that the incapacity was due to that act (the amputation of a toe) and not to the injury caused by the accident. *Humber Towing Co.* v. *Barclay* (1) and *Rocca's* case (2) were cited to the court. It was held that the arbitrator's finding was one of fact and that he had not misdirected himself. The judgment of Scrutton, L.J., contains a passage, at p. 66, which seems to me to be equally H applicable in the present case :

> The learned county court judge has asked himself the very question which two Courts of Appeal have said is the right one : Was the present condition due to the effects of the accident, or to the improper treatment by his doctor ? and the judge, therefore, has asked himself the right question. If he has asked himself the right question, it does not matter how I should have answered that question ; the only question that remains is : Was there evidence on which he could give the particular answer to that question ?

The Court of Appeal was manifestly then treating *Rocca's* case (2) as a binding authority. Only a week later *Bower* v. *Meggitt* (21) was heard, LORD COZENS-HARDY, M.R., WARRINGTON and SCRUTTON, L.JJ., again constituting the court. The facts resembled those in the present case, since it was alleged that the omission to diagnose a fracture and the inadequate treatment given as a consequence of that omission were the cause of the incapacity. The arbitrator had held that the workman had not discharged the onus of proving that his present condition resulted from the accident. It was held that the workman A was entitled to recover, because the burden of proof rested not, as the arbitrator thought, on the workman, but on the employers. *Rocca's* case (2) was again cited to the court. LORD COZENS-HARDY, M.R., who, as I have said, was a party to all the decisions (including *Rocca's* case (2)), which I have so far summarised, seems to have been doubtful whether a workman ought to suffer because a doctor had omitted to use X-rays, but he did not question the correctness of the decision in *Rocca's* case (2), and the decision of the appeal turned B entirely on the point of onus of proof.

In *Saddington* v. *Inslip Iron Co.* (17), the arbitrator had repeated the error of the arbitrator in *Dunham* v. *Clare* (4), which the court again corrected. Judgment was entered for the workman on the facts found. It remains to deal with *Williams* v. *Graigola Merthyr Co., Ltd.* (19), which was decided in 1924. Counsel for the workman placed great reliance on this case, in which the *dictum* of LORD COLLINS, M.R., in *Dunham* v. *Clare* (4), was said (at p. 207), to be a C "working and practical test," as no doubt it sometimes may be. The case can, I think, be regarded as an authority only for the proposition which I have already stated, that the incapacity may be held to result from the original injury even if some supervening cause has aggravated the effects of the original injury. The question was treated as one of fact, and it was held that the arbitrator had properly directed himself, and that there was ample evidence to D support his finding. It is to be observed that the *Humber Towing Co.'s* case (1) was cited to the court, and it must be assumed that the court were of opinion that their decision was consistent with what had been there laid down, as, indeed, I respectfully think that it was.

In my opinion, the authorities which I have reviewed support and justify the propositions which I have ventured to state. If I am right in that opinion, it follows that this court cannot hold either that the county court judge mis-E directed himself or that there was no evidence to support his finding. So far I have not referred to those cases in which the cause of the workman's incapacity is his unreasonable refusal to undergo an operation. In *Lakey* v. *Blair* (3), at p. 64, LORD COZENS-HARDY, M.R., treated those authorities as resting on a different principle, and they do no doubt raise a different question. At the same time I would point out that they appear to be founded on the principle that although a workman's incapacity is due to the original injury in the sense F that it exists because of that injury, nevertheless the true cause of his incapacity may be his neglect to take a step which would remove the incapacity. It would be difficult to argue that in such a case "the old cause goes." The authorities to which I am now referring have been approved by the House of Lords and cannot now be questioned: see *Steele* v. *Robert George & Co.* (1937), *Ltd.* (12). It does not necessarily follow that the result of a third person's G neglect—perhaps the neglect of a well-meaning but inefficient bystander giving first aid to a helpless workman—ought to be regarded as the true cause of an incapacity which the neglect has prolonged, or (in its existing form) has in a sense produced. If a workman, having submitted to an operation, were to be further incapacitated by the negligence of the surgeon, he would, indeed, be unfortunate if it were held that the surgeon's negligence ought properly to be regarded as the true cause of his existing incapacity.

H If I were not satisfied that the previous decisions of the court, coupled with the findings of the county court judge, conclude the matter for me, I am not sure that my own conclusion would have been what it is. Things being as they are, in my judgment, the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Hollinshead & Moody*, Tunstall (for the appellant); *Watson, Sons & Room* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ. *and* F. GUTTMAN, ESQ., *Barristers-at-Law.*]

HUTTER *v.* HUTTER (OTHERWISE PERRY).

[Probate, Divorce and Admiralty Division (Pilcher, J.), **July 26, 1944.**]

Conflict of Laws—Jurisdiction—Nullity—Non-consummation—Wilful refusal—Petitioner domiciled in America—Both parties resident in England—Ceremony in England.

The petitioner, a domiciled American subject, married the respondent in England. At the time of the marriage the respondent was English and domiciled and resident in England. Both parties had been resident in England since the date of the marriage. The petitioner sought a decree of nullity on the ground of the respondent's wilful refusal to consummate, this having been found as a fact, the question arose whether the court had jurisdiction having regard to the petitioner's domicil :—

Held : the court had jurisdiction to grant a decree of nullity.

[**EDITORIAL NOTE.** This case discusses the question of whether the jurisdiction to pronounce a decree of nullity for non-consummation resides exclusively in the court of the domicil. In *Inverclyde* v. *Inverclyde* (2), Bateson, J., relying upon certain observations in *Salvesen* (*or Von Lorang*) v. *Administrator of Austrian Property* (3), drew a distinction between marriages void *ab initio* and voidable marriages. Including nullity suits for impotence in the second group, he held that the court of the domicil alone had jurisdiction. Here Pilcher, J., rejects this distinction as without justification and, following *Easterbrook* v. *Easterbrook* (1), holds that residence and celebration in England are sufficient to give jurisdiction in nullity proceedings.

As to Jurisdiction in Nullity Cases, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357 ; and for Cases, see DIGEST, Vol. 11, p. 428, Nos. 924-926.]

Cases referred to :

*(1) *Easterbrook* v. *Easterbrook*, [1944] P. 10 ; [1944] 1 All E.R. 90 ; 60 T.L.R. 60 ;
*(2) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29 ; Digest Supp. ; 100 L.J.P. 16 ; 144 L.T. 212.
*(3) *Salvesen* (*or Von Lorang*) v. *Administrator of Austrian Property*, [1927] A.C. 641 ; Digest Supp. ; 96 L.J.P.C. 105 ; 137 L.T. 571.
(4) *Armytage* v. *Armytage*, [1898] P. 178 ; 11 Digest 426, *917* ; 67 L.J.P. 90 ; 78 L.T. 689.
(5) *Anghinelli* v. *Anghinelli*, [1918] P. 247 ; 11 Digest 426, *918* ; 87 L.J.P. 175 ; 119 L.T. 227.
(6) *Perrin* v. *Perrin*, *Powell* v. *Powell*, [1914] P. 135 ; 27 Digest 393, *3872* ; 83 L.J.P. 69 ; 111 L.T. 335.
*(7) *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67 ; 11 Digest 428, *924* ; 29 L.J.P.M. & A. 97 ; 2 L.T. 327.
*(8) *Roberts* v. *Brennan*, [1902] P. 143 ; 11 Digest 428, *926* ; 71 L.J.P. 74 ; *sub nom. Brennan* (*otherwise Roberts*) v. *Brennan*, 86 L.T. 599.
(9) *Galene* v. *Galene* (*otherwise Galice*), [1939] P. 237 ; [1939] 2 All E.R. 148 ; Digest Supp. ; 108 L.J.P. 82.
(10) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395 ; 11 Digest 417, *836*.
(11) *White* (*otherwise Bennett*) v. *White*, [1937] P. 111 ; [1937] 1 All E.R. 708 ; Digest Supp. ; 106 L.J.P. 49 ; 156 L.T. 422.
(12) *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259 ; 11 Digest 424, *896* ; 30 L.J.P.M. & A. 185 ; 4 L.T. 307.
(13) *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435 ; 11 Digest 422, *884* ; 41 L.J.P. & M. 74 ; 27 L.T. 351.
(14) *Niboyet* v. *Niboyet* (1878), 4 P.D. 1 ; 11 Digest 423, *894* ; 48 L.J.P. 1 ; 39 L.T. 486.
(15) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517 ; 11 Digest 422, *885* ; 64 L.J.P.C. 97 ; 72 L.T. 873.
(16) *Sinclair* v. *Sinclair* (1798), 1 Hag. Con. 294 ; 11 Digest 431, *944*.
(17) *Ogden* v. *Ogden*, [1908] P. 46 ; 11 Digest 334, *228* ; 77 L.J.P. 34 ; 97 L.T. 827.
(18) *A.* v. *B.* (1868), L.R. 1 P. & D. 559 ; 27 Digest 266, *2334* ; *sub nom. P.* v. *S.*, 37 L.J.P. & M. 80 ; *sub nom* — v. —, 19 L.T. 22.
(19) *Mitford* v. *Mitford & Von Kuhlmann*, [1923] P. 130 ; Digest Supp. ; 92 L.J.P. 90 ; 129 L.T. 153.
(20) *Hussein* (*otherwise Blitz*) v. *Hussein*, [1938] P. 159 ; [1938] 2 All E.R. 344 ; Digest Supp. ; 107 L.J.P. 105.

Petition for a decree of nullity on the ground of the respondent's wilful refusal to consummate the marriage. The facts are fully set out in the judgment.

D. W. E. Neligan for the petitioner.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *E. Holroyd Pearce* and *J. G. P. Comyn* for the King's Proctor.

Pilcher, J. : In this case Hardy Edward Hutter, a private soldier in the

United States Army, seeks a decree of nullity against his wife, Ivy Maud Hutter (otherwise Perry) on the ground that their marriage has never been consummated owing to his wife's wilful refusal to consummate the same.

The parties went through a ceremony of marriage at Dunmow, in Essex, on Aug. 23, 1943. The petition is dated Mar. 29, 1944, and was duly served upon the respondent wife, who did not enter an appearance.

The case came originally before me with a large number of other undefended A cases on May 8, 1944. Having heard the evidence I was satisfied on the facts that the petitioner had established his case that the marriage had never been consummated owing to his wife's wilful refusal to consummate it. It was alleged in the petition that both the petitioner and the respondent were domiciled in the United States of America, and the petitioner in the witness box made it clear that his domicil was in fact in the United States of America. The only other material fact which it is perhaps desirable to mention is that, after the B marriage the respondent continued to live in the home of her parents at Dunmow, where she was visited by the petitioner. The petitioner and the respondent only slept together for two short periods at the respondent's parents' house between August and December, 1943, after which date the petitioner was satisfied, as was I after hearing his evidence, that his wife would not permit him to consummate the marriage, and he accordingly left her.

C The petitioner being admittedly domiciled in the United States of America, I raised the question as to whether the court had jurisdiction to pronounce a decree of nullity on the ground of the wilful refusal of the wife to consummate the marriage.

Counsel for the petitioner relied upon *Easterbrook* v. *Easterbrook* (1), in which HODSON, J., granted to a Canadian soldier admittedly domiciled in Canada a decree of nullity on the ground that his wife had wilfully refused to consum- D mate the marriage. In that case HODSON, J., refused to follow the decision of BATESON, J., in *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (2). In the *Inverclyde* case (2), BATESON, J., after hearing arguments on both sides, delivered a considered judgment in which he refused to grant to a wife domiciled in Scotland a decree of nullity against her husband, also domiciled in Scotland, on the ground of the husband's incapacity to consummate the marriage. BATESON, J., in that case drew a distinction for purposes of jurisdiction between marriages E which were void *ab initio* on the ground of illegality, lack of formality, etc., and marriages which were merely voidable at the instance of one of the parties to the marriage. He said, in effect, that a nullity suit founded on impotence was akin to a suit for dissolution, and, relying upon certain observations made by LORD PHILLIMORE in *Salvesen or Von Lorang* v. *Administrator of Austrian Property* (3), he arrived at the conclusion that in proceedings for nullity based upon impotence the court of the domicil of the parties had exclusive jurisdiction F to pronounce a decree. He therefore dismissed the petition.

The facts in the present case seemed to me to be indistinguishable in point of principle from those in the *Easterbrook* case (1) and in the *Inverclyde* case (2); and the question of the jurisdiction of this court in nullity cases being one of considerable importance upon which two experienced judges had expressed contrary views, I adjourned the present case in order that I might take an G opportunity of looking at the relevant authorities. Having done so, it seemed to me undesirable that I should arrive at a decision without having the matter fully argued, and I accordingly caused the papers to be forwarded to the King's Proctor under the provisions of the Judicature (Consolidation) Act, 1925, s. 181, in order that the King's Proctor might instruct counsel to appear and argue the matter fully before me. The case was restored to the list on July 5, 1944, and on that date I had the advantage of listening to a full analysis of all the relevant H authorities by the Attorney-General himself.

The jurisdiction originally exercised by the ecclesiastical courts in matrimonial suits, including suits for nullity, was, by the Matrimonial Causes Act, 1857, s. 6, transferred to the Court for Divorce and Matrimonial Causes. The Matrimonial Causes Act, 1857, s. 22, provides:

> In all suits and proceedings other than proceedings to dissolve any marriage the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief.

Sect. 22 of the 1857 Act was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925. The section is not in terms re-enacted, but sect. 32 of the 1925 Act provides that:

> . . . where no special provision is contained in this Act, or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.

In substance, therefore, it is still the duty of this court in all matrimonial suits, including suits for nullity but excluding suits for dissolution, to proceed and act and give relief on principles and rules which shall conform as closely as possible to the principles and rules acted upon by the ecclesiastical courts. A marriage which is not consummated on the ground of wilful refusal is clearly voidable in the same sense as a marriage which is not consummated by reason of the impotence of one of the parties to it. The facts in this case, therefore, raise the question as to whether the distinction drawn by Bateson, J., in the *Inverclyde* case (2) between marriages which are void and marriages which are voidable is sound.

It is quite clear that the jurisdiction of each particular ecclesiastical court to entertain any suit depended in the first place on the residence of the party against whom relief was sought within the territorial jurisdiction of the particular ecclesiastical court before which he was cited to appear. Any doubt which may have existed upon this point was set at rest as early as the reign of Henry VIII, when, by the Statute of Citations, 1531, it was provided:

> No manner of person shall be from henceforth cited or summoned . . . to appear . . . before any . . . judge spiritual out of the diocese or peculiar jurisdiction where the person . . . shall be inhabiting and dwelling at the time of awarding or giving forth of the same citation or summons.

The rigidity of this rule was in practice relaxed by a procedure under which letters of request were passed between dioceses, but the residence of the party against whom relief was sought within the jurisdiction of the particular ecclesiastical court was always the governing test.

It is also clear that, provided the party against whom relief was sought was resident within the appropriate ecclesiastical jurisdiction the ecclesiastical courts pronounced upon the validity of all marriages contracted within the realm, whether between British subjects or aliens, and granted such relief as was within their competence in respect of such marriages. They also adjudicated upon marriages contracted abroad, provided that the party against whom relief was sought was resident within the jurisdiction. Provided the residential qualification was fulfilled, the ecclesiastical courts did not concern themselves with questions as to the domicil of the parties, using this word in its technical sense.

In stating what I have above I wish to make it clear that I am not attempting to set out the full limits of the jurisdiction exercised by the ecclesiastical courts, but am merely stressing such points as seem to me to be important for the consideration of the matter now before me.

The Matrimonial Causes Act, 1857, s. 42, which is still unrepealed, provides that petitions in matrimonial causes "shall be served on the party to be affected thereby either within or without Her Majesty's dominions" in such manner as the court may direct. In order, therefore, that this court shall have jurisdiction, the place where the party, against whom relief is sought, happens to be at the time of the service of the petition is no longer important, but the fact that the jurisdiction of the ecclesiastical courts to entertain any particular suit depended upon the place of residence of such party should not be lost sight of. The issue in the present suit for nullity being as to whether the admitted fact that both parties were at all material times resident in England, is sufficient to confer jurisdiction upon this court, or whether the admitted foreign domicil of the husband petitioner is sufficient to oust the jurisdiction, it will be convenient to consider shortly the manner in which this court has interpreted the rules of the ecclesiastical courts in so far as jurisdiction is concerned, in the two most important types of matrimonial causes formerly dealt with by the ecclesiastical courts. Inasmuch as the residence of the party to be cited within the appropriate jurisdiction was a *sine qua non* to found jurisdiction in any particular ecclesiastical court, it is not perhaps surprising that, in dealing with the two principal forms of matrimonial relief formerly granted by the ecclesiastical courts this court has held that the residence of the parties in England was sufficient to found jurisdiction. Thus, in suits for judicial separation, corresponding to the divorce *a mensa et thoro* granted by the ecclesiastical courts, this court has assumed jurisdiction where both parties, irrespective of their domicil or nationality, were resident in England at the time of the institution of the suit: *Armytage* v. *Armytage* (4); *Anghinelli* v. *Anghinelli* (5). In suits for restitution of conjugal rights the residence of both parties within the jurisdiction at the time of the institution of the suit is also sufficient to confer jurisdiction upon this court: *Perrin* v. *Perrin, Powell* v. *Powell* (6). In so far as suits for nullity were concerned the ecclesiastical courts annulled marriages which were voidable on the ground of impotence as well as marriages which were void on the ground of bigamy, irregularity, etc., and it is quite clear that in matters of jurisdiction no distinction was drawn between those two classes of case. In nullity suits, whether the marriage was void or voidable, it was declared *esse et fuisse nullum.* The ecclesiastical courts having no power to dissolve a marriage, this was the only possible form of declaration. In successful nullity suits founded upon the impotence of the party cited the ecclesiastical courts pronounced that the marriage, although unexceptionable in form, was and always had been a mere nullity. Since the Matrimonial Causes Act, 1857, this form of decree in nullity suits has been preserved, and in all such suits, whether the marriage annulled was void or voidable, it is pronounced in the formal decree "to have been and to be absolutely null and void to all intents and purposes whatsoever."

The point which I have to consider in this case is whether there is any real justification for the distinction drawn for purposes of jurisdiction by BATESON, J., between void and voidable marriages. Bearing in mind that it is the duty of the court to follow as nearly as possible the principles and rules acted upon by the ecclesiastical courts, it seems to me that the fact that the form of declaration in use for all nullity suits in the days of the ecclesiastical courts has been followed by this court for more than eighty years is of some importance.

Whilst the residence of both parties within the jurisdiction has, as I have pointed out, been regarded by this court as sufficient to confer jurisdiction in suits for judicial separation and restitution of conjugal rights, the position with regard to nullity suits has never been quite so clearly stated. I take it, however, to be settled law that in suits for nullity based upon consanguinity, bigamy, irregularity, etc., where the marriage is void *ab initio,* this court has jurisdiction to pronounce on the validity of any marriage celebrated in England even though the parties are domiciled abroad.

Simonin v. *Mallac* (7), decided in 1860, shows that shortly after the passing of the Matrimonial Causes Act, the court was prepared to adjudicate upon the validity of a marriage contracted in England between a domiciled Frenchman and Frenchwoman. In that case the marriage had never been consummated and was annulled by a competent French court on the ground of lack of parental consent, lack of publicity and because the parties had deliberately come to this country in order to evade the provisions of the French law. The wife, who had come to live in this country, sought a decree of nullity here. The marriage, which she had contracted in this country, was perfectly good under English law, and the court entertained the suit but dismissed the wife's petition. I refer to this case only because it decided, amongst other things, that the wife having entered into a contract of marriage in this country was subject to the jurisdiction of the competent court in this country in respect of her personal status resulting from the marriage so contracted. It is, moreover, to be observed that, under French law the marriage in this case appears to have been merely voidable and not void. So far as I am aware the proposition that this court has jurisdiction to inquire into and pronounce upon the validity of every marriage contracted in accordance with English law in this country has never been questioned.

In *Roberts* v. *Brennan* (8), SIR FRANCIS JEUNE in an undefended case held in terms that matrimonial residence was sufficient to give the court power to declare a bigamous marriage null and void even though the domicil of the respondent was Irish and the *de facto* marriage celebrated in the Isle of Man. In the course of a very short judgment in that case, SIR FRANCIS JEUNE said, at p. 144 :

> In my view, residence—not domicil—is the test of jurisdiction in a nullity case. The jurisdiction of the ecclesiastical courts was based on the residence of the parties and in suits for nullity this court follows the practice of the ecclesiastical courts was prescribed by the Matrimonial Causes Act, 1857, s. 22.

It is interesting, moreover, to observe that as recently as 1939 Henn Collins, J., on facts somewhat similar to those in *Simonin* v. *Mallac* (7) granted a decree of nullity to a domiciled Frenchman whose marriage, contracted in England A
according to the forms prescribed by English law, had been annulled in the French courts on the ground of lack of parental consent : *Galene* v. *Galene* (*otherwise Galice*) (9). In this case also it seems that the marriage under French law was probably voidable and not void. The case was an undefended one. Henn Collins, J., does not seem to have been referred to the case of *Simonin* v. *Mallac* (7), and he granted the petitioner the decree which was refused in *Simonin* B
v. *Mallac* (7) on somewhat similar facts. I only refer to the case because it was a nullity suit between foreigners domiciled abroad in which the court exercised jurisdiction. It would seem, therefore, that both on principle and on authority there is good ground for saying that in suits for nullity the mere residence of the parties in this country is sufficient to found the jurisdiction of the court to pronounce upon the validity of a marriage celebrated in England. If this were not so it would mean that the competent court for matrimonial suits in this C
country renounced jurisdiction in matters which were within its own peculiar competence, namely, questions relating to the validity of a marriage contracted in England by persons who, if English, are subject as such to the laws of this country, and, if foreigners, must be taken to have subjected themselves to such laws: *Scrimshire* v. *Scrimshire* (10).

The marriage with which I am here concerned was celebrated in this country between a domiciled American subject temporarily resident in this country D
and an English woman domiciled and resident in this country at the time of the marriage ceremony. If the marriage was in fact a nullity the putative wife, who apparently never left her parents' home at Dunmow, probably never in law acquired the domicil of her husband. In this connection I refer to the recent decision of Bucknill, J., in *White* (*otherwise Bennett*) v. *White* (11). A finding on this point is not necessary for the determination of the present case, and I only mention this matter in order to make it clear that the party against E
whom relief is sought in this case, namely, the wife, has always been resident in this country and has probably in law never lost her English domicil of origin. In my view, the fact that she has not entered an appearance in the suit does not affect the matter.

At p. 41 of his judgment in the *Inverclyde* case (2), Bateson, J., says :

> The marriage being voidable and not void and the decree affecting and involving F
> an alteration of status and being a judgment *in rem* binding on all the world, there can be no jurisdiction in this court unless the parties are domiciled in this country. It seems to me that if the principle is sound that in a suit for dissolution of marriage in divorce jurisdiction depends on domicil it must equally so depend in a suit for dissolution of marriage on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution.

I confess that I find some difficulty in following the conclusion at which the G
judge arrives in the last sentence of the passage which I have quoted. It is quite clear that the ecclesiastical courts, in dealing with matters which were within their competence, were not concerned with the domicil of the parties to the suit—using the word "domicil" in the strict sense. The *bona fide* residence of the party cited within the appropriate jurisdiction was all that was required, and no inquiry was ever necessary as to whether such party had established his permanent home within the jurisdiction. The Matrimonial Causes Act, H
1857, conferred upon the newly created civil court the right to dissolve an existing marriage, and the Matrimonial Causes Act, 1857, s. 22, which required this court to act upon principles and rules which conformed to the principles and rules acted upon by the ecclesiastical courts, applied to all suits and proceedings "other than proceedings to dissolve any marriage." It was only by a slow development, extending over some forty years after the passing of the Matrimonial Causes Act, that it was finally established that domicil was necessary to found jurisdiction in dissolution cases. In *Brodie* v. *Brodie* (12), *bona fide*

residence in this country was held sufficient to found jurisdiction in a suit for dissolution. In *Wilson* v. *Wilson* (13), LORD PENZANCE expressly refrained from deciding whether residence in this country which fell short of domicil was sufficient to found jurisdiction in a dissolution suit. In *Niboyet* v. *Niboyet* (14), the Court of Appeal by a majority decided that mere residence was sufficient to confer jurisdiction; and it was not until 1895 that it was finally established in *Le Mesurier* v. *Le Mesurier* (15) that domicil in the strict sense must be established in order to found jurisdiction in a suit for dissolution.

It is to be observed that, in considering the matters requisite to found jurisdiction in a suit for dissolution the civil courts of this country were dealing with a new type of suit, and were not fettered by the terms of the Matrimonial Causes Act, 1857, s. 22, which did not apply to suits for dissolution. In regard to all other matrimonial suits, however, including suits for nullity, this court is still required to act upon principles and rules which shall conform to those acted upon by the ecclesiastical courts. It seems to me, therefore, that the establishment of the "principle" that in suits for dissolution jurisdiction depends upon domicil affords little, if any, ground for saying that jurisdiction in suits for nullity, whether the marriage which it is sought to annul be void or voidable, should be governed by the same test. As I have pointed out, it is now established by a long line of authorities that in nullity suits when the marriage is void *ab initio* residence is sufficient to confer jurisdiction, and it may well be that BATESON, J., would not have drawn the distinction which he did for the purposes of jurisdiction between marriages void *ab initio* and marriages which are really voidable had it not been for certain passages in the speeches of the noble Lords in *Salvesen's* case (3) to which I will now refer.

The short facts in *Salvesen's* case (3) were as follows. A domiciled Scotchwoman married a domiciled Austrian in Paris in 1897. They lived together in Wiesbaden until 1914. During the last war the husband fought in the Austrian Army, and his wife lived in Switzerland until 1923. The Administrator of Austrian Property claimed the wife's moveables in Scotland as being the property of an Austrian subject. The wife instituted a suit for nullity in the Wiesbaden court, which was admittedly the court of domicil, on the ground of lack of formality in the Paris marriage. The Wiesbaden court declared the marriage null. On appeal from the First Division of the Court of Session the House of Lords rejected the plea of the Administrator of Austrian Property and held in substance that the decree of the Wiesbaden court, which was admittedly a court competent to pronounce upon the validity of the marriage, was binding upon the courts of this country and of Scotland. Their Lordships were also of opinion that the decree of the Wiesbaden court, being one which affected the status of the parties, was equivalent to a judgment *in rem*.

In the course of his speech VISCOUNT HALDANE said, at p. 652:

> The real question is simply whether the court of the domicil was competent to dispose conclusively and finally of the question before it. If so it does not matter in law whether it had an exclusive jurisdiction.

Later, at p. 654, he says:

> Whether there cannot be jurisdiction which is not that of the domicil in restricted instances to entertain a suit for nullity is a question we have not before us for determination. For, as I have pointed out, the only relevant issue is whether the German court was competent as against all other courts conclusively to declare the marriage in the present case void.

After dealing with and analysing the decisions in *Scrimshire* v. *Scrimshire* (10), *Sinclair* v. *Sinclair* (16), and *Ogden* v. *Ogden* (17), LORD PHILLIMORE concludes his speech as follows, at p. 671:

> Finally, my Lords, if the court is a competent court, still more if it is the only competent court—and in my opinion the Wiesbaden court was the only competent court for these parties—its judgment must, for the very reason of the thing, be such a judgment as that described in *A.* v. *B.* (18), a "definitive decree declaring a marriage void, which should be universally binding and which should ascertain and determine the status of the parties once for all."

That speech was concurred in by VISCOUNT DUNEDIN and LORD WARRINGTON.

The decision of the House of Lords in *Salvesen's* case (3) was stated by BATESON, J., to be, in his view, conclusive in favour of the argument for the husband in the *Inverclyde* case (2). At p. 44 of his judgment he says that the passage from LORD PHILLIMORE's speech which I have quoted "covers this case precisely." There seems little doubt that in the passage referred to LORD PHILLIMORE was expressing the view that on the facts of *Salvesen's* case (3) the court of domicil was the only court which was competent to pronounce upon the validity of that particular marriage. It is, however, to be borne in mind that this expression of view was not necessary to the decision of the case. It is, moreover, to be observed that in *Salvesen's* case (3) husband and wife had lived for very many years at Wiesbaden. Although the marriage was ultimately pronounced a nullity, the wife had almost certainly acquired a *de facto* personal domicil in Wiesbaden quite apart from any legal domicil derived from her husband. The usual residence of both parties was apparently also in Wiesbaden, and it is perhaps sufficient for me to say that the facts of the case which I am considering are very different from the facts in *Salvesen's* case (3). Any expression of opinion by LORD PHILLIMORE, particularly on a matter of this kind, must, of course, carry great weight even though the opinion expressed may not have been necessary for the decision of the case under consideration.

I am not satisfied that in using the words which he did LORD PHILLIMORE intended to lay down any general proposition which would have the effect of ousting the jurisdiction of the courts of this country to entertain a nullity suit where the parties, although resident, were not domiciled within the jurisdiction, more particularly where the marriage which it was sought to annul had been celebrated in England in the manner prescribed by English law. Any such proposition would be manifestly too wide, and, if accurate, would mean that a whole line of cases, whose authority has not been questioned, are wrongly decided. I need only refer to *Simonin* v. *Mallac* (7), *Mitford* v. *Mitford* (19), *Husseim* (*otherwise Blitz*) v. *Hussein* (20), and *Galene* v. *Galene* (*otherwise Galice*) (9).

A declaration by a competent court that a marriage, whether void or voidable, is in fact a nullity is, of course, a declaration which affects status and as such is a declaration which is peculiarly within the competence of the court of domicil. A decree of nullity of marriage being declaratory of the status of the parties to the marriage contract, it is no doubt desirable on grounds of public policy that such decree should be pronounced by the competent court of the domicil of the parties. The considerations which have led the courts of this and other countries to found jurisdiction exclusively upon domicil in suits for dissolution do not appear to me to apply with equal force to suits for nullity, and it is now well established that proof of domicil within the jurisdiction is not necessary in nullity suits which are void *ab initio*. The decision of BATESON, J., in the *Inverclyde* case (2) was really based upon the distinction which he drew for purposes of jurisdiction between void and voidable marriages. Although the judge seems to have considered that LORD PHILLIMORE's observations in the *Salvesen* case (3) were conclusive of the case before him, it is to be observed that there was nothing in the decision of the *Salvesen* case (3), or in any of their Lordships' observations, which afforded any ground for drawing the distinction which was drawn by BATESON, J., a distinction which, as I have pointed out, formed the real basis for the conclusion at which he arrived.

In my opinion, there is no justification either on principle or on authority for the drawing of such a distinction. Inasmuch as practical questions of status are involved in the declaration of any court which pronounces upon the validity of a marriage the court of the domicil of the parties has no doubt a peculiar competence to adjudicate in such suits. The authorities to which I have referred make it clear, however, that the courts of this country have not regarded the court of the domicil of the parties as having exclusive competence to pronounce upon the validity of a marriage, more particularly where such marriage has, as in this case now before me, been celebrated in this country. I accordingly hold that this court has jurisdiction to entertain the present suit and pronounce a decree *nisi* of nullity.

Order accordingly.

Solicitors: *Law Society* (for the petitioner); *The King's Proctor.*

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

BLYTH AND OTHERS *v.* LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS).

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Macmillan, Lord Wright and Lord Simonds), **June 12, 13, 14, 15, October 9, 1944.**]

Estate and Other Death Duties—Exemptions—Property of "common soldier"—Member of the Home Guard killed while undergoing course of instruction— A *Finance Act,* 1894 (c. 30), *s.* 8 (1)—*Stamp Act,* 1815 (c. 184), *Sched., Pt. III—Army Act,* 1881 (c. 58), *ss.* 176, 190—*Defence (Local Defence Volunteers) Regulations,* 1940 (*S.R. & O.,* 1940, *No.* 748), *reg.* 2 (3), *as amended by S.R. & O.,* 1940, *No.* 1383.

In August, 1940, a retired army major acting as a company commander in the Perthshire Home Guard, was killed by an accidental explosion of a B hand grenade while undergoing a course of instruction. At the time, the Home Guard was organised as a citizen force on the principles of equality of service and status; and although there existed no system of ranks, there were appointments suitably graded for the commanders of the various formations. No privileges, however, attached to the holding of any such appointment. The appellants, trustees acting under the will of the deceased, claimed exemption from estate duty in respect of the property C of the deceased, relying on the provisions of the Finance Act, 1894, s. 8 (1), by virtue of which estates of common soldiers slain or dying in the King's service are exempt from estate or any other death duties. It was contended on behalf of the Crown that the exemption of the Finance Act, 1894, s. 8 (1) was restricted to whole-time soldiers and that no one who served part-time only could be regarded as a "soldier" for the purposes of the Act; and it was further contended that a Home Guard holding an appointment as D acting company commander would not, in any event, come within the definition of a "common" soldier:—

HELD: a member of the Home Guard was subject to military law and was engaged in the performance of military duties in the service of the Crown; and when he met his death while performing such duties, he was to be regarded as a "common soldier" for the purposes of the Finance Act, 1894, s. 8 (1). The mere holding of an appointment was insufficient E to exclude the benefit of the provision.

[**EDITORIAL NOTE.** This is the first reported decision on the Finance Act, 1894, s. 8 (1), exempting the property of a common soldier from payment of death duties. The court rejects the argument that "soldier" connotes continuity of service and holds that the word indicates a man, as distinguished from an officer, who serves the Crown in a military capacity. Applying this test to a member of the Home Guard, he is held, on a consideration of the conditions of service in the Home Guard as laid F down by Order in Council, to come within it. Reference should also be made to LORD MERRIMAN's judgment in *In the Estate of Anderson,* [1943] 2 All E.R. 609, where the position of the Home Guard with regard to making soldiers' wills was under consideration. It must be pointed out that prior to Nov. 19, 1940, all members of the Home Guard were equal in rank, and the fact that the deceased in this case had been appointed to act as a company commander, and was so acting at the time of the accident, did not prevent him from coming within the description of a "common" soldier.

G AS TO EXCEPTIONS FROM THE CHARGE OF ESTATE AND OTHER DEATH DUTIES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 258, 259, para. 253; and AS TO FINANCE ACT, 1894, s. 8 (1), see HALSBURY'S STATUTES, Vol. 8, p. 130].

Cases referred to:

(1) *In the Estate of Rippon,* [1943] P. 61; [1943] 1 All E.R. 676; 112 L.J. (P.) 65; 168 L.T. 357.

(2) *In the Goods of Hiscock,* [1901] P. 78; 39 Digest 334, *202*; 70 L.J.P. 22; 84 L.T. 61.

H (3) *In the Estate of Stanley,* [1916] P. 192; 39 Digest 336, *224*; 85 L.J.P. 222; 114 L.T. 1182.

(4) *Poyser* v. *Minors* (1881), 7 Q.B.D. 329; 13 Digest 505, *562*; 50 L.J.Q.B. 555; 45 L.T. 33; 46 J.P. 84.

(5) *A.-G.* v. *Edison Telephone Co. of London* (1880), 6 Q.B.D. 244; 42 Digest 885, *1*; 50 L.J.Q.B. 145; 43 L.T. 697.

APPEAL from a decision of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, LORD MACKAY, LORD JAMIESON), dated July 13, 1943, holding (LORD MACKAY dissenting) that the expression "common soldier" applied only to a member of the rank and file of the regular army, and accordingly, that the exemption did not cover the members of a part-time citizen force such as the Home Guard. The facts and the arguments are fully set out in the opinions of their Lordships.

J. G. M'Intyre, K.C., and *A. M. Macrae Williamson* for the appellants.

The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.), the Lord Advocate (Rt. Hon. J. S. C. Reid, K.C.), and *J. H. Stamp* and *J. Gordon Thomson* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, on Aug. 17, 1940, Frederick Donald Mirrielees (his title of Major was due to his having previously served in H.M. Forces with that rank and does not affect the present case) while on duty in Perthshire with other members of the Home Guard (then called the Local Defence Volunteers) was killed by the explosion of a hand-grenade accidentally dropped in the course of instruction which was being given to the company to which he belonged, by a sergeant of the regular army. The question to be now decided is whether he died in the service of His Majesty as a "common soldier" within the meaning of the Finance Act, 1894, s. 8 (1). If so, his estate is entitled to complete exemption from death duties. If not, his estate has still been conceded the modified relief contemplated in such a case by the Finance Act, 1924, s. 38.

The Lord Ordinary, LORD KEITH, found himself able to decide the matter in favour of the Revenue, in a case instituted by the Crown to recover the full duties, upon the pleadings and in the light of the official documents therein referred to, without requiring evidence to be given. His view was that the plea-in-law for the executors and trustees of Mirrielees' will, relying on the Finance Act, 1894, s. 8, should be repelled. LORD KEITH's conclusion in favour of the Crown was affirmed (after some supplementary information as to past practice had been by consent added to the record) by a majority of the Second Division of the Inner House (the Lord Justice-Clerk and LORD JAMIESON, LORD MACKAY dissenting).

The Finance Act, 1894, s. 8 (1), runs as follows:

> The existing law and practice relating to any of the duties now leviable on or with reference to death shall . . . apply . . . for the exemption of the property of common seamen, marines or soldiers who are slain or die in the service of Her Majesty . . . as if such law and practice were in terms made applicable to this part of this Act.

The reference of the above section to "existing law" is to the Stamp Act, 1815, Sched., Pt. III, which exempted from all stamp duties:

> Probate of will, letters of administration, confirmation of testament, and eik, thereto, and inventory of the effects of any common seaman, marine, or soldier who shall be slain or die in the service of His Majesty, his heirs or successors.

It is not disputed, and it is plainly right, that the epithet "common" applies to each of the three nouns which follow. This exemption of the estate of the "common soldier" who is slain or dies in the service of the Crown from stamp duty in connection with probate can be continuously traced back through intervening English Statutes as far as 5 and 6 Will. & Mar., c. 21 (1694).

The circumstances of Mirrielees' death were such that it is not, and cannot be, disputed that he died in the service of His Majesty. By S.R. & O., 1940, No. 748, dated May 17, 1940, it was provided that members of the Local Defence Volunteers (as the members of the Home Guard were then called) should be members of the armed forces of the Crown, and that every such member should be:

> . . . subject to military law as a "soldier" notwithstanding that such members might hold Commissions in His Majesty's Forces, so that the Army Act should have effect as if, after s. 176, para. 8A, a new category was added, *viz.*, "or members of the Local Defence Volunteers."

The contrast here is between sect. 176, which prescribes what persons are subject to military law as soldiers, and sect. 177, which prescribes what persons are subject to military law as officers.

It was objected by the Crown that Mirrielees, although subject to military law as a soldier and serving His Majesty at the time of his death, could not in any case be regarded as a "common soldier" because he had been appointed to act as a company commander in the force under Army Council Instruction, 1940, No. 924. This document in para. 6 laid it down that the force:

> . . . is a citizen force organised on the principles of equality of service and status. There is accordingly no system of "ranks," although there are "appointments" suitably graded for the commanders of the various formations. All appointments will be acting and unpaid.

No privileges of any kind attached to the holding of an "appointment." The holder, as regards travelling warrants, medical treatment, the issue of uniform and equipment, etc., was treated in exactly the same way as all other members of the force. Such was Mirrielees' position at the date of his death: a change was subsequently introduced by the Home Guards Officers' Commissions Order, 1940, dated Nov. 19, 1940 (S.R. & O., 1940, No. 2017). But prior to this, all members of the force were equal in rank. I agree with the Lord Justice-Clerk that, in Aug., 1940, no difference in status could be drawn between one member of the force and another. Consequently this objection to the claim for exemption in Mirrielees' case fails, and the question to be decided is the broad question—was every member of the Local Defence Volunteers as constituted in Aug., 1940, a "common soldier"?

The correct answer to this question depends upon placing on the phrase "common soldier" in the Statute its proper connotation. It does not depend on whether Parliament had in mind the particular application of the phrase which is now suggested, or on whether it would be easier to apply the phrase if it was construed with limitations not actually involved in its meaning. The epithet "common" is, I think, introduced merely to exclude higher ranks; thus in Shakespeare's Henry V, when the King, on the night before Agincourt, is touring the battlefield in disguise and comes upon Pistol, the following conversation ensues:

Pistol: "Qui va là?"
King Henry: "A friend,"
Pistol: "Discuss unto me; art thou officer? Or art thou base, common, and popular?"

The Oxford Dictionary defines "common soldier" as "an ordinary member of the army without rank or distinction of any kind." The adjective "common" may, as Lord Mackay observed, convey any one of several meanings, but here I take it to mean "below a certain rank." We are informed that, in the application of sect. 8 to the common soldiers of the Regular Army, the practice is to regard any soldier below the rank of sergeant as a "common soldier."

Lord Keith was of opinion that where every man in a force was of the same rank as every other, the description of "common soldier" could not attach, since there was an absence of the contrast with officers which he thought necessary to give the phrase its application. "When all are equal" he argued, "there is, I think, no room for the common soldier." With all respect to the judge, I do not agree with this argument; it would seem more reasonable to argue that there would be no officers.

But, by Army Council Instruction, 1940, No. 653, para. 3c, it is clear that the Local Defence Volunteers were commanded by Area Commanders of the regular army under the direction of G.Os.C-in-C. Army Command. What, then, is the connotation of "soldier" in this connection? And is an ordinary member of the Home Guard while training or otherwise serving in that force to be regarded as a "soldier" within the exemption of the 1894 Act?

The powerful judgments of the Lord Justice-Clerk and Lord Jamieson reach the conclusion that a member of the Home Guard is not a "soldier." This conclusion largely turns on the contrast of language to be found in the Statute Book when dealing with the rank and file of auxiliary forces and the use of the word "soldier" to indicate an ordinary member of the regular army. Lord Cooper points out, for example, the absence of the word "soldier" in statutes dealing with members of volunteer forces and yeomanry (regulated by the Yeomanry Act, 1804), or of a local militia raised by ballot (regulated by the Militia Act, 1812). Again, when the volunteers were revived half a century later under the authority of the Volunteer Act, 1863, Parliament did not describe the rank and file of such forces as "soldiers." The Statutes spoke of "members" or "private men" or "volunteers." Similarly, when the Territorial and Reserve Forces Act, 1907, was passed, the word used for an ordinary territorial was "man of the Territorial Force." The force of the argument is qualified by observing that the Army Act, s. 176, when setting out what categories of persons are subject to military law "as soldiers," begins with "all soldiers of the regular forces" which seems to imply that there may be soldiers who are not of the regular Army, and goes on to include men belonging to the territorial army when being trained or when embodied or when called out for actual military service, and men belonging to the volunteer forces of the United Kingdom in corresponding circumstances. Again, the Army Act, s. 190, provides that the expression "soldier" includes "every person subject to military law during the time that he is so subject." "Regular forces," on the other hand, are there defined as officers and soldiers who are liable to render continuously for a term military service to His Majesty.

While the majority of the Court of Session came to the conclusion that no one should be regarded as a soldier unless he belongs to the regular forces, the Attorney-General in his argument before this House felt constrained to admit that a member of the territorial force after embodiment and a member of the Home Guard after muster would come within the exemption of the Finance Act, 1894, s. 8. He, therefore, proposed a different distinction, arguing that the exemption was restricted to "whole-time soldiers," and that no one who served only "part-time" in the forces should be regarded as a "soldier." He urged, in support of this contention, that the test of dying in the service of His Majesty pointed to continuous and non-interrupted service, and argued that an individual who gave part-time service would not naturally be called a soldier but would be described according to the profession or trade he was carrying on.

I have considered these arguments with much care, but it seems to me that they are not sufficient to outweigh the broad consideration that "soldier" is a wide word indicating a man (as distinguished from an officer) who serves the Crown in a military capacity. If this country had been invaded and bodies of the Home Guard had been called upon actually to apply their training and their weapons to defend British homes, there would have been every reason to regard them as "soldiers." The meaning and application of the word in the Finance Act, 1894, cannot, I think, be rightly determined by contrasting the specific statutory terms used in earlier Statutes to refer to members of our auxiliary forces. The word "soldier" indicates a genus of which there are various species. It is not, perhaps, irrelevant to note the interpretation put on the Wills Act, 1837, s. 11, which authorises "any soldier being in actual military service" to dispose of his personal estate without complying with the formalities ordinarily required by the Act. No difficulty seems to have been felt in conceding this privilege to the case of an artillery officer in the territorial army who was ordered to rejoin his battery just before the outbreak of the present war (*In the Estate of Rippon* (1)), or in the case of a private in a volunteer battalion who, after sending in his name for active service in the South African war, had been ordered into barracks with a view to being drafted to the seat of war. (*In the Goods of Hiscock* (2)). See also *In the Estate of Stanley* (3), where a nurse employed in a hospital ship was held to be a soldier for this purpose.

An ordinary member of the Local Defence Volunteers or of the Home Guard at the time when he is training or serving is unquestionably subject to military law, and is wearing uniform and bearing weapons which are justified because he has enlisted to defend his country. He is, in my opinion, to be regarded, when so serving, as a "common soldier" for the purposes of the Finance Act, s. 8, and, if he meets with death in the circumstances of Mirrielees, his estate enjoys the exemption which that section confers. It is not necessary in the present case to decide whether the cause of death must be related to the service being performed, as that is plainly so in Mirrielees' case.

I move that the appeal be allowed with costs.

LORD THANKERTON: My Lords, I agree entirely with the opinion of VISCOUNT SIMON, L.C., which I have had the opportunity of considering, and I will only venture to add a few observations of my own.

We have to consider the nature and extent of a right, which is a statutory one. It has been suggested that the use of the phrase "the existing law and practice" in the Finance Act, 1894, s. 8 (1), made it relevant to consider the practice of the Inland Revenue in the period prior to Aug. 2, 1894, as also during the subsequent period, as averred in Condescendence 3. It seems clear, apart from the Act of 1894, that the practice of the Inland Revenue could not affect or alter the statutory right conferred by the Stamp Act of 1815 and earlier statutes. It seems equally clear that the Act of 1894 refers only to the practice then existing and not to any subsequent practice. In my opinion, the reference to practice was in contrast to the then existing law, and was not intended to, and did not, alter the nature or extent of the statutory right conferred by the Act of 1815. The words of LUSH, L.J., in *Poyser* v. *Minors* (4), at the foot of p. 333, appear to me to apply to the present case, *viz* :

> "Practice, in its larger sense . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right."

The Lord Ordinary and two of the judges of the Second Division have referred to old Scots Acts of 1645 and 1647, but I cannot think that these Acts of the Scottish Parliament are of much relevance on the construction of the Act of the English Parliament of 1694. If they were relevant a further examination of the Scots Acts would be necessary, and several in the last two decades of the seventeenth century might prove more useful. In my view, any such digression would not be of assistance in the present appeal.

I concur in the motion.

LORD MACMILLAN : My Lords, the estate of any "common soldier" who is slain or dies in the service of His Majesty is by statute totally exempted from estate duty. The question for decision by your Lordships is whether this exemption applies to the estate of a member of the Home Guard.

The late Major Mirrielees was killed on Aug. 17, 1940, by the accidental explosion of a hand grenade while undergoing as a Home Guard a course of instruction by a sergeant of the regular army. That he was slain or died in the service of His Majesty was not questioned, but the Crown contended that he was not at the time of his death a "common soldier" within the meaning of the statutory exemption.

The exemption of the estates of common soldiers slain or dying in the King's service from stamp and other duties has a long legislative history, and, in the opinions of the learned judges of the Court of Session, as well as in the arguments at the bar of this House, your Lordships have had the benefit of exhaustive research both as to the constitution and characteristics of the armed forces of the Crown for several centuries, and as to the nomenclature employed by Parliament in describing the members of these forces at different times. I do not say that this investigation, though inconclusive, has been without value, but I prefer to approach the question at issue more directly. When the exemption was conferred there was no Home Guard in existence and the legislature cannot have had in contemplation a non-existent body. But, in conferring the exemption it employed certain terms, and the question is whether these terms, when fairly construed under present-day conditions, are apt to include the case of the Home Guard. Such problems in the application of the language of enactments to unforeseen developments are not uncommon. When the Telegraph Acts of 1863 and 1869 were passed no one had thought or heard of telephones, and in 1880 the question arose whether the provisions of the Telegraph Acts applied to this new form of transmitting messages. STEPHEN, J., said in *A.-G.* v. *Edison Telephone Co. of London* (5), at p. 254 :

> Of course, no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.

And so it was held.

Can, then, the expression "common soldier" be fairly said to embrace a member of the Home Guard ? As to the epithet "common," I think there can be little doubt that it denotes merely a soldier who is a member of the rank and file as distinguished from a commissioned officer, and I do not accept the suggestion of the Lord Advocate that it conveys in addition a secondary implication of "ordinary" as distinguished from "unusual." It was on the meaning of the word "soldier" that the controversy at the bar mainly centred. The Attorney-General, as I understood him, was not prepared to confine the term to a member of what are designated as the regular forces of the Crown. He ultimately found his criterion in continuity of service, and relied chiefly on the fact that a member of the Home Guard is not bound to give whole-time service to the Crown, or to enrol for a period exceeding that of the present emergency.

But that is tantamount to limiting the exemption to members of the regular forces on permanent service, which he disclaimed. It is the character of the service, namely that of a soldier in the service of the Crown, rather than the duration of the service which is material, and I see no reason to add to the statutory words an implied condition of continuity of service.

I should have thought that much the most authoritative source to consult for the meaning of the word " soldier " was the current and annually re-enacted Army Act. There I find in sect. 190 that the expression " soldier " includes " every person subject to military law during the time that he is so subject." Then I find that by the Defence (Local Defence Volunteers) Regulations, 1940, para. 2 (3), every member of the Local Defence Volunteers (subsequently the Home Guard) is a member of the armed forces of the Crown and " subject to military law as a soldier." And the Army Act, s. 176, is by these regulations amended so as to include among the persons " subject to military law as soldiers " all members of the Local Defence Volunteers, or Home Guard. It was suggested that the words " as soldiers " means " as if they were soldiers," but that will not do, for the first category mentioned in sect. 176 is " all soldiers of the regular forces," and it would be absurd to enact that " all soldiers of the regular forces " are to be subject to military law " as if " they were soldiers.

A member of the Home Guard, then, is a soldier within the meaning of the Army Act. I can see no reason why he should not equally be a soldier within the meaning of the Finance Act, 1894, and, if he holds no commission, be entitled to the benefit thereby conferred on common soldiers.

The Crown rather half-heartedly suggested that Major Mirrielees was in any event not a " common " soldier because he held an acting appointment as a company commander in the Home Guard at the time of his death. The point is not taken in the reasons annexed to the Crown's printed case to this House, and, in my opinion, it is not well founded. The Army Council Instruction, 1940, No. 924, dated Aug. 15, 1940, expressly states in para. 8 that the Home Guard is " a citizen force organised on the principles of equality of service and status. There is accordingly no system of ' ranks,' although there are ' appointments ' suitably graded for the commanders of the various formations." This has since been altered, but at the time of Major Mirrielees' death every member of the Home Guard, if he was, as I hold, a soldier, was also a common, that is, a non-commissioned, soldier.

As Major Mirrielees, when he met his death, was undoubtedly engaged in the performance of military duties, in the service of the Crown, and as his death was due to his performance of those duties, I do not find it necessary to discuss the problems which were raised as to the position of a Home Guard dying from causes not associated with his service or dying subsequently in hospital from injuries received while on military duty. These points were quite properly raised in order to test the interpretation of the words of the statute, and indicate difficulties in its application. But they need not be decided now, if it is held, as I hold, that the present case falls within the statutory exemption, whatever may be said as to other cases.

I am accordingly in favour of allowing the appeal.

LORD WRIGHT: My Lords, the Finance Act, 1894, s. 8 (1), is in the following terms:

> The existing law and practice relating to any of the duties now leviable on or with reference to death, shall . . . apply for the purposes of the collection recovery and repayment of estate duty and for the exemption of the property of common seamen, marines or soldiers who are slain or die in the service of Her Majesty.

The existing law there referred to is contained in the Stamp Act, 1815, Sched., Pt. III, which exempted from all stamp duties, probate of will, letters of administration, confirmation of testament, and eik thereto and inventory of the effects of any common seaman marine or soldier, who shall be slain or die in the service of His Majesty, His Heirs or Successors. That Act repeated an identical provision contained in the Probate and Legacy Duties Act, 1808, Sched., Pt. III. The same exemption had appeared in the Stamp Act, 1694, s. 6, which provided that nothing in this Act contained should extend to charge the probate of any will or letters of administration of any common seaman or soldier who shall be slain or die in their Majesties' service. The material questions are whether Major Mirrielees was (1) a soldier, (2) a common soldier, (3) in the service of

His Majesty, (4) who died in that service. I disregard the "practice" referred to in the Act of 1894 because no practice material to this case is proved.

The facts are that Major Mirrielees met his death because his duty as a Home Guard involved his taking part in a course of instruction in the use of hand grenades, one of which having been accidentally dropped exploded and caused his death. He was at the time a member of one of the Armed Forces of the Crown, namely, the Home Guard, engaged in training to defend his country. The handling of grenades is notoriously dangerous but is a necessary part of a soldier's training. He was thus, in my opinion, a "soldier" who died in His Majesty's service. The section is remedial and should be construed if not benevolently, at least fairly. It confers a benefit in favour of those who give their lives in the service of their country. The conditions are that they must be capable of being described as soldiers, and as common soldiers. In regard to the latter condition the Second Division were in the appellants' favour, as I think, rightly. But the main issue, whether at the moment of the accident, Major Mirrielees was a "soldier," is a question which depends on what that word means in the section. It is dangerous to attempt a comprehensive and universal definition of so ordinary a word. But in the present context I think it may be defined as meaning a member of the armed forces of the Crown subject as such to military law while on actual service. This is a matter of status and function which in the case of an auxiliary force like the Home Guard may be intermittent and interposed between longer or shorter periods of civilian life. There is no direct authority on the point.

The Home Guard (originally known as the Local Defence Volunteers) was established by Order in Council (S.R. & O., 1940, No. 748), dated May 17, 1940, at a time when the danger of invasion seemed both serious and imminent. Volunteers for the force were under the Order to undertake to serve without pay according to conditions of service prescribed by instructions issued by the Army Council, but were not to be required to give whole-time service or to live away from their homes, or to enrol for a period exceeding the period of the emergency. A member's service could be determined by 14 days' notice in writing given by him. It was in particular expressly enacted by cl. 3 of the Order that:

> Members . . . shall be members of the Armed Forces of the Crown and every such member shall notwithstanding that he may hold any rank or Commission in any other of His Majesty's Forces be subject to military law as a soldier and accordingly the Army Act shall have effect as if after para. 8A of sect. 176 of the Act there were inserted the following para. 8 (*b*), "All members of the Local Defence Volunteers" [later the Home Guard].

That means that they were to be subject to military law as soldiers. With this must also be read sect. 190 of the Act which defines "soldier" in that Act as excluding officers but as otherwise including every person subject to military law during the time that he is so subject. It is thus clear that at least within the purview of the Army Act, a member of the Home Guard is a soldier, though only a part-time soldier, during the time that he is subject to military law. On July 31, 1940, by Order in Council, the Local Defence Volunteers were to be known by the alternative title of the Home Guard. On Aug. 15, 1940, two days before Major Mirrielees met his death, further directions were given in Army Council Instruction, 1940, No. 924. The object of the Force was there defined to be to augment the local defences of the country by providing static defences of localities and protection of vulnerable and key points by giving timely notice of enemy movement to superior military organisations. The Force, it was declared, had been assigned a definite role in the defence plans of the country. The Instruction also provided for a system of "appointments," acting and unpaid, suitably graded for the commanders of the various formations, but it was repeated that "this is a Citizen Force, organised on the principles of equality of service and status." If a member held a commission, as Major Mirrielees did in the Reserve, his commission was to be dormant while he was a member of the Home Guard. He was to serve as a soldier and be subject to military law as such. The Home Guard was to be organised and administered by the War Office, and the Commander-in-Chief, Home Forces, was to exercise operational control together with other subordinate Army Officers acting under him. Cl. 8 dealt with discipline. It is true that by Orders in Council dated Nov. 19, 1940, and Feb. 12, 1941, commissions in the Home Guard were to be granted to members holding appointments. This, however, was subsequent to Major Mirrielees' death. In Dec., 1941, by Royal Warrant, the existing provisions of the Warrant of June 20, 1940, for pensions and retired pay to members of the Military Forces and their dependants, was extended retrospectively as from June 5, 1940, to members of the Home Guard, subject to various adjustments, but it was stated that a member of the Home Guard whilst serving as such member was to be treated as if he were a soldier of the Army on full pay, holding the substantive rank of a private and not serving in a normal engagement in the Regular Army. This provision was treated by the authorities as applying to Major Mirrielees at the time of his death. It is, I think, clear that, if he was a soldier, as I think he was, he was a "common soldier" in the Home Guard.

The case was tried on the pleadings and documents, with particular reference to the Statutory Rules and Orders to which I have referred, and on the Army Act. But when it came before the Second Division, certain further averments of fact were introduced and admitted by the Crown as correct. In particular, I may note the averments that the Home Guard having the duty to train themselves as soldiers carried out this duty intensively, many hours being spent each week in the evenings and at week-ends. Every member was required to hold himself in instant readiness to turn out upon the receipt of a warning which it was arranged was to be given in the event of imminent or actual invasion. From the receipt of this warning the services of members ceased to be part-time and became whole-time and complete in the same way as those of any other soldiers belonging to the Armed Forces. As to "appointments" the new averments emphasised that they were only of an acting nature and did not change the status of or confer any rank on their holders, who had no power to order dismissal or punishment such as that possessed by officers of the Army, and no power to give orders as officers to members of the regular forces or to assume command over a regular officer. I may add that the Home Guard had uniforms, equipment and weapons supplied to them.

In view of these facts, it may be asked why a member of the Home Guard does not satisfy all essential characteristics of a soldier, even though his employment is limited to home defence, and his service is not continuous but is intended to be compatible in general with his living at home and pursuing his usual avocations. He is during periods of duty a member of the Armed Forces of the Crown, subject to military law, and he is liable to be called up for full-time service. In opposition to this view the main objection taken by the Lord Justice Clerk was that common soldier, as the term is used in the Finance Act, 1894, means a member of the rank and file of a full-time force whose services are given continuously and exclusively to His Majesty for the period of his (usually prolonged) engagement and who in consequence receives his maintenance and appropriate pay and allowances for his services—in other words, the ordinary serving members of the regular British Navy or British Army. I think that this part of his judgment expresses the acid test which he adopts. The Attorney-General, however, did not contend in his argument before your Lordships that the meaning of the word soldier as used in the Finance Act, 1894, was limited to a member of the regular forces, but he insisted that the element of continuity of service was the essential characteristic connoted by "soldier." The Lord Advocate advanced the further contention that a member of the Home Guard (particularly if he had an "appointment") did not answer to the description of a "common soldier," but was at best an "uncommon soldier." The word "common," he argued, was used in a pregnant or twofold sense and as indicating not only the absence of rank, which is the ordinary sense to which the epithet "common" like the synonym "private" is applied to a soldier, but as meaning also that the particular man was of the common or ordinary type of soldier. This, it was said, could not be predicated of the Home Guard because its members, if soldiers of any type were soldiers of an extraordinary or unusual type, particularly if the soldier held an appointment. As to the definition of soldier in the Army Act, s. 190 already quoted, and the express inclusion in sect. 176 (8B) of members of the Home Guard in the category of soldiers because subject to military law, it was contended for the Crown that this provision of the Army Act was directed to an object foreign to that of the Finance Act because it was directed mainly to the discipline of Home Guard members when actually on duty; it was also said that the provisions in the Army

Act could not govern the construction of the material section of the Finance Act, 1894, the purpose of which was to give relief from taxation to common soldiers. But they go to show what the word "soldier" means in the Act.

I do not question that the word soldier may have different meanings in various contexts. Thus, in the Wills Act, 1837, s. 11, which exempts a soldier on actual military service from the ordinary restrictions which have to be observed to make a valid will, and enables him to make a nuncupative will, the word "soldier" has received the widest interpretation in the Probate Court. It has been held to include both officers and the rank and file, and to include at the time of the Boer War Volunteers, and in the last war Territorials and nursing sisters. I may refer as one instance to the case of *Rippon* (1). The problem in such cases was different no doubt. But they indicate that the word "soldier" does not bear a fixed or limited meaning. A member of the Home Guard is clearly a soldier for some purposes at least. The Army Act, s. 176, as amended *ad hoc*, provides in terms that he is to be subject to military law "as a soldier." No doubt the antithesis there is primarily between an officer whose position is dealt with in sect. 175 and a soldier who comes under sect. 176; but that latter section includes by express words not merely "soldiers of the regular army" but also "members of the Home Guard." The words "as a soldier" or "as soldiers" govern the whole of sect. 176. What is meant is that the categories specified in the section are all categories of soldiers. The Home Guard is one category. But all the same, it is said, the general usage of the Army Act is to distinguish between the regular or standing army and the auxiliary forces by restricting the word "soldier" to the regular forces and by referring to members of the auxiliary forces not as "soldiers" but as "men." This is true of the nomenclature generally followed in the Army Act. Thus sect. 176 (i) applies to "all soldiers of the regular forces," whereas sect. 176 (6A), for instance, applies to "all non-commissioned officers and men belonging to the Territorial Army." The new class 8B is similarly described as consisting of members of the Local Defence Volunteers. But the Attorney-General does not suggest that men of the Territorial Army, or in earlier days of the volunteer forces, were not soldiers when serving, as the volunteers did in the Boer War, or as the Territorials did in the last war and do now in the present war. Whatever the reason for this particular distinction in nomenclature it cannot import that men of the reserve or auxiliary forces are not soldiers when on duty or serving. These verbal differences in the Army Act could not be regarded as important even if the distinction had been universally drawn. But it is not so, at least in the earlier Acts. Thus in the Consolidated Militia Act, 1786, s. 89 (26 Geo. III, c. 107), it is enacted that any sergeant or corporal of the militia may be reduced to a private soldier of the militia. Thus the term "soldier" was applied to the auxiliary force not many years before the Act of 1815. In the Militia Act, 1662, there are constant references to the rank and file of the militia as "soldiers." For instance, in sect. 7, soldiers were to be punished if they do not do their duties as soldiers, and in sect. 28 there is a prohibition against an officer or soldier of the militia or trained band being mustered beyond their boundaries.

I think that the statutory expressions which I have quoted justify the conclusion that the word "soldier," as used in the Finance Act, 1894, is apt to include members of the Home Guard. The Army Act in particular raises difficulties, as it seems to me, in the way of the Attorney-General's argument that the crucial test of a soldier is continuity of service. He cannot mean only such continuity as there is in the case of a soldier of the regular army, who enlists for life or for a fixed number of years, as contrasted with a man of the auxiliary forces, such as the Army Reserve or the Territorials, who only have the status of soldiers in the various circumstances and at the various times detailed in the Army Act, s. 176. In substance these are on the same footing as the Home Guard. Continuity is thus a question of degree. The continuity is no doubt less close and exacting in the case of men of the Home Guard as compared with men of the Reserve or the Territorial Forces. The real question in each case is one of status and function. If the status or function is intermittent, the title to be called "soldiers" is also intermittent. The Home Guard have accordingly, in my opinion, both the status and duties of soldiers at such periods as they are exercising or training or on duty, or called up to meet an emergency. Such an accident as befell Major Mirrielees and his comrades, who died with him when the grenade exploded, shows, what is familiar now, that modern methods of Army training are both realistic and dangerous. Soldierlike qualities and soldierlike services are required whenever members of the Home Guard are called up to watch and guard important and perhaps threatened points, bridges, lines of communication, buildings and the like. Above all, the Home Guard soldier may be called up to defend his country against threatened invasion by sea or by air, perhaps by German commandos landing from parachutes near his village.

In my opinion, this conclusion agrees with the ordinary use of the word "soldier." I think that the word all through the vicissitudes of its long history, which extends for over six centuries, has borne substantially the same meaning, that is, a serving member of an armed force. As a natural concomitant some form of subjection to military discipline is implied, though it was not until 1757 that the militia was made subject, when embodied, to the Mutiny Act and Articles of War, and not until 1761 that the Mutiny Act was applied to the militia when training as well as when embodied. There is a substantial similarity between the auxiliary Armed Forces as they existed in 1815 and as they existed in 1894, and the Volunteers of 1815 bore a close resemblance to the Home Guard. The militia and yeomanry and the later volunteers may be treated as corresponding to the Territorial Forces in which they were merged in recent years. If we go further back we find that the militia had developed out of the trained bands and the general levy. There is thus a general similarity throughout in the character of the Armed Forces of the Crown and of the "soldier" as a member of them. They were not necessarily professional or whole-time soldiers.

If we turn to literary and popular language, "soldier" is the name used to connote a member of the rank and file of the Armed Forces for many centuries, long before the days of standing armies. This appears from the Oxford Dictionary (*s.v.*). It can be copiously illustrated from Shakespeare. He uses the word "soldier" whenever he has to refer to members of Armed Forces, of whatever country or nation, Roman, English, French, Scotch, without distinguishing whether they were long service or short service soldiers or how they were drilled and armed. He would not have distinguished between regular soldiers and auxiliary soldiers. Indeed, the distinction did not exist in his time. The feudal levy or the general levy were called up at uncertain emergencies and for limited periods of service. Men served for longer periods on occasion, for instance, in the Hundred Years War and in the Civil War. It was not until after the Restoration that the idea of standing armies became familiar and led to their being conditionally legalised in time of peace at the Revolution Settlement. I cannot think that the legislature in 1694 had in mind as the typical only type of soldier a member of the standing army. Nor would this be so in 1815 or 1894. As a later instance of the popular use of the word "soldier," I may take from the Oxford Dictionary (*s.v.* soldier) Hume's observation in 1797 that a succession of wars made every citizen a soldier.

It has also been urged that the Home Guard were an unpaid force and that a soldier *ex vi termini* must be a paid man. No doubt as a matter of etymology, "soldier" is derived from solidus, or coin, but I do not find that payment has been regarded as an essential characteristic of a "soldier," as it is in the case of mercenaries.

My conclusion is that the word "soldier" does not necessarily mean a man whose general occupation is military service or continuous military service, and that not only at the present day, but all through history, military service may be only the temporary or occasional or intermittent occupation of the man. He is a soldier only when he is serving or acting or on duty as a soldier. At such times he has the privileges and responsibilities of a soldier and would be called a soldier. At other times he may be a butcher or a baker or a stockbroker or a solicitor.

I do not think it necessary to consider here the difficult question which might arise when a man dies, after his service has ended, of injuries sustained while he was serving. Something might be said for the view that the material thing was that the man got his "death wound" while on service. I am also disposed to think that there must be more than a mere temporal connection between the service and the death. I do not, however, think that these problems help the decision of the present case. Major Mirrielees's death was immediately and directly caused by the service on which he was engaged. Nor can the interpretation of the material word depend on the possibility of difficulties in administration. On any view such difficulties may arise.

Reference was made to a series of parallel benefits or exemptions under the Finance Act, 1900, s. 14, which was made mandatory instead of discretionary and was otherwise extended by the Finance Act, 1924, s. 38, and by later Acts. These Acts, the language of which is different from the Act of 1894, do not supersede the effect of that Act. A claimant has an option. The Crown in the present case offered to the appellants the lesser benefits under the Finance Act, 1924, but they claim that they are entitled to the full benefits under the Act of 1894, and I think they are right.

I would allow the appeal.

LORD SIMONDS: My Lords, the manner in which Major Frederick Donald Mirrielees met his death on Aug. 17, 1940, the status of the Home Guard, then known as the Local Defence Volunteers, in which he held an appointment, and the relevant S.R. & O. and the Army Council Instructions thereby authorised have already been stated beyond need of my recapitulation.

The question is whether the estate of the deceased is wholly exempt from estate duty and the answer to this question depends on the applicability to him of the provisions of the Finance Act, 1894, s. 8 (1). That subsection makes applicable to estate duty the then existing law and practice in regard to (amongst other duties) probate duty for the purpose of:

> . . . the exemption of the property of common seamen marines or soldiers who are slain or die in the service of Her Majesty.

If the deceased satisfied this description his estate is wholly exempt from estate duty: if he did not, then he is entitled only to the limited relief provided by the Finance Act, 1924, s. 38. As to this no question arises. The words that I have cited from the Finance Act, 1894, are taken from the Stamp Act, 1815, which exempted from all stamp duties:

> Probate of will . . . and inventory of the effects of any common seaman marine or soldier who shall be slain or die in the service of H.M., his Heirs or Successors.

Their genesis can be traced back through intervening statutes to the Stamp Act, 1694. This appears to be the first English statute in which these or very similar words are to be found but they appear in earlier Acts of the Scottish Parliament.

The Second Division of the Court of Session has held by a majority (LORD MACKAY dissenting), affirming a decision of the Lord Ordinary, that the estate of the deceased is not entitled to exemption, finding a solution to the question in a supposed legislative nomenclature which confined the use of the word "soldier" to the regular armed forces of the Crown. But it is clear, and it has, indeed, been admitted by counsel for the Crown on this appeal, that this view cannot be maintained in the light of the further researches that have been made into the relevant legislation. Therefore I do not deem it necessary to deal with this aspect of the case.

Before your Lordships the substantial argument on behalf of the Crown has been that a distinction must be made between so-called whole-time soldiers and so-called part-time soldiers and that it is only to the former that the subsection gives exemption. Into this category, as I understand the argument of the Attorney-General, fall not only the Regular Forces of the Crown but also the Territorial Forces after their embodiment and the Home Guard too after they have been mustered to meet actual or threatened invasion: into the category of part-time soldiers fall the Home Guard during the periods of intermittent training and service.

The grounds of this distinction are said to lie first in the nature of the Act in which the words are found and secondly in a consideration of all the relevant words in their context. I do not find it possible to derive any assistance from the nature of the Act. It is a taxing Act which provides for exemption from taxation in certain cases, and it appears to me to be useless to speculate whether the purpose of the exemption was one that should lead to the widening or the narrowing of its ambit.

It is in the second branch of the argument that I have felt some difficulty—a difficulty of the sort that is apt to arise in the construction and application of a statute or other instrument where an event has happened not contemplated by its authors. The Home Guard in some respects resembles the general levy which from Saxon times was raised to resist the threat of invasion. But, whatever may have been in men's minds and memories in 1694, it is not easy to suppose that in 1894 such a body was in the contemplation of the Parliament which passed the Finance Act of that year. None the less, if the words fit the case, it is immaterial that the section has an unforeseen application. So I take the whole phrase "common seaman marine or soldier who is slain or dies in the service of His Majesty" and ask whether it is applicable only to the whole-time soldier to the exclusion of the man who pursues his ordinary avocation during part of his time but during the other part of it is a soldier in the service of His Majesty and in that service dies. It has been contended on behalf of the Crown that in the construction of this phrase the words "in the service of His Majesty" must be given what has been called a temporal rather than a causal connection: that is to say, the death must take place during the period of service; if it takes place during that period, it matters not what the cause of death may be. The alternative view is rejected, that the death must be attributable to service and that, if it is so attributable, it matters not when it takes place. Without expressing any final view upon the point, I will assume this contention to be sound. If so, the subsection applies only to the man of whom it can be predicated that, being a soldier in the service of His Majesty, he dies during his period of service. The question, then, is whether the phrase so interpreted covers the case of such a part-time soldier as I have described. The strength of the Crown's contention lies, I think, in the appeal to the popular use of the word "soldier." Could it, it is asked, be said of a man serving in the Home Guard, at any rate before muster, that he is a soldier in the service of His Majesty? And it is answered, "No, he would be described as a lawyer, a dentist, or as the case might be. He would not be called a soldier when he was in the Home Guard nor an old soldier when he had left it." I have come with some hesitation to the conclusion that this argument is unsound. It is clearly much weakened by the admission, which the Attorney-General was constrained to make, that a member of the Territorial Forces after embodiment and a member of the Home Guard after muster would come within the exemption. For, if so, the test of popular description becomes clearly inadequate. It is too great a refinement to suppose that a Home Guard in training before muster would be described as a dentist but after muster as a soldier. Perhaps the solution can best be found in this, that the popular use of the word soldier will naturally not extend to a type of military service which is novel and unfamiliar, but nevertheless, if it is military service having the attributes which the word "soldier" connotes, then, in the absence of some context which excludes it, it must be included in that word. I think that the service of the Home Guard satisfies this test. There is no context to exclude him. His service is military: he is a member of the armed forces of the Crown: he is subject to military law: it is, I think, etymology notwithstanding, irrelevant whether he is unpaid or, as a mercenary, "serves the sum of things for pay." The same proposition may be stated somewhat differently. A privilege conferred or a burden imposed by Act of Parliament upon a certain class of persons must be referable to some characteristic which that class bears. If that characteristic is the carrying on of some profession, it may well be that normally it is a whole-time profession: but *prima facie*, it cannot be a condition of the privilege or the burden applying that it should be so, for it is in respect of the carrying on of the profession that the relevant provision has been made, certain acts producing certain consequences whether those acts form the single avocation of the actor or an interlude in other activities. Thus a moneylender in respect of his moneylending business is subject to certain statutory obligations which he cannot escape by saying that he is only a part-time moneylender and that for the rest he carries on some other business. It is irrelevant whether the acts, by the doing of which a man satisfies a certain description, are continuous or intermittent. When he is doing those acts, he does satisfy the description and qualifies for any privilege which Parliament may grant. So here it does not matter whether the deceased was something other than a soldier when he was not on duty as a Home Guard: when he was on such duty he was a soldier, and on such duty he died. It is, in my opinion, at that moment of time that it must be asked of him whether he was a soldier. If he was, then it is irrelevant that at other times he followed some other pursuit, even though he so predominantly followed it that he would generally and popularly have been described not as a soldier but by reference to that other pursuit.

I do not ignore that the deceased in order to obtain exemption under the section must satisfy the description not only of a soldier but of a " common " soldier. That epithet has generally fallen into disuse in relation to any part of the army. But I have no doubt that it was originally intended to distinguish the ordinary members of the army from those of a certain rank. It appears that in practice a somewhat arbitrary line has been drawn and that any soldier below the rank of sergeant has been treated for the purpose of the section as a " common " soldier. But in any case I see no reason for saying that it is adapted to distinguish a soldier in the Regular Forces of the Crown from a soldier in any other of His Majesty's Forces. If a man is a soldier, he is a " common " soldier in whatever force he may be serving unless he has some rank. The Home Guard was a body so constituted at the death of the deceased that, though there were *de facto* leaders, there was equality of status without rank or privilege. Appointments there were : the deceased held the appointment of company commander. But it was an appointment, not a rank : he held no commission and could be discharged or resign in the same way as any other member of the Home Guard. Nor had he any of the powers of summary punishment or discipline which are usually associated with higher rank in an army. He must, therefore, in my opinion, be regarded not only as a soldier, but as a common soldier for the purpose of the section.

My Lords, I concur in the motion that the appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Baillie & Gifford, W.S.*, Edinburgh (for the appellants) ; *Solicitor of Inland Revenue*, agent for *Solicitor of Inland Revenue*, Edinburgh (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

BATTERSBY AND OTHERS *v.* ANGLO-AMERICAN OIL CO., LTD. AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Lord Goddard and du Parcq, L.J.), **October 2, 3, 13, 1944.**]

Practice—Writ—Extension of time for service—Action under Fatal Accidents Act, 1846*—Writ issued within the* 12 *months limited by the Act—Not served within* 12 *months of date of issue—Discretion of court to extend time for service —R.S.C., Ord.* 8, *rr.* 1, 2*—R.S.C., Ord.* 64, *r.* 7.

A writ was issued on Oct. 9, 1942, in proceedings under the Fatal Accidents Act, 1846, within the 12 months limited by sect. 3 of the Act ; but the writ was not served on any of the defendants within the 12 months allowed for service by the Rules of the Supreme Court. On Jan. 18, 1944, and again on May 22, 1944, application for renewal of the writ was refused. The plaintiff appealed from the second refusal and on May 23, 1944, an order was made renewing the writ for 6 months from Oct. 18, 1943, and for a further 6 months from Apr. 17, 1944. It was contended on behalf of the defendants that extension of time for renewal should be refused as it would deprive the defendants of a defence under a statute of limitations :—

HELD : since the period of limitation, under the Fatal Accidents Act, 1846, s. 3, had run when the application for renewal of the writ was made, the effect of grant would be to deprive the defendant of the benefit of the statute and therefore the application must be refused.

Holman v. *George Elliot & Co., Ltd.* (1) *not followed.*

[EDITORIAL NOTE. R.S.C., Ord. 64, r. 7, gives a wide discretion to renew a writ more than twelve months after the date of issue, but a line of cases commencing with *Doyle* v. *Kaufman* (2) has held that the discretion ought not to be exercised where the remedy is barred and the effect of exercise would be to deprive a defendant of the benefit of a defence based on statutory limitation. In *Holman* v. *George Elliott* & Co. (1) the Court of Appeal recently held that this, while the accepted practice, did not amount to a rule depriving the judge of his discretion to renew, but here a different Court of

Appeal express their disagreement and decide otherwise, and in view of these conflicting decisions the matter now awaits determination by the House of Lords.

As to Renewal of Writ, see HALSBURY, Hailsham Edn., Vol. 26, pp. 26, 27, para. 35; and for Cases, see DIGEST, Practice, pp. 311, 312, Nos. 358-368, and pp. 845, 846, Nos. 3924-3926.]

Cases referred to:

*(1) *Holman* v. *George Elliot & Co., Ltd.*, [1944] 1 K.B. 591; [1944] 1 All E.R. 639.

*(2) *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7, 340; Digest, Practice 845, *3924*; 47 L.J.Q.B. 26.

*(3) *Re Jones, Eyre* v. *Cox* (1877), 46 L.J.Ch. 316; Digest, Practice 311, *359*.

*(4) *Smalpage* v. *Tonge* (1886), 17 Q.B.D. 644; Digest, Practice 845, *3925*; 55 L.J.Q.B. 518; 55 L.T. 44.

*(5) *Hewett* v. *Barr*, [1891] 1 Q.B. 98; Digest, Practice 311, *362*; 60 L.J.Q.B. 268.

(6) *Weldon* v. *Neal* (1887), 19 Q.B.D. 394; Digest, Practice 106, *913*; 56 L.J.Q.B. 621.

*(7) *Mabro* v. *Eagle Star and British Dominions Co., Ltd.*, [1932] 1 K.B. 485; Digest, Practice 405, *1067*; 101 L.J.K.B. 205; 146 L.T. 433.

(8) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293.

Appeal by the defendants from an order of Birkett, J., in chambers. The facts are fully set out in the judgment of the court delivered by Lord Goddard.

Valentine Holmes for the first three appellants, the Anglo-American Oil Co., Ltd., P. W. Higgins and the Petroleum Board.

D. A. Scott Cairns for the appellants C. J. Bartley & Co.

G. R. Mitchison for the appellants Crowley Russell & Co.

P. E. Sandlands, K.C., and *Geoffrey Howard* for the respondents.

Lord Goddard [delivering the judgment of the court]: On Oct. 20, 1941, Albert Victor Battersby, the husband of the first plaintiff and father of the others, who was employed by the defendants Simmons & Hawker, Ltd., was killed by an explosion at the works of the first defendants. On Oct. 19, 1942, the writ in the action was issued. In the opinion of the court this writ covers, and was only intended to cover, a claim under the Fatal Accidents Act, 1846, and does not include any claim by the administratrix under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the loss sustained by the deceased of his expectation of life. This writ was not served on any of the defendants during the ensuing 12 months, but on Jan. 18, 1944, an application for its renewal was made to a master and was refused. On May 2, 1944, judgment was given by this court in the case of *Holman* v. *George Elliott & Co., Ltd.* (1) and it was, no doubt, because of that decision that the plaintiff again applied for a renewal of the writ. This application was heard and refused by Master Baker on May 22. The next day the plaintiff applied to Stable, J., by way of appeal from this refusal, and on that day Stable, J., renewed the writ; the effect of his order was to renew the writ for 6 months from Oct. 18, 1943, and for a further 6 months from Apr. 17, 1944. Orders for renewal are necessarily made *ex parte*, and, accordingly, the defendants, on being served, followed the correct procedure of entering a conditional appearance and applying to set aside the writ and service. Again this application came before Master Baker, who set the writ aside, but on appeal, Birkett, J., reversed his order. The form of the judge's order was that the appeal was allowed, the order of the master was rescinded and the order of Stable, J., giving leave to renew the writ was to stand. The effect of the order was to render the appearance unconditional. It is from this order that the defendants, other than Simmons & Hawker, and Halliday, who has not been served, appeal. Their contention is that it was wrong to renew the writ in this case because the effect of so doing is to deprive them of the defence that the action is barred by the provision in the Fatal Accidents Act, 1846, s. 3, which provides that:

> . . . every such action [i.e., an action given by the Act] shall be commenced within 12 calendar months after the death of such deceased person.

The period during which an unserved writ is effective and provisions for its renewal are dealt with by R.S.C., Ord. 8. Ord. 8, r. 1, so far as it is material, is in these terms:

> No original writ of summons shall be in force for more than 12 months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the 12 months, apply to the court or a judge for leave to renew the writ; and the

> court or a judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original . . . writ of summons be renewed for 6 months . . . and so from time to time during the currency of the renewed writ . . . and a writ . . . so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited . . .

Ord. 8, r. 2, provides :

> The production of a writ . . . showing the same to have been renewed . . . shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

It will have been seen that the writ in the first place was issued within the period allowed by the statute, but no application to renew it was made within 12 months from the date of issue. So when STABLE, J., renewed the writ, not only had the time for renewal expired, but more than 12 months had elapsed since the death of the deceased. The plaintiffs, however, contend, and in this have the support of the decision in *Holman* v. *George Elliott & Co., Ltd.* (1), that the court has a discretion under Ord. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to STABLE, J., to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision to which reference has already been made, that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Before dealing with the authorities on this point we think we ought to refer to one matter dealt with in the judgment of MACKINNON, L.J., in *Holman's* case (1), which was not strictly necessary for the decision, but from which we feel constrained to differ. That, also, was a case under the Fatal Accidents Act ; and, as in the present action, a writ was issued within 12 months of the death, but was not served, and application for renewal was not made within 12 months of the date of issue. Acceding to an argument advanced by the plaintiff, MACKINNON, L.J., is reported as saying, at p. 593 ([1944] 1 All E.R. at p. 640) :

> Mr. Fox-Andrews, for the plaintiff, points out, and I think with reason, that this is not a case where the order of the learned judge, in extending the period for the service of the writ, deprives the defendants of an accrued right of defence under Lord Campbell's Act. The right of defence by the limitations section . . . would arise if the writ had not been issued before Oct. 9, 1942. It was in fact, issued on Oct. 7, 1942, two days before the expiry of the twelve months from the date of the accident.

With all respect, we are unable to agree that the issue of a writ which has become a nullity by reason of nonservice within the prescribed time satisfies the section. If the writ has ceased to be in force the position is the same as if it had never been issued ; otherwise we see no reason for the concluding words of Ord. 8, r. 1, which provides for a renewed writ preventing the operation of statutes of limitation. These words would be unnecessary if a writ which had expired and had not been renewed would answer that purpose. A new writ issued more than 12 months after the date, would clearly be out of time, so either the writ originally issued must be renewed or the action is barred.

We agree, therefore, with the view expressed by both members of the court in *Holman's* case (1) that the real question which arose there, and also arises in the present case, is whether there was a discretion in the court to enlarge the time for renewal under Ord. 64, r. 7. As we have just said, there is a consistent line of authority that the court will not extend the time in such cases, so as to deprive the defendant of the benefit of the statute. The first case is *Doyle* v. *Kaufman* (2). In the Divisional Court, COCKBURN, C.J., with whom LUSH, J., concurred, said, at p. 8 :

> The power to enlarge the time given by Ord 57, r. 6 [now Ord. 64, r. 7] cannot apply to the renewal of the writ when by virtue of a statute the cause of action is gone.

Perhaps it might have been more accurate to say "when the remedy is barred" but the effect is the same. The report in the Court of Appeal is not as satisfactory as one could wish ; it merely says that the court intimated that the principle of the judgment in the court below was right, but dismissed the application on the ground that the plaintiff, who was a solicitor, had himself been guilty of laches, which disentitled him to a renewal. This looks as though the court, while affirming the rule laid down by Cockburn, C.J., in unqualified terms, thought that there might be exceptions to it, as indeed did Kay, L.J., in a later case, to which we shall refer. But whether there can be exceptions or not, there is no doubt as to what the Court of Appeal held was the rule.

The next case that was cited was *Re Jones* (3), heard by Sir George Jessel, M.R., earlier in the same year, 1877. In that case he renewed the writ after the expiration of 12 months from the date of issue, but it will be observed that no question of limitations arose, nor is there any suggestion that any right of the defendant then existing would be prejudiced. The case is reported, apparently, only because the writ had been amended, since issue, and Sir George Jessel, M.R., held that the 12 months must be computed from the date of the writ and not from the amendment. That case, therefore, is of no assistance to the present proceedings. Then comes *Smalpage* v. *Tonge* (4). There a writ for service within the jurisdiction had been renewed, and finding that the defendant was out of the jurisdiction, the plaintiff applied for and obtained leave to issue a concurrent writ for service out of the jurisdiction, although the enlargement of time for issuing a concurrent writ might affect the Statute of Limitations. But in that case the original writ was always alive and effective, and Cotton, L.J., pointed out that the court was not being asked to renew a lost cause of action, but only to make the writ effectual by serving it abroad, and, as Lindley, L.J., observed, the writ had been renewed from time to time, and if the defendant came over here the action could go on without him. But the court referred (at p. 648) to *Doyle* v. *Kaufman* (2) and obviously approved it.

Then in 1891 came *Hewett* v. *Barr* (5). This case has never been questioned and, in our opinion, is really conclusive of the present appeal. Lord Esher, M.R., stated, as a general rule of conduct, that amendments ought not to be granted where they would have the effect of altering the existing rights of the parties. He then said, at p. 99:

> This being the rule with regard to amendments . . . the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statute of Limitations.

Lopes, L.J., was equally emphatic, and expressly referred to *Doyle* v. *Kaufman* (2). Kay, L.J., in concurring, did say (at p. 99) that he was:

> . . . disposed to think that Ord. 64, r. 7, might be construed to give the court power to do so under exceptional circumstances.

He apparently thought that in some cases accident or mistake in not applying for renewal within 12 months might be excused. That, however was not the judgment of the court, and can only be regarded as a *dictum* cautiously expressed. Moreover, the facts in that case were rather exceptional: a clerk was unexpectedly detained in court till after 4 o'clock, and then found the office closed when he went to make his application for renewal: he applied the next morning but the court held that he was too late, as by then the statute had run. If such circumstances did not avail the plaintiff, it is indeed difficult to see what accident or mistake would, though we do not deny that if the defendant himself had brought about the delay, as, for instance, by asking the plaintiff to withhold service for some reason, he might well be held disentitled to object to a renewal after the prescribed period had expired. This rule had been applied by the Court of Appeal three months earlier in *Weldon* v. *Neal* (6), which was a case in which an amendment of pleadings was sought and refused because it would, if allowed, have affected the operation of the statute.

In *Holman's* case (1) the court referred to *Mabro* v. *Eagle Star and British Dominions Insurance Co.* (7), where the court refused to allow a person to be added as a plaintiff to an action, if thereby the defence of the statute would be defeated, and did so for precisely the same reasons as were given in the earlier cases which we have set out above. Scrutton, L.J., said at p. 487:

> . . . the court has always refused to allow a party or a cause of action to be added

> where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the Statute.

That, if we may say so, puts the reason underlying the rule clearly and emphatically. In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was made. To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case. The passage from the judgment of GREER, L.J., (at p. 489) cited by the court in *Holman's* case (1) appears to us to be equally conclusive against the present application. In our opinion, what GREER, L.J., meant was that, even assuming the words of the particular rule confer a discretion, it is one which can be exercised only in one way, if an exercise in the other direction would deprive a party of a legal defence. In making the orders they did, we have no doubt that both STABLE and BIRKETT, JJ., were influenced by, and intended to follow, *Holman's* case (1). That is a decision of this court, but, in our opinion, it is in conflict with the earlier cases also decided in the Court of Appeal. Accordingly, in conformity with the decision of the full court in the recent case of *Young* v. *Bristol Aeroplane Co.* (8), we are at liberty to disregard it, and, in our opinion, we ought to follow the earlier decisions.

We conclude by saying that even when an application for renewal of a writ is made within 12 months of the date of issue, the jurisdiction given by Ord. 64, r. 7, ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course, on an application which is necessarily made *ex parte*. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others. But ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried, or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order, and who will not necessarily know the grounds on which the discretion was exercised.

The appeal will be allowed; the writ will be set aside with costs here and below.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Simmons & Simmons* (for the first three appellants, the Anglo-American Oil Co., Ltd., P. W. Higgins and the Petroleum Board); *Berrymans* (for the appellant C. J. Bartley & Co.); *Coward, Chance & Co.* (for the appellant Crowley Russell & Co.); *W. R. Bennett & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MARSH *v.* COMMISSIONER OF POLICE AND McGEE.

[COURT OF APPEAL (Lord Goddard, Scott and du Parcq, L.JJ.), **October 12, 1944.**]

Inns -Innkeeper's lien -Luggage -Ring handed to innkeeper as security for bill.

A guest came to a hotel on Nov. 24, 1942, and stayed there until Nov. 29, 1942. On Nov. 25, 1942, he obtained possession of a diamond and sapphire ring on approval from a firm of jewellers, and, being unable to meet his hotel bill, he handed the ring to the hotel proprietors as security for the payment of the bill. He was later arrested and convicted of larceny of the ring. The jewellers claimed the ring back, but the hotel proprietors claimed to exercise an innkeeper's lien upon it. It was contended on behalf of the jewellers that the lien did not attach to the ring as it was never in the possession of the hotel proprietors as part of the guest's luggage but was received by them as security :—

HELD : the innkeeper's lien attached to the ring as soon as it was brought into the hotel by a guest, in his capacity as a guest ; there was no evidence to support the contention that the deposit of the ring as security constituted a separate transaction, and the hotel proprietors were, therefore, entitled to exercise the lien.

Decision of the Divisional Court ([1944] 1 All E.R. 161) *reversed.*

[**EDITORIAL NOTE.** In the court below it was held that a ring deposited with an innkeeper as security for payment of the bill was not subject to the innkeeper's common law lien, because it did not form part of the guest's luggage, and was the subject of an independent transaction. It is now held that everything brought by a guest into a hotel, whether to the innkeeper's knowledge or not, or acquired by him during residence, is subject to the lien, and no special arrangements for deposit such as were here made are available to defeat the innkeeper's right.

AS TO INNKEEPER'S LIEN, see HALSBURY, Hailsham Edn., Vol. 18, pp. 160-164, paras. 222-230 ; and FOR CASES, see DIGEST, Vol. 29, pp. 18-21, Nos. 238-266.]

Cases referred to :

(1) *Gordon* v. *Silber* (1890), 25 Q.B.D. 491 ; 29 Digest 20, *259* ; 59 L.J.Q.B. 507 ; 63 L.T. 283.

(2) *Robins & Co.* v. *Gray*, [1895] 2 Q.B. 501 ; 29 Digest 19, *240* ; 65 L.J.Q.B. 44 ; 73 L.T. 252.

APPEAL by the respondent McGee from a decision of the Divisional Court (VISCOUNT CALDECOTE, L.C.J., MACNAGHTEN and TUCKER, JJ.), dated Nov. 25, 1943, and reported [1944] 1 All E.R. 161. The facts are fully set out in the judgment of LORD GODDARD.

Gilbert J. Paull, K.C., and *Horace C. Fenton* for the appellant, A. F. McGee.

Paul E. Sandlands, K.C., and *A. E. Beecroft* for the respondent, H. C. O. Marsh.

LORD GODDARD : This is an appeal by Alfred Francis McGee, representing the Ritz Hotel Co., against a decision of the Divisional Court on a case stated by the magistrates of Middlesex sitting at Feltham in a matter which came before them under the Police (Property) Act, 1897.

The matter arose in this way : A man named Nall arrived at the Ritz Hotel, and apparently was received as a guest, on Nov. 24, 1942. He seems to have been a rascal, and while he was a guest at the Ritz Hotel he stole, by means of a trick, a diamond and sapphire ring from the Goldsmiths and Silversmiths Co., who are represented in these proceedings by Marsh. On Jan. 12, 1943, Nall was convicted and sentenced for the larceny of a ring. On Nov. 28, 1942, Nall was asked by the Ritz Hotel to pay his bill and he had not the means to do so. But, as the case finds, Nall when asked to pay the hotel the amount of the bill stated that he was unable to do so, and he then produced and handed over the said ring to the hotel as security for payment of the said bill, and the same was received and retained by the hotel in its character of innkeeper as a lien for the amount of the bill. It is also stated in the case that no suggestion was made that the hotel knew of any of the facts and circumstances under which Nall had come into possession of the ring or that possession thereof by the hotel had not been continuous. After Nall had been convicted and sentenced, the proceedings which I have referred to were taken before the magistrates under the provisions of the Police (Property) Act, 1897. There were two complaints before the court, one by Marsh claiming the ring as the property of the Goldsmiths and Silversmiths Co., and a complaint by McGee, on behalf of the Ritz Hotel, alleging that they had got a lien upon it. The magistrates decided :

> . . . that the ring was received and retained by the hotel in its character of innkeeper and that in the circumstances in which the hotel received the said ring there was nothing which was inconsistent with the existence or continuance of a lien and that the second-named respondent had established the claim for a lien and thereupon ordered that the said ring be handed over to the second-named respondent accordingly.

In view of the argument which has been advanced in this court, the justices appear to have stated a case which has relation to both the complaints which were before them, but in fact the case was stated at the instance of Marsh who had been found by the magistrates not to be entitled to the ring which is the matter with which we are dealing. On behalf of the Goldsmiths and Silversmiths Co., that is to say, Marsh, the point that is taken is that this ring was not the subject of a lien. It has not been contested, and the authorities seem to be perfectly clear and uniform on the point, that an innkeeper's lien will attach upon property brought by a guest to the hotel although the property is in fact stolen property. I need not refer to all the cases which have been cited, but *Gordon* v. *Silber* (1) is a clear authority upon that point. It has been recognised in *Robins* v. *Gray* (2), and counsel for Marsh has not sought to argue to the contrary. That point is out of the way. The lien can attach although the property belongs to somebody else and has been brought to the hotel by a guest who has stolen it. Counsel for Marsh says that a lien does not attach in this case because it was property which was always in the exclusive possession of the guest, and the cases show that, if the property is always in the exclusive possession of the guest and never in the possession of the innkeeper the lien does not attach.

The facts found by the magistrates are not very satisfactory in this case, and they become less satisfactory when we see the evidence, because there is very little evidence before the magistrates which is admissible evidence at all. What they have to say is that this article was obtained on Nov. 25 ; on Nov. 28 Nall was asked to pay his bill and did not do so, and then handed over the ring to the hotel as security for payment of the bill ; he stayed there, and in fact was allowed to stay on having done that, until Nov. 29.

The authorities which have been cited in this case show no doubt that an innkeeper is not entitled to detain the person of a guest who has not paid his bill and, as a corollary of that, he is not entitled to take the clothes off the back of a guest as was attempted to be done in one case. I can find nothing which shows that where a guest comes with an article of jewellery to the hotel and has it in his possession at the hotel, that the innkeeper's lien does not attach to that property. It seems to me that, if a person takes jewellery to the hotel, or obtains it when he arrives there, or acquires it during his residence there and takes it to the hotel, there is no more reason why the lien of an innkeeper should not attach to that property than to the clothes which the guest takes with him. It is not a question whether it is " baggage " or " luggage " in the sense in which those words are generally used. The lien attaches to the property or the chattels which the guest brings to the hotel in his character as a guest. If a man is staying in an hotel in London and he does some shopping, buys things and takes them to his hotel and keeps them at the hotel, I see no reason at all why the authorities should constrain me to hold that the innkeeper has not the same lien as he would have in respect of actual property such as clothes and so forth which the guest has in his bags when he arrives. Counsel for Marsh also says that the lien did not attach here because when the guest was leaving the hotel, or at any rate when he was challenged with not having paid his bill, he gave the ring as security. That seems to me merely to show that the guest was accepting the inevitable. He knew he would not be allowed to leave the hotel with his property unless he paid his bill. It seems to me it cannot make any difference in law whether the innkeeper seeks to exercise his lien when the bags are in the hands of the porter who is carrying them downstairs, or whether he seeks to exercise his lien when the bags are in the hands of the guests when he is carrying them downstairs. I think in this case, though the facts are not particularly or illuminatingly found by the magistrates, there is evidence upon which they could find that this was the property of the guest brought to the hotel and that the innkeeper accordingly could exercise a lien upon it.

I want to say one thing about the view which was taken by the Divisional Court. Viscount Caldecote, L.C.J., said ([1944] 1 All E.R. 161, at p. 162):

> On the facts it is quite clear that the innkeeper did not exercise an innkeeper's lien upon this ring for the simple reason that he was never in a position to do so. The guest, owing a bill which he was unable to pay, merely handed over valuable security to the innkeeper for the purpose of the debt . . .

Thereby Viscount Caldecote, L.C.J., apparently considered the handing over of the ring as an entirely separate and independent transaction. In my view, it was nothing of the sort. I think that the lien attaches to the property whether the innkeeper takes the different items of the guest's property or not ; it attaches for instance, to the contents of his portmanteau, although the innkeeper may not know whether the contents of it are the clothes or a few bricks or other things put in to give the appearance of the man being a person of some substance. It attaches to that thing although the occasion for exercising the lien does not arise until the guest has incurred a debt and has been presented with a bill and seeks to leave the hotel without paying the bill.

It seems to me clear upon the facts of this case that the magistrates could find that this ring was brought into the hotel by the guest in his capacity and character as a guest and, therefore, whether the innkeeper knew it was there or not does not matter. The lien attached to it and as soon as the innkeeper knew that there was this ring he could exercise his lien upon it. It seems to me to make no difference in law whether the guest produced it before him and said : " There you are ; I owe you a debt and you can exercise your lien upon this " ; or whether the innkeeper just laid his hand upon it and said : " I am going to exercise my lien upon it." One may illustrate the position which arises in this way : Supposing a person staying in a hotel finds that he has had his pocket picked and is temporarily bereft of money. He goes to the innkeeper and says : " Will you lend me £5, and I will give you my watch as security." There is no doubt a pledging there of the watch which arises from the fact that he has lent money upon it and taken the watch as security for the loan. If it be that the guest then comes and repays the £5 but cannot pay the amount of his bill, it seems to me to be perfectly clear that the innkeeper can say : " I have a lien on your watch, not only for the £5 which I lent you and which is a matter of pledge, but I have my innkeeper's lien upon it. You brought it to the hotel ; it is now in my possession and I shall keep it as security for your bill." In this case it becomes *a fortiori*, when one sees that this man was allowed to stay in the hotel for a day after the property had actually been in the hands of the innkeeper. It seems to me that the innkeeper had a lien upon this property, and for these reasons I cannot agree with the decision of the Divisional Court, and the appeal must be allowed.

Scott, L.J. : I agree.

du Parcq, L.J. : I agree. Viscount Caldecote, L.C.J., said, at p. 162 :

> . . . I base my judgment upon the view which I take that the ring had never been received as part of the guest's luggage . . .

On the facts I agree with my Lord that it was open to the justices to find that it was received as part of the guest's luggage. Nobody doubts—as certainly it was not doubted by the judges in the Divisional Court—that a ring may be part of a guest's luggage. A lady's ring may be part of a male guest's luggage. This ring came into the possession of Nall, the guest, on Nov. 25, the day after he was received as a guest at the hotel. On Nov. 28, it was still in his possession. The justices have stated that no such suggestion was made before them that possession of the ring by the hotel had not been continuous. It was continuous down to Nov. 28, when Nall allowed the hotel to take it into their possession. The position is exactly the same as if it had been a fur coat or some other article of clothing which he had in his room and which he had transferred to their custody so that they might be quite sure it should not be removed.

I thought, when this case was before us on the previous occasion, that it might turn out that there had been some conversation proved before the justices which made it clear that, far from being the exercise of a lien, the action of the hotel was that of persons taking a ring under an entirely separate contract. There is nothing to support such a suggestion. It now appears that there was no receivable evidence before the justices as to what precisely had happened. But I am clear that we cannot say that they were wrong in drawing the inference which they did. It is impossible to say that the view which VISCOUNT CALDECOTE, L.C.J., took was the only view which could be taken upon the evidence. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Leslie J. Griffin* (for the appellant, McGee); *McKenna & Co.* (for the respondent, H. C. O. Marsh).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re BERKELEY, BORRER *v.* BERKELEY AND OTHERS.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 16, 1944.**]

Practice—Time for appeal—Appeal entered late—Overruling decision by superior court in an analogous case—Whether relevant ground for application to enlarge time for appeal—Discretion of court to extend time—Finance Act, 1941 (*c.* 30), *s.* 25 (1)—*R.S.C., Ord.* 58, *r.* 15, *Ord.* 64, *r.* 7.

The Finance Act, 1941, s. 25 (1), was designed to impose some part of the tax burden on the recipient of a tax-free annuity where the testamentary disposition was made before Sept. 3, 1939. An order was made in an administration suit, dealing in part with this question, *i.e.*, whether a gift of an annuity in a codicil dated before the relevant date and confirmed by a codicil dated after the relevant date was subject to the provisions of the section. This order, giving the annuitant the annuity free of tax, followed a previous decision in an analogous case. Beyond payments to the annuitant to date, no steps were taken by the parties under the order. After the time for appeal from the order had expired, the Court of Appeal reversed the decision on which the order was based. The applicant asked for leave to appeal, notwithstanding that the time had expired. It was contended that the mere fact of a superior court overruling a judgment and laying down a different principle of law gave no ground for enlarging the time for appeal:—

HELD: (i) the fact that in a subsequent case a superior court overruled a decision and took a different view from that taken by a judge in a previous case was not necessarily a ground for enlarging the time for appealing.

(ii) under the powers given by R.S.C., Ord. 58, r. 15, and Ord. 64, r. 7, the court had to take into consideration the whole of the circumstances of the case, and considering the conduct of the parties under the order and the fact that the rights of the parties not before the court below remained unaffected by it, it was in the interests of justice that leave should be given.

[**EDITORIAL NOTE.** It is well settled by authority that the discretion to enlarge the time for appeal will not necessarily be exercised solely because, since the order appealed from, another court has taken a different view of the law. This may be one element to be considered, but the sole test is whether it is just, having regard to all the circumstances, that leave to appeal out of time should be given. Here nothing had been done under the order and other parties not bound by the order could have obtained a contrary order governed by the later decision. Justice, therefore, required leave to be given.

AS TO EXTENSION OF TIME FOR APPEAL, see HALSBURY, Hailsham Edn., Vol. 26, pp. 116-118, paras. 229, 230; and FOR CASES, see DIGEST, Practice, pp. 805-807, Nos. 3682-3698. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1287-1300, 1400-1402; SUPPLEMENT, 1944, pp. 108, 109, 118.]

Cases referred to:

*(1) *Re Tredgold, Midland Bank Executor and Trustee Co., Ltd.* v. *Tredgold and the Royal Society of Musicians of Great Britain (Incorporated)*, [1943] Ch. 69; [1943] 1 All E.R. 120.

(2) *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co., Ltd.*, [1944] 1 Ch. 331; [1944] 1 All E.R. 672.

*(3) *Re Wigfull (J.) & Sons' Trade Marks*, [1919] 1 Ch. 52; 43 Digest 195, *432*; 88 L.J.Ch. 30; 120 L.T. 78.

(4) *Gatti* v. *Shoosmith*, [1939] Ch. 841; [1939] 3 All E.R. 916; Digest Supp.; 108 L.J.Ch. 380; 161 L.T. 208.

APPLICATION for leave to appeal notwithstanding that the time for entering an appeal had expired. The facts and the arguments are fully set out in the judgment.

E. G. Eardley-Wilmot for the trustees.

J. H. Stamp for the applicant.

J. V. Nesbitt for the tenant for life.

C. E. Harman, K.C., and *Wilfrid Hunt* for the first annuitant.

M. G. Hewins for the second annuitant.

Lord Greene, M.R.: This is an application by a tenant for life in remainder for leave to appeal out of time against that part of an order of Cohen, J., which dealt with the matter of a certain annuity bequeathed by the testator.

The order was made on May 19, 1943, in an administration suit, but we are told that nothing has been done under the order (except that the annuitant down to date has been paid in accordance with it) because the parties, at the suggestion of the judge, have been negotiating with a view to arriving at some compromise.

The point on which Cohen, J., made his order, stated shortly, was this. An annuity was given by a codicil before the date when the Finance Act, 1941, s. 25, became effective. That bequest was confirmed by a codicil which was made after that date. The question which arose, as between the annuitant and those interested in remainder, was, whether or not that gift of the annuity was subject to the provisions of that section, which would result in its being scaled down, or not.

When the matter came before Cohen, J., there stood the decision of Simonds, J., in the case of *Re Tredgold* (1), which dealt with the confirmation by a subsequent codicil of a gift of an annuity in a will dated before the relevant date. He held that, in those circumstances, the disposition, for the purposes of the section, must be treated as having been made by the codicil, with the result that the section did not apply and the annuitant got her tax free annuity in full.

Cohen, J., followed that decision, with the result that the annuitant got her tax free annuity in full and we are told that, in the ordinary course of nature, in time that annuity will, if not exhaust, at any rate seriously deplete the capital of the estate.

Subsequent to that decision, this court had to consider the decision of Simonds, J., in *Re Tredgold* (1) in *Re Sebag-Montefiore* (2), and came to the conclusion that *Re Tredgold* (1) was wrongly decided, and overruled it.

The result was that the tax free annuity, having been given under a document dated before the date when the section came into operation, fell to be scaled down in accordance with the directions of the section.

In those circumstances the tenant for life in remainder comes to this court and asks for leave to appeal, notwithstanding that the time has expired. We have not gone in detail into the relevant testamentary dispositions, but we are told (and this is not disputed) that, after the present tenant for life in possession, there are other tenants for life in remainder in succession, at least one of whom was not a party to the proceedings below, and accordingly is not bound by them. There will be, in addition, remaindermen interested in capital who are not yet in existence, but may hereafter be born. They, too, are not bound by this order of Cohen, J.

It is pointed out, and, I think, correctly pointed out, by counsel for the applicant, that a tenant for life in remainder not a party to the proceedings could to-morrow issue an originating summons and ask for a decision contrary to that of Cohen, J., and the judge before whom such a summons came would be bound, by force of a decision of this court in *Re Sebag-Montefiore* (2), to come to a different conclusion to that embodied in the order of Cohen, J.

Those are the facts of this case. What we have to decide is whether, in those circumstances, we ought to exercise the discretion, which unquestionably we have, to allow an appeal to be presented out of time. It is argued by counsel for the first annuitant, notwithstanding the fact that the court must have a discretion, that the discretion ought not to be exercised in circumstances such as these. He maintained that the only relevant circumstance which can be put forward in favour of the application is the fact that this court in *Re Sebag-Montefiore* (2) overruled *Re Tredgold* (1). Counsel for the first annuitant relies on the decision of this court in *Re Wigfull (J.) & Sons' Trade Marks* (3). He says, on the basis of that decision, it is not sufficient merely to state that the law has been differently laid down by a superior court in a subsequent case. Swinfen

EADY, M.R., said, on p. 58:

> In my judgment, where an application is made to enlarge the time for appeal, there must be some proper grounds for supporting it. It is not enough to say the time has expired; it expired more than two years ago, and therefore I cannot appeal without the time being enlarged; because it has expired, therefore I ask that it may be enlarged. That alone is no ground. In my judgment also, it is not necessarily a ground for enlarging the time that in some subsequent case a different view is taken of the construction of an Act of Parliament.

His decision on this point is on p. 59:

> In my opinion the court has power to enlarge the time for appealing if it is just that, under the circumstances, an order enlarging the time should be made.

I find no difficulty whatsoever in reconciling the statement that the different decision is not necessarily a ground for enlarging the time with the statement that the court can enlarge the time if it is just in the circumstances to do so.

It seems to me that the principle to be extracted is this. It is not sufficient for a party to come to the court and say: "A subsequent decision of a superior court has said that the principle of law on which my case was decided was wrong." The court will immediately say to him: "That bald statement is not enough for you. What are the circumstances? What are the facts? What is the nature of the judgment? Who are the parties affected? What, if anything, has been done under it?" In other words, the whole of the circumstances must be looked at. If the court, in the light of those circumstances, considers it just to extend the time, then it will do so. That seems to me to be the proper principle, and it is entirely in accordance with the view taken by this court in *Gatti* v. *Shoosmith* (4), the most recent case under this rule.

Taking all the circumstances of this case into consideration, namely, the fact that the rights of the parties not before COHEN, J., are unaffected by his order: the fact that beyond mere payment down to date nothing has been done: the fact that no inquiries have been pursued: the circumstance that this court has declared the law to be different to what it was thought to be—putting all those facts together, the case appears to me to be clearly one where, in the interests of justice, leave ought to be given.

Counsel for the applicant does not seek and, indeed, could not properly seek, to disturb any payments which have been made, and the order giving leave will recite that he does not seek to disturb those matters.

Subject to that, the case is one in which, in my opinion, the interests of justice demand that leave should be given, and it will be given accordingly.

FINLAY, L.J.: I agree.

MORTON, L.J.: I agree.

Leave to appeal given.

Solicitors: *Boodle, Hatfield & Co.* (for the trustees); *Garrard, Wolfe & Co.* (for the applicant and also for the tenant for life); *Field, Roscoe & Co.* (for the first annuitant); *Culross & Co.* (for the second annuitant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

In the Estate of MARDON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), **July 28, 1944.**]

Wills—Revival—Three wills—Later will revoking earlier—Subsequent codicil altering main portions of first will—Absence of express confirmation of first will—Intention to revive first will—Wills Act, 1837 (c. 26), s. 22.

The testatrix executed three wills, the first in 1934, the second in 1935, and the third in 1939. All those wills contained a revocation clause. The wills were retained in the custody of the solicitor of the testatrix. In 1940, a relative of the testatrix, acting on her express instructions, drafted a codicil to her first will which altered the main portions of that will without, however, confirming it in all other respects and without, in particular, cancelling its revocation clause. This codicil was executed in 1941. It was contended that the codicil did not revive the first will, and that only the codicil and the third will should be admitted to probate:—

HELD: the words in the codicil showed an intention to revive the first will with the exception of two clauses, and there ought to be admitted to probate as the last will of the testatrix the 1934 will, with the exception of two clauses, the codicil and the 1939 will.

[**EDITORIAL NOTE.** A codicil to a revoked will is here held to revive part of the will, although the testatrix did not know that the will had been revoked, having forgotten the existence of later wills. There was clear evidence that the mind of the draftsman of the codicil had been applied to certain provisions of the will, and these are, therefore, held to be revived. A

As to Revival of Will, see HALSBURY, Hailsham Edn., Vol. 34, pp. 91-95, paras. 129-131; and for Cases, see DIGEST, Vol. 44, pp. 365-370, Nos. 1979-2034.]

Cases referred to:

*(1) *In the Goods of Stedham, In the Goods of Dyke* (1881), 6 P.D. 205; 44 Digest 369, *2028*; 50 L.J.P. 75; 45 L.T. 192.

*(2) *Goldie* v. *Adam*, [1938] P. 85; Digest Supp.; 107 L.J.P. 106; 158 L.T. 359; 54 T.L.R. 422; *sub nom. Re Taylor's Estate, Goldie* v. *Adam*, [1938] 1 All E.R. 586. B

Probate Motion by one of the executors to determine whether a codicil, dated Apr. 22, 1941, revived the main portions of a will, dated Apr. 18, 1934, the testatrix having made two subsequent wills. The facts are fully stated in the judgment.

H. Clifford Mortimer for the executor.

Wm. Latey for the Society for the Propagation of the Gospel. C

Barnard, J.: This motion concerns the testamentary affairs of Sarah Tutton Cheriton Mardon, a spinster, who died on Nov. 13, 1943. Her estate is approximately of the value of £12,800. The relevant facts appear from the affidavit of her solicitor and also of a Mr. Cox, who is the present applicant on thd motion. Mr. Cox was a relative of the testatrix.

The late Miss Mardon executed three wills, and all those three wills were D prepared for her by her solicitor. The first will is dated Apr. 18, 1934, and it appoints Agnes Mowbray and Vernon Haddon her executors, and disposes of her whole estate. She executed a further will on Aug. 29, 1935, by which she appointed Mr. Cox and Vernon Haddon to be her executors, and that will also disposed of her whole estate. She executed a third will on Aug. 19, 1939, by which she appointed Mr. Cox and Edith Bellamy her executors, and that will also disposed of her whole estate. All those wills contained a revocation clause, E and those wills, as and when they were executed, were retained by her solicitor in his custody on behalf of the testatrix. The testatrix appears to have been a methodical old lady, and according to her solicitor she was in the habit of making an epitome or abstract of her will as and when a will was executed, and she retained those abstracts for her own use; but the only abstract forthcoming at her death was an abstract of her first will, the will dated Apr. 18, 1934. In F September, 1940, on one of Mr. Cox's visits to the testatrix, she handed him the summary of her first will, and told him that she wanted him to draw a codicil to her will. The testatrix went through the summary of the first will with him, and gave him instructions for the preparation of the codicil. She also handed him a schedule, and asked him to make a fair copy of it, in order that it might be attached to the codicil. Para. 3 of Mr. Cox's affidavit deals in detail with those instructions which he received from the testatrix, and it also deals in G detail with those portions of the summary of the first will which she desired altered by the proposed codicil. Mr. Cox, in due course, drafted a codicil, and he also made a fair copy of the schedule, and the codicil was executed on or about Apr. 22, 1941. Now it is to be noted that the codicil was not drafted by a trained lawyer; it was drafted by Mr. Cox; and I think it is only fair to Mr. Cox to put on record that he undertook this task very reluctantly, and only after having pressed her, the testatrix, to see her solicitor about it. H

This codicil contains no clause confirming the will in other respects, which is a usual clause in a codicil which makes alterations to a will, and nearly always terminates with the clause "In all other respects I confirm my said will," or words to that effect. The question I have to decide is what documents together constitute the last will of the testatrix, and, as such, should be admitted to probate; and it arises out of that general question as to whether the first will in whole or in part has been revived by the codicil which was executed in April, 1941, and purports to be a codicil to that will; and it is also to be noted that it is a codicil to that will by date, and not a codicil to her last will. The question really depends upon the interpretation of the Wills Act, 1837, s. 22, the material part of which reads as follows :

> No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same.

A It is quite obvious from the facts in this case that the testatrix, when she asked Mr. Cox to prepare this codicil, had completely forgotten the existence of the two later wills. In other words, the whole transaction was a blunder, and it is the type of blunder that makes it very difficult to apply the law ; but I should like to say here and now that in trying to apply the law I have received the utmost assistance from counsel engaged in the case.

I think it is clear from the authorities that it is not necessary that a codicil B should show on the face of it that the deceased knew that the will to which the codicil purports to be a codicil had been revoked, and that she was, in fact, reviving such will. This particular codicil shows an intention to revive a part of the revoked will, by reference to certain provisions of that will, as of an existing and valid will. I am fortified by that view I take of the law by what SIR JAMES HANNEN, P., said in the course of his judgment in the case of *In the Goods of Dyke* (1), at p. 208 :

C

> Where a simple mistake has been made as to the date of an instrument, the mistake can be set right : but in a case like this where the mind of the draftsman, whether the testator himself, or someone employed by him, has been really applied to the words of a particular instrument, it is impossible for me to say that it was by mistake that that instrument was referred to instead of another. It is plain that that was the actual instrument which the then draftsman had in his mind, and it is not possible to avoid the conclusion that the codicil which purports to be a codicil to the will of Oct. 29, 1878 D [that was the first and the revoked will] and which, after making certain alterations, confirms that will in all respects does revive that will.

In this case, as I have already pointed out, this codicil contains no clause confirming the will in all respects. Counsel for the Society for the Propagation of the Gospel asked me to admit the codicil and the last will of Aug. 19, 1939, only, to probate, on the ground that the reference in the codicil to the first and E the earlier will was a mistake, and he has referred me to the case of *Goldie* v. *Adam and Others* (2). In that case the facts were the exact opposite of the facts in this case, because in *Goldie* v. *Adam* (2) BUCKNILL, J., found that there was no evidence that the draftsman applied his mind to the provisions of the will to which the codicil purported to be a codicil, and the mind of the draftsman must be treated as the mind of the testator, and also there was a complete absence of any words of revival.

F The evidence in this case is clear and undisputed, that the draftsman applied his mind to certain provisions of the first and the revoked will, and, therefore, at any rate in part, revived that will, and when you read para. 3 of Mr. Cox's affidavit and then compare the first and revoked will with the codicil, it seems clear to me that the draftsman of the codicil did not apply his mind to either the residuary bequest in the first will, which is contained in cl. 4, or the revocation clause which is contained in cl. 7 of the revoked will, and as there is no clause G in this codicil confirming the revoked will, nor does there appear on the face of the codicil any words showing an intention to revive either of those clauses, I do not think that either of those clauses of the revoked will can be admitted to probate, but I do find that the codicil has revived the first will of April, 1934, with the exception of cll. 4 and 7, and reading the codicil and the provisions of the first will which are revived, together, there is no revocation clause and no H bequest of residue, and, therefore, I think there can be no question that the last will, which was never, in fact, revoked, must also be admitted to probate.

Solicitors : *Clifford-Turner & Co.*, agents for *Linnell & Murphy*, Oxford (for the executor) ; *Nicholl, Manisty, Few & Co.* (for the Society for the Propagation of the Gospel).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WATFORD *v.* THE LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Wrottesley, J.), **June 27, 1944.**]

Highways—Private street works—Apportionment of cost—Objection—Persons protected under statute required to give notice of objection—Private Street Works Act, 1892 (*c.* 57), *ss.* 7, 22.

The plaintiffs had executed certain private street works and, under the Private Street Works Act, 1892, made an apportionment of the cost on the defendants whose railway abutted on the street. The defendants claimed to be exempted from the liability to make this contribution by sect. 22 of the Act and gave a notice of objection under the Act, but the notice was out of time. The plaintiffs contended that, even if the defendants were protected by sect. 22, they had lost that protection by failure to give the notice of objection in due time under sect. 7. The defendants contended that persons protected by sect. 22 of the Act were not entitled to give notice of objection :—

HELD : persons protected by sect. 22 of the Act upon whom an apportionment has been made are required to give notice of objection under sect. 7 (*f*) of the Act and by failing to do so they lose the protection of sect. 22.

[**EDITORIAL NOTE.** The Private Street Works Act, 1892, gives some preferential treatment to railways and it was here suggested that, if an apportionment is made upon them, they need not lodge an objection within the time specified for ordinary persons. It is, however, decided that in this respect the railways are not in any privileged position.

AS TO PRIVATE STREET WORKS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 452-464, para. 656-675 ; and FOR CASES, see DIGEST, Vol. 26, pp. 543-547, Nos. 2414-2446.]

Cases referred to :

(1) *R.* v. *Jones & Barry U.D.C., Ex p. Mein* (1907), 71 J.P. 326 ; 26 Digest 542, *2401* ; 96 L.T. 723.

*(2) *Porthcawl U.D.C.* v. *Brogden*, [1917] 1 Ch. 534 ; 26 Digest 547, *2446* ; 86 L.J.Ch. 393 ; 116 L.T. 405.

(3) *Wallasey U.D.C.* v. *Walker & Co.* (1906), 70 J.P. 199 ; 26 Digest 547, *2445*.

ACTION under the Private Street Works Act, 1892, to recover the cost of certain private street works apportioned on the defendants whose land abutted on the street. The facts are fully set out in the judgment.

The Private Street Works Act, 1892, s. 22, provides : Railways and canals abutting but not communicating with streets not to be chargeable with private street expenses. No railway or canal company shall be deemed to be an owner or occupier for the purposes of this Act in respect of any land of such company upon which any street shall wholly or partially front or abut, and which shall at the time of the laying out of such street be used by such company solely as a part of their line of railway, canal, or siding, station, towing path, or works and shall have no direct communication with such street ; and the expenses incurred by the urban authority under the powers of this Act which, but for this provision, such company would be liable to pay, shall be repaid to the urban authority by the owners of the premises included in the apportionments, and in such proportion as shall be settled by the surveyor ; and in the event of such company subsequently making a communication with such street they shall, notwithstanding such repayment as last aforesaid, pay to the urban authority the expenses which, but for the foregoing provision, such company would in the first instance have been liable to pay, and the urban authority shall divide among the owners for the time being included in the apportionment the amount so paid by such company to the urban authority, less the costs and expenses attendant upon such division, in such proportion as shall be settled by the surveyor, whose decision shall be final and conclusive. This section shall not apply to any street existing at the date of the adoption of this Act.

Serjeant Sullivan, K.C., and *Erskine Simes* for the plaintiffs.
Harold Williams for the defendants.

WROTTESLEY, J. : The plaintiffs claim under the provisions of the Private Street Works Act, 1892, the sum of £516 0*s.* 10*d.*, being the final apportionment of the cost of certain private street works in a street in the borough of Watford, namely, that part of Gade Avenue which is bounded for 556½ft. by the railway embankment of the defendants, the London Passenger Transport Board and the London and North Eastern Railway Co. That the plaintiffs did all that was necessary in order to enable them to claim from the various frontagers on that avenue the proportionate part of the cost of the works is admitted, and that the amount claimed, subject to what has to be said hereinafter, is the right amount, is also admitted. It is also admitted that, if the defendant companies had, like ordinary frontagers, to give notice of objection, the notice they gave was out of time. It follows, therefore, that the provisional apportionment became the basis of the final apportionment, and only two questions arise which could form a shield of defence to the defendant companies.

The first question is whether under the Private Street Works Act, 1892, s. 22, (which I will hereinafter refer to as the Act), the railway company are excused from liability to pay their share of these costs on the ground that the land in respect of which the claim is made is land of the railway company which was at the time of the laying out of Gade Avenue used by them solely as a part of their line of railway or works, and had no direct connection with Gade Avenue. It is common ground that in fact this land had no direct connection with Gade Avenue.

[His Lordship considered the evidence and continued]: I have no doubt, therefore, that the defendants were using the land on their side of the fence solely as a part of their line of railway or works, some time before the avenue was laid out. It is not necessary for this purpose that the railway should be opened to the public. The defendants, therefore, were protected by sect. 22 of the Act, provided they have taken the proper steps to invoke that protection.

Upon this part of the case, if the defendants are in the right, they were not merely not bound; they were not entitled to object under sect. 7, and the justices under sect. 8 had no power even to consider any objection they might make. And the defendants agree that this follows from their contentions. This question is not an easy one to determine, and involves a careful consideration of the Act.

The origin of this Act is similar to that of many of the provisions of the Public Health Acts. It began as a private Act obtained by various municipal authorities. Then it was enacted as a general adoptive Act. But whereas the private Act had contained a provision referring disputes to arbitration, the public Act substituted the provisions of sect. 8, making a court of summary jurisdiction the authority for hearing and deciding objections, and denying to the High Court any jurisdiction to deal with "objections under the Act." If, therefore, the protection afforded to the defendants by sect. 22 constituted something which could have been put forward as an objection under the Act, the defendants failed to take the necessary steps in time, and this court cannot help them in view of the plain words of sect. 8 (2), which provides:

> No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever.

It is true that sect. 22 nowhere says that a railway company to which that section applies shall have a ground of objection. The court must, therefore, look at the Act as a whole, and at sect. 7 in particular, to see whether a railway company, relying on sect. 22, is under obligation to raise the matter under sect. 7.

Among the grounds set out precisely as grounds of objection in that section, only two are suggested by the plaintiffs as applicable, viz., (*e*) and (*f*). The section provides:

> During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say) . . . (*e*) That any premises ought to be excluded from or inserted in the provisional apportionment; (*f*) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection.

The rest of that is irrelevant.

Of these grounds, sect. (*e*) is clearly inapplicable, because it is implied in sect. 22 that the railway premises falling within the section are not to be excluded, but are to be inserted in the provisional apportionment. The premises must be included in order that the cost apportioned to them may be spread over the other frontages.

That leaves, however, the far more general words of para. (*f*), namely :

> . . . that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection.

I am aware that there are matters other than those arising under sect. 22 to which these words are apt, but nevertheless they seem to me to be apt also to a case covered by sect. 22. I take the words of sect. 22 to mean that a railway company to which the section applies, even though it be in fact the owner of premises, fronting, abutting or adjoining a street, is to be deemed not to be the owner of such premises. If that be so, an apportionment which not merely includes the premises, but treats them as though the railway company did own such premises is incorrect, judged by the Act. What the apportionment ought to do is to state the cost of the works relative to this frontage, and then to distribute this sum *pro rata* over the other premises, and so against the owners of those other premises. In failing to do this, the apportionment of the cost relative to the premises of the railway company against the railway company, without more ado, is incorrect in respect of something which is made a matter of fact by the Act, and can be objected to on that score by the railway company before the court of summary jurisdiction.

There is no direct authority on this point. It is true that *R.* v. *Jones, Ex p. Mein* (1), is a case where a railway company took objection before justices and failed ; and on appeal to a Divisional Court the justices were upheld. But the point was not taken.

I am fortified in the view I have taken by a decision of SARGANT, J., in *Porthcawl U.D.C.* v. *Brogden* (2), following a decision of BRAY, J., in *Wallasey U.D.C.* v. *Walker & Co.* (3). In that case arguments very similar to those used in this case were put forward, but the judge said, at p. 539 :

> I think that to adopt such a construction would be to read the scheme of the Act too narrowly. In my judgment, the scheme of the Act was to have an apportionment of the liability of particular named persons published and ascertained by the local authority and that from that time forward—or rather from the time when the opportunity under the Act of objecting to that apportionment had passed by—the apportionment should be conclusive, so that all persons concerned should know what their position was. To my mind, it is an essential part of that construction not only that the apportioned amount should be ascertained, but that the persons liable for that amount should be ascertained.

Then later at p. 540, he goes on :

> I should have come to that conclusion on this legislation if there had been no authority in respect of it, but the point seems to have been decided by Bray, J., in *Wallasey Urban Council* v. *W. H. Walker & Co.* (3).

It would undoubtedly have made the Act clearer if it had been provided in sect. 22 that the facts there set out would constitute a good objection to apportionment as against the railway company ; or if among the grounds set out in sect. 7 there had been a reference to the matters enacted in sect. 22. But since there is nothing in sect. 22 to which effect cannot be given in the way I have indicated upon the provisional apportionment, I think that the general line of reasoning used by SARGANT, J., must prevail. The general objects of the Act are best achieved if all objections of whatever nature are disposed of within the period, and by the procedure laid down as the only method in sect. 8 (2).

In the result there must be judgment, therefore, for the plaintiffs for the amount claimed.

That does raise a certain question of costs here. Upon a matter upon which a very large part of the time of the court was taken, the plaintiffs fail but they succeed on the point under the section, and I think the proper order as to costs, subject to what anyone may say, should be that the plaintiffs should have the costs of the action except in so far as those costs were increased by the point taken that the road was laid out before the railway was constructed.

Order accordingly.

Solicitors : *Theodore Goddard & Co.*, agents for *W. G. L. Davies*, Watford (for the plaintiffs) ; *R. McDonald* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

R. *v.* RAWLING TEARSE, LAMBERT HEATON LEE, AND JAMES RITCHIE HASTON AND ANGEL ROSALIE ETHEL KEEN.

[COURT OF CRIMINAL APPEAL (Humphreys, Wrottesley and Tucker, JJ.), **September 25, 1944.**]

Trade Unions—Illegal strike—Acts committed before commencement of illegal strike—Whether acts " in furtherance of " strike—Trade Disputes and Trade Unions Act, 1927 (*c.* 22), *s.* 1.

The appellants were charged under the Trade Disputes and Trade Unions Act, 1927, s. 1, with acting in furtherance of an illegal strike, and with aiding and abetting others to act in furtherance of an illegal strike. The bulk of the evidence against the appellants was concerned with their acts committed before the commencement of the illegal strike. In his summing-up the trial judge informed the jury that an act in the furtherance of an illegal strike might be an act committed before as well as during the strike. The appellants were convicted. On appeal:—

HELD: (i) upon the true construction of the Trade Disputes and Trade Unions Act, 1927, s. 1, the words " in furtherance of a strike " are concerned with acts done after the commencement of the strike.

(ii) where counts are included in an indictment alleging acts of furtherance, particulars of such acts should be included in the indictment.

[**EDITORIAL NOTE.** This case considers whether the offence of acting in furtherance of a strike, within the Trade Disputes and Trade Unions Act, 1927, applies to a strike not yet in existence. The word " furtherance " may mean the advancement of things before they come into existence, or after they have been begun, but in connection with industrial disputes the word has a history. Both the Conspiracy and Protection of Property Act, 1875, and the Trade Disputes Act, 1906, contained the words an act done in contemplation or furtherance of a trade dispute," and in *Conway* v. *Wade* (1), LORD SHAW observed that " furtherance " must apply to a trade dispute in existence. This construction is here accepted and applied to the furtherance of a strike within the 1927 Act.

AS TO ACTS IN FURTHERANCE OF TRADE DISPUTE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 511-516, paras. 809-812; and FOR CASES, see DIGEST, Vol. 43, pp. 122, 123, Nos. 1247-1256.]

Case referred to:

*(1) *Conway* v. *Wade*, [1909] A.C. 506; 43 Digest 120, *1237*; 78 L.J.K.B. 1025; 101 L.T. 248.

APPEALS from a decision of CASSELS, J., dated June 19, 1944, at Newcastle-upon-Tyne Assizes. The facts are sufficiently set out in the judgment of the court delivered by WROTTESLEY, J.

James Burge for the appellants.

C. Paley Scott, K.C., and *Dr. John Charlesworth* for the Crown.

WROTTESLEY, J. [delivering the judgment of the court]: The appellants were charged together with Angel Keen, who has not appealed, with various offences against the Trade Disputes and Trade Unions Act, 1927. They were charged, firstly, with conspiracy together to act in furtherance of a strike declared by sect. 1 of that Act to be illegal, namely, the strike of the Tyneside apprentices, and of this they were acquitted by the verdict of the jury. In the second place each of them was charged with acting in furtherance of such a strike, and of this each of them was found guilty. In the third place each of them was charged with aiding and abetting the commission of such an illegal strike by aiding others to act in furtherance of the strike, and each was found guilty. In the fourth place each of them was charged with conspiracy to incite the apprentices to declare such an illegal strike, and of this they were acquitted by the verdict of the jury. Finally, each of them was charged with actually inciting others to declare such an illegal strike, and of this they were also acquitted by the verdict of the jury.

The evidence upon which all these charges rested was taken together, and no attempt was made to distinguish between those parts of it which supported any one charge as compared with any other charge.

The appellants and Keen are members of the Revolutionary Communist Party; they call themselves Trotskyists, and operate through an organisation called the Militant Workers' Federation.

The matters relied upon by the Crown arose out of the relations between the appellants and the apprentices serving in the shipyards on the Tyne. These apprentices were much disturbed, during the period November, 1943, to March, 1944, by the possibility that they might, as the result of the ballot, be taken from their work in the shipyards and be sent to work in coal mines. Among them was one Davey, a member of the Young Communist League, who got in touch with the appellant Lee, and the defendant Keen, and so first with Haston, who was general secretary of the Revolutionary Communist Party and wrote for a newspaper called the Socialist Appeal, and finally with Tearse, honorary secretary and organiser of the Militant Workers' Federation.

The evidence of the prosecution was in the main uncontradicted, and consisted of the story told by Davey and other apprentices, and of correspondence and other documents prepared by one or other of the defendants, the authenticity of which was not disputed. In general this evidence was, before the conclusion of the trial, confirmed by the evidence of the defendants themselves. From this it is abundantly clear that there was ample material upon which a jury might have found all the defendants, with the possible exception of Haston, guilty of the first count, namely, conspiracy to act in furtherance of the strike, which actually occurred, and also of conspiracy to incite and of actually inciting the apprentices to strike, as in fact they did, after the issue of a letter on Mar. 7 to the Minister of Labour threatening that unless legislation were passed within three weeks to guarantee the unconditional exemption of all apprentices (irrespective of industrial group) from liability to direction under the Mining Ballot Scheme, the apprentices' labour would be withheld.

The jury, however, negatived the case for the Crown under these heads, and found the four defendants guilty only of doing acts in furtherance of the strike and of aiding and abetting Davey and others to act in furtherance of a strike.

It is necessary here to say that the bulk of the evidence dealt with the acts and behaviour of the defendants before the strike broke out, which consisted of the preparation of plans, some of which were reduced into writing, for the setting up of various committees for the better and more efficient conduct of the strike, and for the co-ordination of it with other strikers elsewhere, and the preparation of documents for the purpose of inflaming the minds of the apprentices, and the making of speeches to meetings of apprentices along the same lines.

At the close of the evidence for the Crown, counsel for the defendants submitted, among other matters, that the words in the 1927 Act: "to do an act in furtherance of a strike" presuppose the existence of a strike, and that, therefore, nothing that took place before Mar. 28, the day when the strike began, could be said to be such an act. Upon that submission the judge ruled that the prosecution were not confined to acts done after the strike had begun, and in the course of his summing up, in dealing with counts 2 to 5, he said:

> It is not necessary that the act in furtherance of an illegal strike should be during the actual time of the strike; it may be an act before the strike as well as an act during the strike, if it should be an act which could reasonably be regarded, upon the evidence, as an act in preparation for the strike and that that strike is an illegal one. Counts 6, 7, 8 and 9 are against respectively Tearse, Lee, Keen and Haston for aiding and abetting Davey and others to act in furtherance of a strike declared by the Act of Parliament to be illegal, and you may take it that a person aids and abets the commission of an offence if he is present and assists in carrying it out.

These appellants say that, in view of the language of the section there was a misdirection of law. The matter is not free from doubt, but the court has come to the conclusion that the view submitted by counsel for the appellants at the trial and here before us, is the true view, and I proceed to give the reasons which have induced us to come to this conclusion.

The Act deals both with strikes and lock-outs, and the relevant parts of sect. 1 of that Act are as follows:

> It is hereby declared (*a*) that any strike is illegal if it (i) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged; and (ii) is a strike designed or calculated to coerce the government either directly or by inflicting hardship upon the community . . . it is further declared that it is illegal to commence, or continue, or to apply any sums in furtherance or support of, any such illegal strike or lock-out. For the purposes of the foregoing provisions (*a*) a trade dispute shall not be deemed to be within a trade or industry unless it is a dispute between employers and workmen, or between workmen and

workmen, in that trade or industry, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of persons in that trade or industry; and (*b*) without prejudice to the generality of the expression "trade or industry" workmen shall be deemed to be within the same trade or industry if their wages or conditions of employment are determined in accordance with the conclusions of the same joint industrial council, conciliation board or other similar body, or in accordance with agreements made with the same employer or group of employers.

Subsect. (2) of the same section provides:

> If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike or lock-out, declared by this Act to be illegal, he shall be liable on summary conviction to . . . Provided that no person shall be deemed to have committed an offence under this section or at common law by reason only of his having ceased work or refused to continue to work or to accept employment.

The important words are: "If any person declares, instigates, incites others to take part in or otherwise acts in furtherance of a strike."

If these words fell to be construed apart from the consideration of previous legislation and pronouncements upon that legislation, it might be difficult to suggest that any restriction should be placed upon the meaning of the word "furtherance." In English literature it is found applied equally to mean the advancement of things before they come into existence, and after they have been begun. But the words "in furtherance of a trade dispute" have a history. The Trade Disputes Act, 1906, s. 1, which is to be construed as one with, amongst others, the Trade Disputes and Trade Unions Act, 1927, added to the Conspiracy and Protection of Property Act, 1875, s. 3, the following paragraph:

> An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.

In *Conway* v. *Wade* (1), the defendant, a trade union representative, who had succeeded in getting a man dismissed from his employment by threatening to bring out the other employees unless he were dismissed, invoked the protection of this paragraph. A jury found that no trade dispute was at the time within contemplation or in execution, and that the defendant acted as he did with a view to forcing the plaintiff to pay a fine due to the trade union, and awarded the plaintiff damages.

In upholding the decision some of their Lordships took the opportunity to consider and observe upon the meaning of the language "an act done in contemplation or furtherance of a trade dispute." And both LORD LOREBURN, L.C., and LORD SHAW expressed the view that an act done in contemplation meant an act done before the dispute arose, and an act in furtherance meant an act done when the dispute had come into existence. These observations and this distinction were not necessary to the decision in that case, but we think there can be no doubt that they are right. If "act in furtherance" had meant or included an act done with a view to the dispute, and before it came into existence, there was no need for the words "in contemplation of."

When the Act of 1927 was passed, Parliament must have been aware that the words "in furtherance of" an object, had this restricted meaning, that the thing to be furthered must be in existence. The more so as the word is used more than once elsewhere in the Act in a context in which it refers to something already in existence.

Is there anything in sect. 1 (2) of the Act of 1927 to indicate that a wider meaning is to be attributed to this phrase? Firstly, it is here linked up with the word "strike" as contrasted with "dispute." That cannot, we think, lead to a wider meaning for the word "furtherance." Secondly, it is here used not merely to define the limits within which a man may lawfully agree with another in restraint of trade, but to create a new statutory indictable offence. In such a context it would require clear words to indicate that "furtherance" is to be given a wider meaning than it carries in other parts of these Acts (which are to be read as one) and, indeed, in the Act itself. It was suggested that the whole phrase is a mere repetition of the former phrase "in contemplation or furtherance," substituting for the vague words "in contemplation" words more appropriate for a criminal offence, namely, declaring, instigating, inciting. It is not necessary for us either to assent to or dissent from this proposition. But we should not expect the legislature to create new statutory offences by the use of words so vague as "acts in contemplation of a strike."

In the event, therefore, we think that the acts done before a strike which are made crimes by this section are the matters mentioned *eo nomine*, that is to say, declaring it, instigating it, inciting to it; and that the acts "otherwise in furtherance of a strike" which are made crimes by the section are acts done after the strike has commenced. Applying this conclusion to the case under appeal, the jury should have been directed by the judge that under the counts alleging acts of furtherance or aiding and abetting others to do acts of furtherance against the defendants, they must confine their attention to evidence of acts committed after the strike had broken out. In fact the jury were, as has been pointed out, told the contrary of this, and the conviction under these counts cannot stand, and must be quashed.

There is one other matter upon which we think it is desirable that we should say something. Perhaps because in the case under appeal both those concerned for the prosecution and those concerned for the defence concentrated their attention on the more important counts, such as the conspiracy counts, and the counts relating to incitement, no particulars were either included in the indictment or demanded by the defence of the counts alleging acts in furtherance against the defendants. From every point of view, but particularly from the point of view of those accused of such matters, we think it desirable that where counts are included in an indictment alleging acts of furtherance, particulars of such acts should be included in the indictment.

Appeals allowed. Convictions quashed.

Solicitors: *Smithdale, Rutledge & Co.* (for the appellants); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

Re PALMER. NATIONAL PROVINCIAL BANK, LIMITED *v.* BARWELL AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 17, 1944.**]

Will—Bequest—All stocks, shares and moneys in the care, custody or possession of bank—Bank holding only dividend mandates for stocks inscribed at the Bank of England—Testatrix afterwards of unsound mind—Order in lunacy for transfer of stocks to the name of Accountant-General—Effect of order on dividend mandates—Lunacy Act, 1890 (c. 5), *s.* 116—*Lunacy Act*, 1922 (c. 60), *s.* 2 (8).

A testatrix held certain stock inscribed in her name at the Bank of England. In respect of these holdings she had for a number of years before her death given dividend mandates to Grindlay's Bank under which all interest payable upon the stock was paid into her current and deposit accounts at that bank. These dividend mandates represented the only connection of Grindlay's Bank with the sums of stock. By her will the testatrix bequeathed to her nephews "all such stocks, shares, moneys and things as shall at her death be standing in her name or at her disposal and be in the care, custody or possession of Grindlay's Bank." She died in July, 1941. In the interval her mind had become affected, and on Mar. 6, 1941, an order in lunacy was made directing *inter alia* the investments inscribed at the Bank of England to be transferred to the name of the Accountant-General. In regard to the sums of cash standing to her credit in the accounts of Grindlay's Bank the direction was given that they be placed to a special credit designated "Moneys at Grindlay & Co., bankers," and be brought into court. It was contended that the vesting of the stock in the name of the Accountant-General was a mere temporary measure and did not revoke the dividend mandates, thereby severing the only link connecting the holdings with Grindlay's Bank:

Held: (i) at the time of the death of the testatrix the holdings were not "in the care, custody or possession of Grindlay's Bank."

(ii) although powers were given by the Lunacy Act, 1922, s. 2 (8) to preserve the *status quo* in relation to the lunatic's estate, the order of the master contained no reference to the inscribed stock. Applying general principles, therefore, the order vesting the stock in the name of the Accountant-General had the same effect as if the testatrix, while of sound mind, had herself transferred the dividend authority to another bank.

(iii) since all connection with the stocks was severed by the order from Grindlay's Bank, the stocks did not fall within the bequest.

[**EDITORIAL NOTE.** This is not a case of ademption, as in *Re Wood*, [1894] 2 Ch. 577, where it was held that transfer of stock under an order in lunacy adeemed a bequest of all stock "standing in my name and belonging to me." Here the bequest was described as being in the "care custody and possession of Grindlay's Bank" and by the time the subject-matter fell to be ascertained the dividend mandate to the bank had been revoked by the lodgment order in lunacy, so that there was nothing answering this description which could pass under the will. The stock in question could have been dealt with by a Master under the powers given by the Lunacy Act, 1922, s. 2 (8), to preserve the *status quo*; but, as it was not the subject of a special order, the matter is decided upon general principle.

AS TO JUDICIAL POWERS OVER ESTATE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 348-353, paras. 601-608; and FOR CASES, see DIGEST, Vol. 33, pp. 215-221, Nos. 1228-1302.]

Case referred to:

(1) *Re Walker, Goodwin* v. *Scott*, [1921] 2 Ch. 63; 33 Digest 216, *1236*; 90 L.J.Ch. 433; 125 L.T. 764.

APPEAL from an order of UTHWATT, J., dated May 4, 1944. The facts and arguments are fully set out in the judgment of LORD GREENE, M.R.

C. L. Fawell for the appellants.

W. G. H. Cook for the respondent trustees.

C. D. Myles for the infant respondent.

G. D. Johnston for the respondent life-tenants.

LORD GREENE, M.R.: We are concerned with two holdings of stock which belonged to the testatrix. One of them was a $3\frac{1}{2}$ per cent. conversion stock, and the other was 4 per cent. consols. Both those holdings were inscribed in the name of the testatrix at the Bank of England. She held another stock—I am not sure whether the proper word is inscribed or registered—either inscribed or registered, in her name, we are told, at the Westminster Bank. No question arises with regard to the last mentioned stock on this appeal.

In respect of all three holdings, the testatrix had, a number of years before her death, given dividend mandates under which the interest payable upon them was payable to Grindlay's Bank. She also had current and deposit accounts at that bank; and those accounts were fed entirely, with the exception of, I think, the sum of £100, from the interest on these three holdings of stock.

On Mar. 6, 1941, an order was made under the Lunacy Act, 1890, s. 116, which, to a considerable extent, was common form in its nature. A receiver was appointed and provision was made for the maintenance of the testatrix, and certain lodgments in court were directed. The investments of the testatrix which were affected by that order were, first, all her inscribed stocks, including the two in question which were inscribed in the books of the Bank of England. Under the lodgment schedule, those holdings were to be transferred into the name of the Accountant-General.

Certain registered stocks were also directed to be transferred into the name of the Accountant-General, and, also, it should be noticed, certain inscribed stock which was inscribed in the books of the Westminster Bank. There were two sets of New South Wales stock which were inscribed in the books of the Westminster Bank, and the proper officer of the Westminster Bank was, by the lodgment schedule, directed to transfer them. Those two sums of New South Wales stocks were different to that in respect of which Grindlay's held a dividend mandate, and it does not appear why that last-mentioned sum of New South Wales stock was not dealt with by the lodgment schedule. Anyhow, it was not so dealt with. The result was that that apparently remained inscribed at the Westminster Bank in the name of the testatrix.

The gift in the will of the testatrix on which the controversy arises is in these terms:

> I bequeath all such stocks, shares, moneys and things as shall at my death be standing

in my name or at my disposal and be in the care, custody or possession of Grindlay's Bank Limited of Parliament Street, London, S.W.1. to such of them my nephews as shall be living at my death and if more than one of them shall be so living as tenants in common in equal shares.

The only items of property belonging to the testatrix with which Grindlay's were associated were the three sums of stock I have mentioned and the sums in the two accounts. The only connection of Grindlay's Bank with the three sums of stock consisted in the fact that dividend mandates had been signed by the testatrix for the payment of the interest upon them to Grindlay's Bank. Apart from that, Grindlay's had nothing to do with them. With regard to the New South Wales stock, no question arises here on the decision which has been given in regard to it, namely, that that stock fell within the words of the bequest as being "in the care, custody or possession of Grindlay's Bank Limited."

The question we have to deal with arises solely in connection with the other two sums of stock and has been dealt with on the footing that, but for the order directing the lodgment of these sums of stock, they, too, would have been properly described as being "in the care, custody or possession of Grindlay's Bank" at the date of the death.

UTHWATT, J., has held that those two sums of stock, having during the life of the testatrix, been put into the name of the Accountant-General, with the result that the only connection Grindlay's Bank had with them was severed, could not be said to be "in the care, custody or possession of Grindlay's Bank" at the time of the testatrix's death. It is argued that that decision was wrong.

I propose to assume that, but for the lodgment, and, if the stock had remained subject to the same directions of the testatrix, it would have fallen within the language of the bequest. The only question I propose to discuss, and the only question which has been argued before us, is whether, on that basis, the lodgment under the order has had the effect of taking these stocks out of a description which otherwise they would have satisfied.

It cannot be disputed that, at the death of the testatrix, which took place on July 12, 1941, it was impossible to say that those two holdings were "in the care, custody or possession of Grindlay's Bank." If the testatrix had not become, unfortunately, of unsound mind, and had herself severed the only connection with Grindlay's Bank by revoking the dividend mandate in their favour and signing another dividend mandate in favour of another bank, it could not be disputed that, if she had then died, the holdings would not have been then "in the care, custody or possession of Grindlay's Bank."

The question, therefore, is whether the circumstance that that connection with Grindlay's Bank was severed as a result of the order in lunacy makes any difference to the position as it would have been if the connection had been severed by the voluntary act of the testatrix herself.

It is said as a general proposition (and I do not in the least wish to dispute it) that, in the administration of the estates of lunatics, the court will always be careful not to disturb the actual state of affairs, in which the estate of the lunatic is found, more than is necessary for the purpose of the care of the lunatic and the due administration of the lunatic's estate. But, apart from statute, the proper principle to apply appears to me to be that acts done pursuant to, or as a consequence of, any order in lunacy are as effective as, and produce precisely the same results as, acts done by the lunatic himself or herself, save in so far as a statute may otherwise provide, or save in so far as, under some statutory discretion, a different provision may be made by the Judge in Lunacy, or the Master on his behalf.

The position with regard to statutory provisions of that kind is, I think, made clear in a decision of RUSSELL, J., in *Re Walker* (1). I need not go into the details of that case, but the effect of the decision, I think, is this. Apart from statutory provisions, which modify what would otherwise be the result of an order in lunacy, the order in lunacy has its *prima facie* simple effect, notwithstanding the fact that it may alter the rights, or disappoint the hopes, of persons interested, or likely to be interested, in the lunatic's estate.

The section which RUSSELL, J., had to deal with was the Lunacy Act, 1890, s. 123 (1). That was one of the statutory provisions to which I have referred. The earlier one was the Lunacy Regulation Act, 1853, s. 119, and since the decision of in *Re Walker* (1), there has been a third Act. I wish to say a word about that third Act for a reason which will appear. The Lunacy Act, 1922, s. 2 (8), is in the following terms :

> Amongst the powers which by virtue of the Lunacy Act, 1891, s. 27, may be exercised by the Master there shall be included the power of making orders for the purpose of preserving so far as possible in the administration of the property of the lunatic the quality, tenure and devolution of the property.

In the present case, the Master had that power in mind because, in regard to the two sums of cash standing in the accounts at Grindlay's Bank, he made a special direction from which it is clear that he had the terms of this clause in the will before him. The special direction that he made was to this effect :

> For the purpose of preserving so far as possible in the administration of the property of the patient the quality and devolution of the sum of £507 2*s.* 4*d.* or other the amount standing to the credit of the patient on current account at Messrs. Grindlay & Co., Ltd. . . . and the sum of £100 or other the amount similarly standing on deposit account at the said bank, the same are to be placed to a special credit designated " Moneys at Messrs. Grindlay & Co., Ltd., bankers."

The lodgment schedule directed those sums to be brought into court, and, as a result of their being brought into court, they were, at the date of the death, not covered by the literal language of the bequest. But it is quite obvious that the Master, in making that special order, desired, so far as he could—and I have had no occasion to consider whether he could or could not do it under this section—to preserve the position as to those two sums of cash pursuant, as he conceived, to the powers given to him by the 1922 Act, s. 2 (8). He made no such order with respect to the two sums of stock ; therefore, this question falls to be considered without reference to any of the statutory provisions under the Lunacy Acts designed, putting it broadly, to preserve the *status quo* in relation to the lunatic's estate. The only ground, therefore, on which the appellant can succeed must be on some principle of law, if he can point to one, which is applicable to the case.

The bequest is one the subject matter of which can only be ascertained at the death of the testatrix. Strictly speaking, no case of ademption arises. At the death of the testatrix the situation of her property must be looked at, and it must be asked what articles are there which satisfy the description in both respects as standing in her name or at her disposal " in the care, custody or possession of Grindlay's Bank." As I have said, the only link which could be said to satisfy those words had, at the date of her death, been severed. On no argument could this stock be said to be " in the care, custody or possession of Grindlay's Bank." Does the fact that that link was severed by reason of something done in lunacy justify us in saying we must treat it as though it had not been severed ? I can find no principle in any of the cases, nor, indeed, any principle grounded in good sense, which would justify us in laying down any such proposition.

It seems to me that the legislature, having indicated the cases in which the situation and nature of the property are to be, or may be, preserved, can only have done it on the assumption that, but for these special provisions, the ordinary law would apply. I think it well to point out at this stage that, if it be true that the 1922 Act, s. 2 (8), empowers the master to make the order which would preserve the *status quo* in such a case as this, it is unfortunate that, if, by a mere oversight, or by some misconstruction of the will of the lunatic, he fails to make such an order, the interest of third parties, who are necessarily not before him, may thus be profoundly affected. But I do not see how that can be helped.

In answering the first general proposition put before us, I feel constrained to say that the order of the Master in Lunacy, in these circumstances, has its *prima facie* effect, and is not to be given some artificial effect merely because it is an order in lunacy. Then counsel for the appellants argued that his case could be put on a broader ground, and he called our attention to a number of authorities of this nature. Testators frequently make bequests of articles of property by reference to their situation at the time of their death. The bequest of the contents of a house, for instance, is a typical case. It has been held in a number of such cases, summing them up, if I may do so, that where articles whose normal situation is in the particular house, articles which, so to speak, are normally domiciled there, are temporarily removed for some special purpose in circumstances which do not indicate any intention of permanent removal in the mind of the testator, those articles, for the purpose of such a gift, are to be treated as still remaining in the house—they belong to the house, if one may so put it. The fact that a piece of furniture has been sent away for repair, or a picture has been sent away to be cleaned, does not operate to take those articles out of the gift as at the death of the testator in the same way that a permanent removal would have done.

Counsel for the appellants argued that the present case could be treated as analogous to those cases, because the order for lodgment in court was really done for the purposes of safe custody. As a matter of fact, we are told that orders, certainly in the case of inscribed stock, are made as of course, and it is probable that the order in this case was made almost automatically, according to the regular practice. But, for the sake of argument, treating it as a removal for safe custody, I cannot see that a removal made in such circumstances is comparable with the type of removal considered in the cases to which counsel for the appellants has referred. The removal from Grindlay's Bank was not a temporary removal; it was intended to be a permanent removal. If the testatrix herself, not being of unsound mind, decided to transfer her dividend authority from Grindlay's Bank to another bank, nobody could suggest that that was a temporary transfer analogous to the case of removal of furniture for greater safety during some particular time, or for repairs, or something of that sort. People do not change their banks in that sort of way as a temporary measure. If the testatrix had done it, it would obviously have been a permanent act, changing, so to speak, the domicil of these holdings from Grindlay's to some other bank. I cannot see myself that the order of the Master in Lunacy in this case has any different character. It was not, in any sense, a temporary removal. It was just as permanent a removal as if the testatrix had done it herself.

In the result, therefore, although it may appear to be unjust or unfortunate, I find myself constrained to hold that the two stocks in question do not fall within the bequest, and, accordingly, this appeal fails.

I should add that I have delivered this judgment in my own words out of deference to the very careful and helpful arguments which have been presented to us; but, had it not been for that, I think I should have been quite content to approve the judgment of the judge and accept his reasons as my own.

Finlay, L.J.: I agree.

Morton, L.J.: I agree. I only want to add this. **Uthwatt, J.**, decided this case on the assumption that the possession of the dividend mandate by Grindlay's Bank, Ltd., was sufficient to bring the stocks in question within the ambit of the phrase "in the care, custody or possession of Grindlay's Bank Limited." As my Lord has said, this court has decided the case upon the same assumption, without expressing any view as to whether that assumption is a correct one.

I agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Williamson, Hill & Co.*, agents for *Page, Gulliford & Gregory*, Southampton (for the appellants, for the respondent trustees and for the infant respondent); *Lovell, Son & Pitfield*, agents for *Pitfield & Oglethorpe*, Petworth (for the respondent life-tenants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

PORTER *v.* PORT OF LIVERPOOL STEVEDORING CO., LTD.

[LIVERPOOL ASSIZES (Hilbery, J.), **April 24, 1944.**]

Master and Servant—Duty of master—Provision of safe system of working—Adaptation to changing circumstances—Unloading of cargo—Change over from discharging by means of a derrick to hauling up by straight lift—Breaking of rope.

The defendants, who were stevedores, were engaged in discharging a cargo of bacon from a ship in South Hornby Dock, Liverpool. In order to discharge the cargo from the refrigerator chambers in the upper tween decks the bacon was placed in slings and swung up above the coaming of the hatch. This operation caused chafing on the rope fall and accordingly the defendants adopted the expedient of joining a wire leg to the rope fall to take the chafing. It was the duty of the hatch boss to watch for weakening at the join of the rope fall and the wire leg and to make a new join when necessary. When the plaintiff came on to work with the night shift the refrigerator boxes had been emptied and work was proceeding on the straight lifting of slings from the lower tween deck. Nevertheless the combined rope fall and wire leg were still being used, although this was unnecessary and involved the risk of fraying at the join. After the plaintiff had been working for some hours, a rope gave way at the join with the wire leg and the load of bacon in the sling fell upon the plaintiff and caused him serious injury:—

HELD: the employers had not provided a safe system of working, since they had not adapted the system to changing circumstances, and they were liable in damages.

[**EDITORIAL NOTE.** This is an interesting illustration of the principle that the duty of an employer to provide a safe system of working may vary during the course of a job. A system which is safe at the beginning may require modification as the work proceeds, and failure by a servant of the employer to provide such modification is here held to amount to negligence for which the employer is liable at common law, as distinguished from negligence in carrying out a safe system, for which the defence of common employment might have been available.

AS TO THE DUTY OF AN EMPLOYER TO PROVIDE A SAFE SYSTEM, see HALSBURY, Hailsham Edn., Vol. 22, pp. 189, 190, para. 317; and FOR CASES, see DIGEST, Vol. 34, pp. 196-203, Nos. 1602-1657.]

Case referred to:

*(1) *Speed* v. *Thomas Swift & Co.*, [1943] K.B. 557; [1943] 1 All E.R. 539; 112 L.J.K.B. 487; 169 L.T. 67.

ACTION for damages for negligence. The facts are fully set out in the judgment.

E. Wooll, K.C., and *B. R. Rice-Jones* for the plaintiff.

W. Clothier, K.C., and *S. Scholefield Allen* for the defendants.

HILBERY, J.: On June 17, 1943, the defendants, who are stevedores, were discharging cargo from a ship in the South Hornby Dock, in the Port of Liverpool. During the day, including the afternoon, at the hatch in question in this case, they had been discharging from what are called by them the boxes, the refrigerator chambers, in the upper tween decks. They were working the hatch with two gangs.

In order to discharge from the refrigerator boxes in the upper tween decks, it was necessary, when the cargo to be discharged—in this case bacon, mostly in boxes and bales—was placed in the slings, for the whole sling with the load to be dragged from its position, first sideways, so as to bring it under the open hatch, and then, when it was under the open hatch, to haul it up above the height of the coaming, where it would be swung to the required position and lowered.

Now that process could not be done without the fall from the derrick head, when it was attached to the sling in the refrigerator boxes and took the strain for the dragging and lifting, being brought sharply in contact with the underside of the coaming of the hatch, and then, as the dragging began, the fall was necessarily rubbed against that under-side until at last the loaded sling was brought free of the refrigerator box and swung out under the open hatch. It is obvious, of course, that the consequence of that chafing on the fall would be to weaken a rope fall very rapidly.

At this time, the only form of rope which was available for use at all was a sisal rope, not manilla, and the sisal rope is shorter in the fibres than manilla and perhaps liable to chafe a little more rapidly than manilla.

In order to overcome the dangers attendant on working with a rapidly weakening fall from the derrick, the defendants adopted during the day and while clearing the boxes a method which was as follows: they used at the end of the rope fall a wire leg of some 20ft. to 25ft. in length, which would be of a sufficient length to reach from the loaded slings in the refrigerator boxes A
out to the open hatch, so that it would be the wire leg, when attached to the fall from the derrick, which would be rubbing against the under-side of the coaming of the hatch, and take the chafing as the bales were drawn to the open space under the hatch.

That wire leg, as I have said, had to be affixed to the fall from the derrick. It could not be fixed by means of an eye in the rope fall and a thimble in that eye and then a shackle to the eye at the end of the wire, because that thimble B
with an eye and that shackle would not pass through the gin block at the end of the derrick, and as it was necessary to have a length of wire leg such as I have stated in order to get the necessary lift to bring the load above the hatch coaming, it was necessary to have a join at the point where the wire leg joined the rope fall which would pass through the gin block.

The method which was, therefore, adopted was a well recognised method, C
and it was this: to splice the rope to the eye at the end of the wire, the wire having an eye at the upper end which was fairly flat from the strain that had been put upon it. The rope was a three-strand rope. It was unstranded for a certain distance, the strands were unwound and made free, and then two of them were passed through the eye to form a loop in the eye from the one side to the other. The third was passed from the opposite side through the eye, and then all three were brought back on to the standing part of the rope fall and D
were tucked into the rope fall in a long splice.

The long splice, when it was newly made, bunched a little, of course, as even the best made splice is bound to do; but it was easily flattened down by being drawn out in taking the strain of a load, and after it had been well drawn out it would, with the eye at the end of the wire, readily pass through the gin block.

That was the method, and as I have said, a well-recognised method, but it is obvious, of course, to anyone with any experience of rope and wire rope, E
that where the strands of that rope had been rove through the eye of the wire, the very action that it was necessary for this wire eye and rope fall to go through in dragging these heavy loads out from the refrigerator boxes and swinging them under the hatch and lifting them, would produce a grinding and chafing of the wire on the strands of the rope that had been rove through the eye of the wire.

That would result, of course, in a rapid weakening at that join of the rope F
part of the join. That was recognised, and it was said here by the defendants' witnesses that to obviate the risks necessarily resulting from the danger of that chafing, the hatch boss was required to keep, and it was part of his duty to keep, a constant watch on that join to see whether it was weakening and, when he observed it weakening, his duty was to cut it and reeve a fresh length of strands of rope through the eye and make a fresh splice. G

The evidence shows me that at any rate once or twice during the day the hatch boss had cut the join and made a fresh join of the same nature as before. The evidence for the plaintiff is that on one or other of the falls the join had given way or broken: but whether that evidence really refers to the occasions when the hatch boss cut it away, or whether it refers to occasions when it had given, I think is a little uncertain. However that may be, there had not been any mishap with the device previously in the day, and I do not think it matters H
very much for the purposes of my judgment and the view I take in this case whether, in the course of doing that work of the extraction of the cargo from the refrigerator chambers, that fall with the leg attached to it had given way or had been cut away when it was weakening, because this case in my view does not turn on the negligence of the hatch boss in not keeping a sufficient look out on the join.

Towards the late afternoon or early evening, the refrigerator boxes in the upper tween decks were emptied; the discharge of those refrigerator boxes was completed, and the discharge began of the lower tween deck; and the lower tween deck under the opening of the hatch of the upper tween deck was the site, from then onwards, on which they were loading the slings, and that site was actually composed, at that point, of the hatch coverings of the lower hold.

Upon that site immediately under the opening of the hatch above, the men discharging then assembled the loads which were to go up in the slings, in the
A way in which, if one sees these things at all or has moved about at all in places where they are done, one is accustomed to see these slings being loaded. The sling would be spread and prepared to receive the load of bales and sides of bacon and the load would then be placed on the sling and the sling ropes would be brought up and, when the fall from the derrick came down, it would be hooked to the sling; the hatch boss would give the direction to the man on the derrick, and the loaded slings would be lifted.

B They were lifted, and, the derrick being fixed to one side of the hatch, in order that they might in the quickest way possible be deposited over that side where they were required, the fall was kept in position for a straight lift by a guy rope with a traveller on the fall, and that guy rope was controlled by a man standing by the hatch on the deck above.

Now, when the change over in the work from the discharge of the refrigerator boxes to the straight lifting of slings loaded on the lower tween deck took place,
C no change was made in the contrivance of the fall which I have just described. In other words, the type of fall which was, it may be said—and I think probably rightly said—a necessary type to use when discharging the refrigerator boxes, was maintained for a straight lift from the deck below the open hatch of the loaded slings of cargo.

The plaintiff came on to work with the night shift, and the fall with the wire
D leg on the end was still being used as the system of work for lifting from the lower tween decks the cargo in the slings for a straight hoist. It was, of course, no longer necessary to use a wire leg on the end of the fall from the derrick. There was no dragging from the side of the vessel to bring under the open hatch the load which was about to be hoisted. It was a straight up and down hoist which was then in progress.

About two hours after the plaintiff began his work in that lower tween deck,
E about 10 o'clock at night, a load just having been sent up, he set about what was the next necessary operation which he had to perform. He began to arrange an empty sling under the open hatch into which the next load would be placed. While he was arranging that sling under the open hatch, the load which had just been sent up, with something like 1,200lbs. of bacon in it, fell upon him; and it fell because the strands of rope at the end of the rope fall where they were rove through the eye of the wire leg, in the way I have indicated, gave way;
F and such was the weight which fell upon the plaintiff, and such the force with which it fell upon him, that his legs were forced through the hatch-cover on which he was standing. To anyone who knows what is the usual weight and strength of hatch coverings, that will give some indication of the force of the blow which he took.

There was the accident, and the result to the plaintiff has been very serious.
G That I can deal with later. The problem which I have to resolve is this: Are the masters, the defendants, liable to the plaintiff at common law? In other words, is it established on those facts that they were guilty of a breach of that duty owed by the master to the servant in such circumstances?

MACKINNON, L.J., has pointed out in his judgment in *Speed* v. *Thomas Swift & Co.* (1) that what I have to resolve is whether it was a breach of the masters' duty; and that question has to be resolved by remembering
H the following things: (i) It is the duty of an employer towards his servant to provide a safe system of working in the operation the servant has to carry out; (ii) the employer may, and in many cases must, delegate the provision of such a system to an agent, but in such a case the employer is responsible for any failure of such agent to provide such a system; (iii) if injury to a workman is caused by the failure of the employer, either personally or vicariously, to provide such a system of working, the employer is liable to pay damages to the workman for such injury; (iv) if, however, the employer has fulfilled, either personally or vicariously, the duty of providing such a system and the

workman is injured by the failure of a fellow workman, even though he may be in a superior or commanding position towards the injured man, to carry out the system properly, the doctrine of common employment absolves the employer from liability to the injured workman.

Now those are the principles, and, as MacKinnon, L.J., observed, it is not difficult to enunciate those general principles; the difficulty is to apply them to the facts of a particular case. In this case the plaintiff says the system which was provided by the master, through those to whom of necessity he delegated the duty of deciding what system of work should be employed for the particular operation which was being carried out, was not a reasonably safe system.

For the employers it is said that the system which was provided was a reasonably safe system provided the hatch boss kept the necessary look-out on this join, and did his duty in watching that join and seeing to it that when the join weakened through the rope chafing, it was cut away, and a fresh join was made; and they say, therefore, that in this case it was not a failure to provide a reasonably safe system, but it was a failure of a fellow workman to carry out the system properly.

There is the problem. I have, therefore, to ask myself, as the court asked itself in *Speed* v. *Thomas Swift & Co.* (1), what is the provision of the system here? and I find considerable help in that decision towards a solution of the matter, and I think I am following the reasoning of the decision in arriving at the conclusion at which I do arrive.

In that case Lord Greene, M.R., has said, at p. 562 ([1943] 1 All E.R., p. 541):

> . . . the duty of providing a safe system must be considered, not generally, but in relation to the particular circumstances of each job . . .

In another part of his judgment he says, at p. 563 ([1943] 1 All E.R., at p. 541):

> . . . in many kinds of work there is no such regularity or uniformity, and what is a safe system can only be determined in the light of the actual situation on the spot at the relevant time. A system of working may consist of a number of elements and what exactly it must include will, it seems to me, depend entirely on the facts of the particular case.

Lastly, in another part he says, at p. 563 ([1943] 1 All E.R., p. 542):

> A system may be adequate for the whole course of the job, or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.

Now just as in that case it was said by Goddard, L.J., at. p. 573 ([1943] 1 All E.R. at p. 547), that the decision in the particular circumstances as to whether there was danger in leaving a rail in position must rest with the careful employer according to the circumstances which were present, so here I think that when there was the change over from the type of discharging by means of the derrick which was being done when the refrigerator boxes were being emptied, to one where the hauling up was going to be a straight lift, it rested with the employer at that change in the work to adopt what was a reasonably safe system for the changed form of the work.

I ask myself, if it had been work beginning with straight lifting, and this type of fall with a wire leg had been employed, should I have said that was the provision of a reasonably safe system for working with straight lifting from the hatch? And I am bound to say I should not. It was not a reasonably safe system to provide for that straight lifting, because the danger inherent in it was well known, and there was no necessity for the system where you had merely a straight lift. With merely a straight lift, the all-rope fall from the derrick could have been used, and it is clear on the evidence given by one of the defendants' witnesses that he intended, that very evening, when that fall with the leg had got into a condition that he considered unsafe, to cut it away and not to go on using the wire leg, because they had then only straight lifting to do; that he then intended to adopt what would have been the proper system for the straight lifting, namely, the all-rope fall to the hook; and the case seems to me to be one where the master failed to employ what was the reasonably safe system when the change over in the type of work rendered the old system which had been previously used, with its inherent danger, no longer necessary.

That means that in my view there was a failure on the part of the foreman of this ship and the hatch boss—the persons to whom the masters left the general lay-out of the work and the system to be adopted, and necessarily left it, because the defendants are a limited liability company and must leave it to some servant—there was a failure on the part of those servants, to provide a reasonably safe system for the work which was being done at the time when the plaintiff met with his injury.

As I have said, if the plaintiff had met with his injury at a time when the wire leg was being used, and the hauling of the cargo from the refrigerator chambers was the work in hand, a very different state of affairs might have been the case, and indeed it seems to me that the plaintiff would then have been faced with a very formidable difficulty, because for that particular type of work that is a well-known system which can be worked with reasonable safety for the man, provided that the hatch boss performs his duty of watching the join sufficiently carefully; and if, in those circumstances, when that work is being done by that system a man is injured through the hatch boss not keeping a sufficiently careful look-out on the join, I should have thought—though of course I have not to decide that matter—that probably the plaintiff would fail, because that would be the causal failure of the hatch boss to perform the duty which was imposed upon him and upon the performance of which depended the continued safety of the system. In these circumstances I have to decide what is the proper amount of damages for the plaintiff to recover.

On the evidence the allegation made in the amended statement of claim that sisal rope was an improper and unsafe rope to use and ought not to have been used, fails, in my view, completely, because it has been proved before me that sisal rope was the only rope available, having regard to the war-time restrictions, and that no manilla rope is available for use in the docks at the present time, nor was it then. Nor is it right to say that the join between the rope and the wire leg was a wrong type of join. It was the only type of join which could be employed where such a length of wire leg was required for use at such a hatch. The other sorts of join would not have been useful, because they would not have passed through the gin block at the head of the derrick. It is quite wrong to say that there was a breach of duty because the defendants did not adopt a shorter wire leg and a thimble; had they adopted a shorter wire leg, it would not have reached the distance which it was necessary to have it reach in order to discharge the refrigerator boxes in this particular ship.

The only breach of duty which the plaintiff has alleged and upon which he succeeds is the breach of duty which I have indicated as being present in this case.

Judgment for plaintiff.

Solicitors: *Silverman & Livermore*, Liverpool (for the plaintiff); *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

BILLINGS *v.* REED.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and Lawrence, L.JJ.), **October 11, 1944.**]

Emergency Legislation—Personal injury—" War injury "—Fatal injury—Cases unprovided for by scheme—Partial dependency—Funeral expenses—Claim in trespass—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *ss.* 3, 8—*Personal Injuries (Civilians) Scheme,* 1944 (*S.R. & O.,* 1944, *No.* 369), *arts.* 1 (8), 29.

Negligence—Fatal injury by aeroplane—" War injury "—Cases unprovided for by scheme—Partial dependency—Funeral expenses—Claim in trespass—Personal Injuries (Emergency Provisions) Act, 1939 (*c.* 82), *ss.* 3, 8—*Personal Injuries (Civilians) Scheme,* 1944 (*S.R. & O.,* 1944, *No.* 369), *arts.* 1 (8), 29.

The plaintiff's wife met her death owing to the negligence of the defendant who flew an aeroplane at a height of only 6ft. over the field in which she was working. The negligence was admitted, but the defendant claimed that, under the provisions of the Personal Injuries (Emergency Provisions) Act, 1939, s. 3 (1), he was not liable for damages. The plaintiff had been only partially dependent on his wife and had, therefore, no rights under the Personal Injuries (Civilians) Scheme, 1944, made in pursuance of the

1939 Act. Further, the Scheme makes no provisions for payments which can be claimed under the Law Reform (Miscellaneous Provisions) Act, 1934. It was contended that (i) the injury which resulted in the death of the injured person could not be a "war injury" within the meaning of the 1939 Act; (ii) since the plaintiff had no rights under the Scheme, the action was not barred by sect. 3 (1) of the Act; (iii) the section did not bar a claim in trespass; and (iv) the claim for funeral expenses was not barred, since such expenses were not "physical injuries" :— A

HELD: (i) the injury was a "war injury" within the meaning of the Act, even though instantaneous death resulted from the injury.

(ii) sect. 3 (1) relieved the defendant from liability for damages, in spite of the fact that the plaintiff had no rights under the Scheme; sect. 3 (2) of the Act was purely procedural and did not modify sect. 3 (1).

(iii) the words "breach of duty" in the section covered the case of trespass to the person. B

(iv) a claim for funeral expenses under the 1934 Act is not a separate claim but a head of damage in an action for damages resulting from fatal injury. It was, therefore, impossible to say that such a claim was not barred because such expenses were not physical injuries.

[**EDITORIAL NOTE.** This case contains a very valuable review of the object and purpose of the Personal Injuries (Emergency Provisions) Act, 1939. The object of C the legislation is expressed in the words of LORD GREENE, M.R., at p. 419 *post*, "No existing legislation is to apply in the case of war injuries however caused; war injuries are to be treated as a special class of injury outside the intention and scope of previous legislation which has not contemplated any such thing and compensation for such injuries or provision for such injuries is to be made and made only under the terms of a scheme of pensions and allowances to be settled by the Minister." The plaintiff here is unable to bring himself within the Scheme made under the Act. Nevertheless, the court holds that his right of action for damages for negligence is lost, although the D effect of this is that he obtains no pecuniary compensation at all, either from the Government or from the defendant who had caused a "war injury" within the meaning of the Act.

FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, s. 3, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 1063.]

Cases referred to:

(1) *Adams* v. *Naylor*, [1944] 2 All E.R. 21. E

(2) *Carlin* v. *Donaldson Atlantic Line, Ltd.*, [1943] S.C. 172.

APPEAL by the defendant and cross-appeal by the plaintiff from a decision of CHARLES, J., dated Mar. 2, 1944, in an action for damages for negligence and/or trespass brought under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The action was brought by the plaintiff as personal representative of the estate of his deceased wife. The deceased F woman met her death owing to the negligence of the defendant, a pilot in the Royal Air Force, who flew an aeroplane at a height of less than 6ft. over a field in which she was engaged on farm work. The defendant admitted negligence but pleaded that he was relieved from liability for damages under the provisions of the Personal Injuries (Emergency Provisions) Act, 1939, s. 3 (1), since the death was due to a war injury within the meaning of the Act. CHARLES, J., held (i) the injury was a war injury within the meaning of the Act; (ii) since G the plaintiff was not entitled to compensation under the Personal Injuries (Civilians) Scheme, 1944, his right of action outside the Act was not barred by sect. 3 (1) of the Act. He, therefore, gave judgment for the plaintiff for £450 and costs. In his notice of cross-appeal, the plaintiff sought to set aside that part of the judgment which held that the injury suffered by the deceased was a war injury within the meaning of the 1939 Act.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), for the appellant. H

Arthur Ward, K.C., and *S. L. Elborne* for the respondent.

The Solicitor-General: The purpose of the Act was to provide for compensation by the community for war injuries and for the relief of the individual in the case of any claim made against him in respect of such injuries. The relief section of the Act applies to all cases where the Minister was empowered to make a provision in the Scheme, not merely where the existing Scheme covers the case. That point was not fully argued in *Adams* v. *Naylor* (1). [Counsel referred to *Carlin* v. *Donaldson Atlantic Line* (2).]

Arthur Ward, K.C.: The Act is to make provision for war-injured people and the common law rights can only be taken away where a claim under the Personal Injuries (Civilians) Scheme is possible. The plaintiff, as a partially dependent relative, has no claim under the Scheme nor is there any provision for the benefit of the estate of a war-injured person. Neither death nor funeral expenses can be called "physical injuries." The section is alternatively based on trespass to the person and sect. 3 (1) of the Act does not purport to grant relief in such cases.

LORD GREENE, M.R.: The deceased woman met her death in circumstances which unquestionably, but for the statute in question, would have given to the respondent, as her legal personal representative, a right to claim damages in respect of the negligent act of the appellant by which her death was unquestionably caused. It would also have given him a right to claim under the Fatal Accidents Act, 1846, in his personal capacity. It was contended on behalf of the defendant before CHARLES, J., that both those causes of action are taken away from the plaintiff by virtue of the provisions of the Personal Injuries (Emergency Provisions) Act, 1939. That contention was unsuccessful; hence this appeal.

The Act in question, passed on the day of the outbreak of the present war against Germany, made provision for pecuniary grants by way of pension or lump sum, as the case might be, in respect of "war injuries sustained by gainfully occupied persons" and "war service injuries sustained by civil defence volunteers." We are concerned only with the former of those two classes as the lady was a civilian, and was not in the forces of the Crown, nor was she a civil defence volunteer. She was killed when she was pursuing her peaceful work. The Act, therefore, is making provision for pensions or other allowances to civilians who suffer what is described as a "war injury." "War injuries" are defined, by sect. 8 (1) of the Act, as meaning:

> . . . physical injuries . . . (*b*) caused by the impact on any person or property of . . . any aircraft belonging to, or held by any person on behalf of or for the benefit of, His Majesty . . .

The question which arises at the outset is, of course, the question whether this particular injury which caused the instantaneous death of the deceased woman is a war injury within the meaning of the Act. If it is not, no question can arise as to the exclusion of the claims in the present case. As will be seen presently, claims are only excluded by the Act in respect of war injuries, and, if the injury is not a war injury, then the ordinary remedies are not excluded. The object of the plaintiff's cross-appeal was to establish the proposition that this particular case was not a case of a war injury within the meaning of the Act because it resulted in death. In my opinion, that argument cannot be sustained. It seems to me clear beyond possibility of doubt that the circumstance that death ensues from injury does not in any way make that injury any the less a war injury than it would have been if the person injured had survived. Indeed, one would not expect to find any such distinction drawn which would be quite anomalous and produce the most extraordinary results. In my opinion, however, the language of the Act makes the matter clear beyond question. By sect. 1 (2) of the Act, the scheme which the Minister is to make under the Act may authorise him to make payments of specified classes, one of which is as follows:

> (*b*) payments by way of pension or grant, which shall be payable only where the injury causes serious and prolonged disablement or death.

To what do the words "the injury" in that paragraph refer? They refer back quite clearly to the words at the beginning of the subsection "In respect of any such injury." To what do the words "such injury" in that phrase refer? They refer back to the injuries mentioned in subsect. (1), and those injuries are war injuries, and a war injury means a physical injury. Accordingly, sect. 1 (2) (*b*), if it is written out at length without shortening it referentially, as it is shortened by the draftsman, would read as follows: ". . . payments by way of pension or grant, which shall be payable only where a war injury causes death, and a war injury is a physical injury." Those considerations appear to me to dispose of the argument quite conclusively.

Having dealt with that matter, I must now turn to the language of the section which affects the other questions in the case. Sect. 3 (1) provides as follows:

> In respect of a war injury sustained during the period of the present emergency by any person . . . no such compensation or damages shall be payable, whether to the person injured or to any other person, as apart from the provisions of this subsection (*a*) would be payable under the Workmen's Compensation Acts, 1925 to 1938, or the Employers Liability Act, 1880 . . . or (*b*) would, whether by virtue of any enactment, by virtue of any contract, or at common law, be payable (i) in the case of a war injury, by any person . . . on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible.

Putting it shortly: the broad effect of that provision, read according to its ordinary meaning, appears to me to be that in the case of war injuries all rights to sue in tort or for breach of contract, or to claim under the Workmen's Compensation Act or any other enactment, is taken away where the injury in question is a war injury and the cause of action is based on some negligence, nuisance or breach of duty. That, again, for the sake of complete accuracy, must be qualified by remembering that the right to claim under the Workmen's Compensation Act is expressly excluded, and the words "attributable to some negligence, nuisance or breach of duty" do not apply in that case; it is a separate case.

Pausing there for a moment: It may be said (and the argument at first sight seems attractive) that it would be a remarkable thing for Parliament to take away a man's legal rights and give him nothing in exchange, and, therefore, there is a natural inclination of the mind to construe this abrogation of rights as not extending to cases where, under the scheme contemplated by the Act, no alternative right is conferred. In the present case, although unquestionably the plaintiff had rights under the Law Reform (Miscellaneous Provisions) Act, 1934, and under Lord Campbell's Act, he has no rights under the Personal Injuries (Civilians) Scheme, 1944. The reason for that is this: the Scheme, which is a most elaborate document, and necessarily so, does not enable a widower to claim under it unless he was "the dependent husband of his wife at the date of her death . . . incapable of self-support and in need" (art. 1 (8)). It is quite obvious that many widowers who could have claimed under Lord Campbell's Act are unable to satisfy the stringent conditions laid down by this Scheme, and the present is such a case. If the contention of the defendant is right, the present plaintiff has under the Scheme lost the rights he would have had under Lord Campbell's Act and got nothing in exchange. So far as any claim under the Law Reform Act is concerned, there, of course, he is claiming in right of his deceased wife and in respect of the tort committed against her. There, again, there is no provision in the Scheme under which the estate of the deceased wife in her right can make any claim at all in such circumstances as these.

It is said that to construe the language of this Act in a way which will involve the deprivation of injured persons of their common law or statutory rights in cases where the Scheme does nothing for them would be a very grave matter, and, if possible, the courts should avoid putting such a construction upon the language used. That argument, as I have already said, at first sight sounds attractive. Broadly speaking, one may say that the court does not construe an Act of Parliament as depriving a person of his normal rights as a subject unless clear language is used, and where that would be the effect of an Act in ordinary cases it has often been held that a comparatively slight context is sufficient to justify the court in construing the language in the opposite sense. In the present case, however, it seems to me that there are certain broad considerations which, so far from leading to a displacement of the *prima facie* meaning of those words, actually confirm it, or, at any rate, indicate the strong probability that the legislature intended precisely what it has said. The legislature was confronted with a situation in which injuries arising out of war conditions might affect the civil population in a very extraordinary and unusual degree, and it appears to have taken the view that neither existing statutes nor, in some cases, existing contracts ought to be regarded as having contemplated anything of that kind. Therefore, it seems to me that the scheme of this legislation was to lift that class of injury right out of the common law and existing legislation, such as the Workmen's Compensation Act and any other statutes, and to give to it special treatment. That seems to me to be not an out-of-the-way or unjust idea, but a very sensible and businesslike way of handling a totally unprecedented situation. The legislature is, in effect, saying: No existing legislation is to apply in the case of war injuries however caused; war injuries are to be treated as a special class of injury outside the intention and scope of previous legislation which has not contemplated any such thing, and compensation for such injuries or provision for such injuries is to be made and made only under the terms of a scheme of pensions and allowances to be settled by the Minister with the approval of the Treasury, subject to the usual control of Parliament. I cannot find in such a conception anything extravagant; it seems to me to be both reasonable and just. Therefore, looking at the general context of the Act, that is to say, its apparent scope and purpose on the face of it, I do not find there any context which would justify me in writing a gloss or a qualification into the clear language of sect. 3 (1) which in terms takes away the right of action.

Now is there anything else—any other context—which might be useful for the purposes of the plaintiff's argument? What is pointed to is sect. 3 (2), which deals with cases where a claimant is entitled to make a claim under some scheme or enactment or instrument, but fails to make it in time because he has mistakenly endeavoured to claim under the scheme made pursuant to the Act. It is what may be called a procedural section, and in order to appreciate the point I think one ought to read the relevant words:

> The failure to give a notice or make a claim or commence proceedings within the time required by any enactment shall not be a bar to the maintenance of proceedings in respect of any personal injury, if (*a*) an application for a payment under a scheme, or under any other enactment or instrument, has been duly made to the Minister in respect of the injury; and (*b*) the court before which the proceedings are brought is satisfied that the said application was made in the reasonable belief that the injury was such that a payment could be made under the scheme or that other enactment or instrument, as the case may be; and (*c*) the Minister certifies that the application was rejected, or that payments made in pursuance of the application were discontinued, on the ground that the injury was not such an injury; and (*d*) the proceedings are commenced within one month from the date of the said certificate of the Minister.

The way in which that subsection operates can be shown by a very simple example: A man who has suffered an injury which he believes to be a war injury makes a claim under the Scheme, and the Minister rejects it. Then, provided he takes his proceedings within one month, the fact (if so it be) that he would otherwise be out of time is not to prejudice him in the proceedings which he then takes. He can take those proceedings because, in the example I have given, the injury not being a war injury his right to claim outside the Scheme in respect of that injury is not taken away by sect. 3 (1). That is the sole object of subsect. (2). It is purely procedural, and it is intended to preserve the rights of a man who has made a mistake by claiming in the wrong quarter. It is said that, if the only case where a man could be in such a position was a case where he alleged a war injury and it turned out not to be a war injury, why does not the subsection say so? The subsection refers to an application:

> . . . made in the reasonable belief that the injury was such that a payment could be made under the scheme.

It is suggested that, if the defendant's construction of the Act is right, then those words ought to have been "in the reasonable belief that the injury was a war injury." That argument is not one, I think, which carries any weight, for the simple reason that the rather longer phrase which the draftsman has used—"in the reasonable belief that the injury was such that a payment could be made under the scheme"—was due to the fact that he had to find a form of words which would cover not merely mistaken claims under the scheme of this Act, but mistaken claims under "any other enactment or instrument," as is mentioned in this subsection. I cannot extract from subsect. (2) any such context as would justify me in cutting down the clear language of sect. 3 (1).

The fact that the object of this Act was in substance what I have suggested can, I think, be seen from a consideration of the way in which the Scheme has been framed pursuant to the Act itself, and with the tacit approval of Parliament as provided in the Act. At any rate, we are entitled to look at the Scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorised. It will then be found, I think, that the proposition for which counsel for the plaintiff has contended is quite unarguable. Let me take two examples only, although many others could be found. One example is to be found in art. 60 (2) of the Scheme, under which the Minister, in the case of a person who, in his opinion, is unworthy of a grant from public funds, can either withhold the award of a pension or can direct that it be forfeited. It would follow, therefore, according to the argument, that, in the case of an unworthy person from whom a pension has been withheld, he could then go to the court and say : " Sect. 3 (1) does not apply to me because that is limited to cases where the person in question is entitled to claim a pension, and, therefore, my common law or statutory rights are not taken away from me, and I am entitled to maintain my action." That would be a very remarkable result because it might very well be that the person whom the Minister regards as unworthy of a grant from public funds, by this fortunate avoidance of the stay on his right of action, could put himself into a far better position than the worthy person to whom a pension has been awarded under the Scheme. The matter does not end there, because what is to happen if a person has been awarded a pension which is subsequently stopped because he is considered to be unworthy ? According to counsel for the plaintiff—and I think that logically he is driven to the position—directly the pension is stopped that person's common law or statutory rights revive, and he can accordingly claim in respect of them, unaffected by this legislation or this Scheme. That, again, seems to me to be a curious result. The other example to which I should like to refer is the case where the injury was caused or contributed to by the serious negligence or misconduct of the person injured. That is referred to in art. 6 of the Scheme, and in such a case the Minister may withhold, cancel or reduce the award. Take the case of a workman who is injured in such circumstances as to bring that discretion of the Minister into operation, and the Minister decides not to make an award to him under the Scheme. That decision, according to the argument, entitles the workman to claim under the Workmen's Compensation Act, provided that the case is one of those under that Act where, notwithstanding the serious misconduct of the workman, he is still entitled to recover. Those examples show the type of case which may arise. I think it is sufficient to put the position under the Scheme in contrast with the position as it would be if the plaintiff's contention is right to see that the policy of the legislature was much more likely to have been what I have suggested it was, than that which is attributed to it by the plaintiff.

That, I think, is all I have to say on the main part of this appeal. But there are two minor arguments upon which I must say a few words. First, it is said by counsel for the plaintiff that his claim was laid in trespass as well as in negligence, and he suggests that sect. 3 (1) does not bar a claim in trespass. He takes the words in sect. 3 (1) (*b*), " on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty," and says : " If I claim in trespass I am not putting my case on the ground that the injury was attributable to any of those three things, because trespass is not negligence, trespass is not nuisance, and trespass is not breach of duty." I am quite unable to accept that proposition. It would appear to limit the words " breach of duty " to cases of breach of duty to take care, which, of course, is the same thing as negligence. It seems to me that, in this context the phrase " breach of duty " is comprehensive enough to cover the case of trespass to the person, which is certainly a breach of duty as used in a wide sense. If that view be not right, it would be easy to get round this subsection, because the plaintiff would only have to frame his action on the ground of trespass to the person, saying no word about negligence, and he could avoid the effect of the subsection altogether. That cannot possibly be the result.

The other point is a quite minor one. Counsel for the plaintiff says that, whatever the effect of the statute may be in respect of the rest of his claim, it does not preclude his client, as executor of the deceased, from claiming for the funeral expenses which the estate has had to defray. In my opinion, there is nothing whatever in that point. Funeral expenses in a claim under the Law Reform Act are merely an item of damage which the statute regards as flowing from the cause of action which the deceased person had and which, by the statute, is preserved to the executor on the death of the deceased. It is not a separate claim at all, it is merely a head of damage in respect of the one and only cause of action.

In the result, in my opinion, the judgment of CHARLES, J., cannot stand, and the appeal must, accordingly, be allowed.

MACKINNON, L.J.: I agree. The only possible argument by which the judgment of CHARLES, J., can be supported with any show of plausibility must, I think, be based on sect. 3 (2) of this Act. That seems to contemplate that, where an application has been made to the Minister under the Scheme and has been rejected, proceedings in the courts can then be taken if commenced within one month from the Minister's decision. It may be arguable that that shows that, if no allowance or pension can be obtained under the Scheme, then a right of action may be pursued in the courts, and, therefore, the right of action cannot be barred by sect. 3 (1). But I think that is quite an untenable argument. The words of sect. 3 (1) are quite clear and unambiguous. They are, putting it shortly: In respect of a war injury, there shall be no enforcible claim in the courts. I think that subsect. (2) is only dealing with the cases where there has been a failure to obtain an allowance under the Scheme because the injury was not a war injury. That seems to be indicated by the whole of the section, and, in particular, by the words in subsect. (2) (*c*):

> The Minister certifies that the application was rejected, or that payments made in pursuance of the application were discontinued, on the ground that the injury was not such an injury;

" Was not such an injury " seems to me quite clearly to mean " was not a war injury." Sect. 3 (1) only puts an end to claims in respect of war injuries; it has no operation with regard to an injury which is not a war injury. Sect. 3 (2) seems to me only to be put in to guard against the possible effect of delay in bringing a suit which is not barred by sect. 3 (1) because it is not in respect of a war injury, the delay being caused by the mistaken belief of the claimant that his injury was a war injury. If it was not a war injury, then sect. 3 (1) does not bar him from pursuing his remedy in the courts.

I agree that the decision of CHARLES, J., was erroneous, and this appeal must be allowed.

LAWRENCE, L.J.: I agree, and have nothing to add.

Appeal allowed. Cross-appeal dismissed. Judgment for the defendant with costs of the appeal and cross-appeal and of the action. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor* (for the appellant); *W. H. Thompson*, agent for *Williams & Co.*, Peterborough (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re RING SPRINGS, LIMITED'S PATENTS.

[CHANCERY DIVISION (Simonds, J.), **January 17, 1944.**]

Patents—Extension of term—Patents acquired from German company—English company paying under agreement one-quarter of moneys received under patents to German company—German company majority shareholders in English company—Loss or damage suffered due to hostilities—Whether English company carried on wholly or mainly for benefit of German company—Custodian of enemy property—Vesting order—Shares sold by Custodian to directors of English company—Patents and Designs Acts, 1907-1942, *s.* 18 (6).

An English company owned three patents, granted in 1927 and expiring in 1943. The patents were acquired from a German company under an agreement dated Oct. 18, 1926. As part of the purchase price the Englis company had agreed to pay to the German company one-quarter of all moneys or other consideration received by way of purchase money, royalties or otherwise from the sale of, or granting of licences under, the patents. Most of the issued shares in the English company were held by the Germa company, the remainder being in the hands of the directors of the Englis company, who were British subjects. By an order of the Board of Trade dated Jan. 13, 1941, the German held shares were vested in the Custodia of enemy property who, on May 15, 1942, sold them to the directors of th

English company. It was found as a fact that the company's business in connection with the relevant inventions was brought to a complete termination by the outbreak of war. The company, claiming to have suffered loss and damage by reason of hostilities between His Majesty and Germany, applied for an extension of the term of the three patents. It was contended that the business of the company was carried on wholly or mainly for the benefit of the German company, certainly so for the period from the outbreak of war to the vesting order and from the latter date to the date of the sale of the shares to the directors of the English company :—

HELD : (i) the business of the English company was not carried on wholly or mainly for the benefit of the German company.

(ii) since the majority of its shares belonged beneficially to an enemy subject at the outbreak of war, losses suffered by the company in regard to the period from the outbreak of war to the vesting order could not be taken into consideration.

(iii) from the date of the vesting order to the sale of the shares to the English directors the beneficial ownership of the shares was in statutory abeyance.

(iv) the patents could be extended, in each case, for a period from the date of the vesting order to the expiration of the patent.

[**EDITORIAL NOTE.** The main point of interest in this case is the application of the principle decided under the Trading with the Enemy Acts of the last war that an order vesting property in the Custodian of Enemy Property effects an abeyance of the beneficial ownership. It is here held that in consequence of this abeyance it cannot be said, after the making of an order vesting shares of an enemy company in the Custodian, that the business of the company is carried on for the benefit of the enemy shareholders.

AS TO EXTENSION OF TERM OF PATENTS, see HALSBURY, Hailsham Edn., Vol. 24, pp. 737-746, paras. 1373-1378 ; and FOR CASES, see DIGEST, Vol. 36, pp. 719-725, Nos. 2056-2125.]

Case referred to :

(1) *Re Munster*, [1920] 1 Ch. 268 ; Digest Supp. ; 89 L.J.Ch. 138 ; 36 T.L.R. 173.

APPLICATION by originating summons under the Patents and Designs Acts, 1907-1942, s. 18 (6), for an extension of the terms of certain patents. The facts are fully set out in the judgment.

James Mould for the applicants.

G. H. Lloyd Jacob for the Comptroller-General of Patents.

SIMONDS, J. : This application for extension of Letters Patent which is made under the Patents and Designs Acts, 1907 to 1942, s. 18 (6), raises a question of some difficulty in regard to the meaning and effect of the proviso to that subsection. The subsection is as follows :

> Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the court in considering its decision may have regard solely to the loss or damage so suffered by the patentee : Provided that this subsection shall not apply if the patentee is a subject of such foreign state as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's dominions.

The applicant is an English company, Ring Springs, Ltd., which was incorporated on Oct. 14, 1926. Its primary object, according to its memorandum of association was to purchase or otherwise acquire any interests in any patents, etc., and in particular to acquire the benefit of certain patents relating to springs and with a view thereto to enter into and carry into effect an agreement with a German company, Ringfeder G.m.b.H. The original capital of the company was £1,000 divided into 1,000 shares of £1 each, those numbered 1 to 100 being founders' shares and carrying certain special rights, and the remaining 900 being ordinary shares. The capital was increased from time to time, and at the outbreak of war was £4,000 of which 100 were still founders' shares and the remaining 3,900 were ordinary shares. At the same date all the founders' share and 2,700 of the issued 3,400 ordinary shares belonged to the German company; the other 700 issued shares belonged to British directors; 600 ordinary shares remained unissued. To complete the history of the shareholding, on Jan. 13, 1941, the Board of Trade made an order under the Trading with the Enemy Act, 1939, and the Trading with the Enemy Custodian Order, 1939, vesting in the Custodian the 100 founders' shares and 2,400 ordinary shares held by the German company, and on May 15, 1942, the Custodian in exercise of the powers conferred on him by the vesting order sold the same shares to the three British directors of the company.

Immediately after its incorporation the company, as contemplated by its memorandum, entered into an agreement dated Oct. 18, 1926, with the German company. That agreement which is expressed to be made between the German company, hereinafter called "the vendor" of the one part and the English company, hereinafter called "the company" of the other part, recites the title of the vendors to certain inventions and Letters Patent and other rights, and by its operative part it was agreed that the vendor should sell and the company should purchase certain scheduled patents, the full and exclusive benefit in certain scheduled applications, and the exclusive right to all Letters Patent and other similar privileges in respect of the said inventions in all Dominions, colonies and territories therein stated. Cll. 2, 3, 4, 5 and 6 contain provisions ancillary to the first provision, and cll. 7 and 8 provide that as part of the consideration for the sale the company shall allot and issue to the vendor or its nominees as fully paid up 100 founders' shares of £1 each of and in the capital of the purchaser; the allotment and issue to be made upon the completion of the assignment to the company of the scheduled patents.

Cl. 8—and this is the material clause—provided:

> As a further part of the said consideration the company shall pay or transfer to the vendor one-quarter of all sums of money or other consideration received by the company either by way of purchase money or by way of royalty or otherwise howsoever from the sale of or the grant of licences under the patents to be assigned to the company in pursuance of cl. 4 hereof and all patents under which the company shall acquire exclusive rights in accordance with the provisions of cl. 5 hereof or any one or more of such patents.

The patents now in suit, namely, Letters Patent Nos. 285,401, 289,072 and 289,073, had not been granted at the date of the agreement, but in pursuance of its provisions they were in due course vested in the company, the first of them claiming the date Feb. 15, 1927, and the second and third of them the date Apr. 21, 1927, under the International Convention.

Apart from the question that arises under the proviso to subsect. 6, I should have no difficulty in granting an extension of the Letters Patent for the full period of the war. The evidence shows clearly that the company's business and opportunity of business in connection with the relevant inventions were brought to a complete termination by the outbreak of war. The question is, however, whether and to what extent the company is to be excluded from the benefit of the subsection upon the ground that the company is "a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects"—"such subjects" meaning such subjects of a foreign state with which His Majesty is at war. There are two separate aspects to this question. First, it is said that (apart from the shareholding of the company) the business of the company is carried on wholly or mainly for the benefit of the German company. This contention is founded on cl. 8 of the agreement of Oct. 18, 1926, which provided for the payment by the company to the German company of one-quarter of all sums of money or other consideration received by the company either by way of purchase money or by way of royalty or otherwise, howsoever from the sale of or the grant of licences under the patents subject to the agreement. A provision of this kind requires anxious consideration, but I think that, in this case, the facts that are disclosed by the affidavits of the managing director, C. W. Myddleton, displace the suggestion that the business of the company comes within the relevant proviso. It is not a matter in which it is possible, or desirable, to lay down any general rules. The word "mainly" in the proviso is itself sufficiently vague. It is, I think, sufficient to say, without attempting to define the border line, that each case must be examined on its own facts and that, in this case, the condition of the proviso is not, upon this ground, satisfied.

Secondly, it is said that (*a*) for the period from the outbreak of war to Jan. 13, 1941, the date of the vesting order, and (*b*) for the period from the latter date to May 15, 1942, the date of the sale to the British directors, the business of the company was carried on for the benefit of the German company. I have thus divided up the period before the company's shares came to the hands of the British directors, because it appears to me that different considerations apply to the two parts of it.

It could not, I suppose, be doubted that, if a patent was vested at the outbreak of war in an enemy subject and in the course of the war was transferred to a British subject, the latter could not claim to be compensated under the subsection for any loss or damage sustained by the former during that part of the war in which the patent was vested in him. I entertain no doubt that by parity of reasoning, where the patentee is an English company and the whole of the shares or the majority of them belong beneficially to an enemy subject the company cannot claim under the subsection in respect of the period during which that state of affairs continues. The language of the proviso is amply wide enough to cover such a case, and it appears to me to accord with its obvious purpose to give that effect to it. I, therefore, hold that, in regard to the period up to Jan. 13, 1941, I cannot take into consideration any losses suffered by the company.

The greater difficulty arises in regard to the period between the vesting in the Custodian and the sale by him of the shares. It was held that the effect of a vesting order under the Trading with the Enemy Acts in the last war was to create an anomalous position—otherwise almost unknown to our law—the beneficial ownership of vested property was in statutory abeyance (see *Re Munster* (1)). In this respect I can see no different result arising from a vesting order made under the present Trading with the Enemy Acts. If so, from the date of the vesting order, Jan. 13, 1941, to the date of the sale the beneficial ownership in the shares formerly held by the enemy was in statutory abeyance; the legal title was in the Custodian.

I have to apply to this set of facts the words of the proviso. Can I predicate of this period that the business of the company was then carried on wholly or mainly for the benefit of the German company? It is, I think, impossible to do so. If the proviso is to operate it must be shown affirmatively that the case falls within it. What may happen as the result of further war legislation or Treaties of Peace to the property of enemy subjects vested in the Custodian, or its proceeds, lies in the future. The German shareholders may or may not in the days to come get in cash or in kind the proceeds of sale of their shares; in either case I cannot say that during the period in question the business of the company was in fact carried on for their benefit.

I have been referred to certain cases in which the question that I now have to decide appeared to arise. But I am unable, from the short judgments that were delivered to discuss the *ratio decidendi*. I must, therefore, follow my own judgment in the matter. I decide, accordingly, that I can in each case grant an extension for a period from the date of the vesting order, namely, Jan. 13, 1941, to the expiration of the patent. There will be a re-grant on the usual terms; the English company will pay the costs of the Comptroller.

Application for extension granted.

Solicitors: *Bristows, Cooke & Carpmael* (for the applicants); *Solicitor to the Board of Trade* (for the Comptroller-General of Patents).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

EASSON *v.* LONDON & NORTH EASTERN RY. CO.

[COURT OF APPEAL (Goddard and du Parcq, L.JJ., and Vaisey, J.), **March 3, 1944.**]

Carriers—Negligence—Railway—Infant passenger's fall through door of corridor train in motion—Opening of door unexplained—Whether doctrine of res ipsa loquitur applicable—Burden of proof.

The infant plaintiff, a boy aged five, travelled in the company of his mother on an express corridor train from Newcastle to London. Soon after the train had left Grantham station, the boy was allowed by his mother to go to the lavatory. He went down the corridor of the coach and fell through a door on the off-side of the train on to the railway line and was seriously injured. There was no evidence how the door became open. It was in proper working order, fitted with a proper lock and provided with a safety catch which would have prevented the door from flying open even if it had been improperly shut. There were no means of opening the door from inside, it could only be opened by lowering the window and turning the handle outside the carriage. It was contended that since the infant plaintiff was too small to have opened the door from outside himself, the case was one in which the doctrine of *res ipsa loquitur* would apply, and the onus was on the defendants to establish absence of negligence :—

HELD : though it was the duty of the railway company to inspect the carriage-doors and see that they were properly fastened before the train leaves a station, the doors were not continuously under their sole control in the sense necessary for the doctrine of *res ipsa loquitur* to apply, and the mere fact that a door came open was not in itself *prima facie* evidence of negligence against the railway company.

[**EDITORIAL NOTE.** Consideration is given here to the question of how far the doctrine of *res ipsa loquitur* is applicable to accidents caused by the opening of railway carriage doors. It is essential to the application of this doctrine that the thing causing the accident should be wholly under the control of the defendant and the court holds that on a long journey it is impossible to say that the doors are so continuously under the control of the railway company that upon the happening of an accident through an open door the burden is upon the company to disprove negligence.

AS TO DEGREE OF CARE NECESSARY, see HALSBURY, Hailsham Edn., Vol. 4, pp. 60-71, paras. 91-107 ; and FOR CASES, see DIGEST, Vol. 8, pp. 78-80, Nos. 533-553.]

Cases referred to :

*(1) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 ; 36 Digest 91, *601* ; 5 New Rep. 420 ; 34 L.J.Ex. 220 ; 13 L.T. 148.

*(2) *Gee* v. *Metropolitan Ry. Co.* (1873), L.R. 8 Q.B. 161 ; 8 Digest 78, *533* ; 42 L.J.Q.B. 105 ; 28 L.T. 282.

*(3) *Burns* v. *North British Ry. Co.*, [1914] S.C. 754 ; 8 Digest 79, *539 i.*

*(4) *Inglis* v. *London, Midland & Scottish Ry. Co.*, [1941] S.C. 551.

(5) *Cole* v. *De Trafford* (*No.* 2), [1918] 2 K.B. 523 ; 34 Digest 198, *1621* ; 87 L.J.K.B. 1254 ; 119 L.T. 476.

APPEAL by the infant plaintiff from a judgment of CROOM-JOHNSON, J., without a jury, dated Nov. 1, 1943, in an action for damages for personal injuries suffered by the infant plaintiff who fell out of an express train run by the defendants. The facts are sufficiently set out in the judgment of GODDARD, L.J.

Russell Vick, K.C., and *J. F. F. Platts-Mills* for the appellant.

G. J. Lynskey, K.C., and *Gerald Howard* for the respondents.

GODDARD, L.J. : This is an appeal by the plaintiff from the judgment of CROOM-JOHNSON, J. The matter arises out of a very sad and distressing accident which happened to a little boy five years of age who fell out of a Scotch express one day in July, 1942, soon after the train had left Grantham on its way south. The child was picked up, alive but seriously injured, on the line near Corby station. It is alleged that the railway company were negligent in that they had not taken proper steps to see that the doors of the carriages were safe. The point of interest from the legal aspect of the matter, and the only point, is the argument which has been advanced by counsel for the appellant, that, in the circumstances the onus is upon the railway company to explain how the accident happened, and that, unless they give an explanation how the accident happened, that is to

say, as I understand it, positive evidence how the accident happened, they
are liable.

The facts of the case have been dealt with in great detail by the judge and
I need not repeat them at the same length as he has done. They are on record.
We see no reason to differ from any of his findings. For the purpose of our
judgment it is necessary to state comparatively few facts. The little boy was
with his mother, who also had a baby to look after. She joined the train at
Newcastle, which is 263 miles from London. The train was a very heavy train A
consisting of some 19 coaches. She was travelling somewhere about the middle
of the train. She was in what is commonly called a corridor coach, the corridor
being on the near side of the train. The coach immediately in front was a
coach which in ordinary times would be used as a dining car, but at this time was
being used simply as a passenger coach. The corridor there was down the middle.
In the corridor coach there was a lavatory, I think at either end, certainly one
at the forward end of the coach next to the dining car. The dining car had a B
vestibule, a large sort of lobby, in which luggage could be placed. There was a
lavatory on the off side of that coach.

The first stop that the train made was at Darlington, 31 miles from Newcastle,
where it stopped with the platform on the off side. There is no evidence as to
whether anybody got in or got out at Darlington. One may assume that some
passengers did certainly get in but there is no evidence about it. There is
nothing to suggest that any of the doors of the train were left other than properly C
shut. The train arrived at York, which is, I think, about 44 miles from Darlington,
without any untoward incident having taken place. At York examiners
walked along the off side of the train. Their evidence, which was accepted by
the judge, though for the purpose of my judgment in this case I do not think
their evidence makes a great deal of difference, having regard to the view I
take and the view du Parcq, L.J., and Vaisey, J., take, was that all the handles D
of the doors were in proper alignment and condition so that the doors were all
shut. Some time in the early part of the journey the small boy, who was playing
in the corridor with other children, had been taken by his mother to the lavatory
at the far end of the corridor coach. He was back in the carriage with her when
the train arrived at Grantham, which was the last stop before King's Cross,
and which is 83 miles from York. So far again nothing had happened to call
anybody's attention to any of the doors, and there is no suggestion that anything E
was out of the normal down to this point.

The train had been very crowded to York. Apparently a large number of
passengers had left the train at York, and it was described by the railway people
as a light train after that station. Soon after leaving Grantham the boy asked
his mother to let him go to the lavatory again. She was attending to her baby
at the time and she thought that he was old enough to look after himself in
that respect and she told him he could go. Whether he did go to the lavatory F
nobody knows. She assumed that he went to the lavatory, or, at any rate,
in the direction of the lavatory which she had taken him to earlier in the day,
that is to say, in the forward part of the coach. According to the evidence
of the chief petty officer who was travelling on the train, he, the chief petty
officer, had gone to the lavatory in the corridor coach just before the train got
to Grantham and did not leave it until after the train had got to Grantham. G
If that were so it is highly probable that the boy went, not to the lavatory in the
corridor coach, but to the lavatory, if he went at all, at the end of the dining
coach. That again is, to some extent, a matter of speculation, but it would
appear to be probable.

The boy did not come back. The mother searched the train for him without
success. Meanwhile we know what had happened. The chief petty officer,
having got back into the coach where he was riding, in the dining car coach, H
noticed, either from his own observation, or because of some exclamation on the
part of somebody, that the off side door of the dining car was open. He had
considerable difficulty in closing it. As far as I can understand from the evidence,
a soldier, who had just been using the lavatory in the corridor coach, leant
out of the window of the door of the corridor coach, and managed to reach this
door which had been blown right back (it opened away from the London direction,
and, therefore, the blast of the wind would carry it back) and managed to give
it a push. The chief petty officer then managed to get hold of the door, and,

I should think at some risk to himself, managed to close it, he not knowing at that time or having any suspicion that anybody had fallen out. This must have been just before the time that the train reached Corby, which is 12 miles from Grantham, and as the small boy was picked up on the line a mile or two on the Grantham side of Corby it is as certain as anything can be that it was out of this door that he fell. There is no evidence one way or the other as to whether anybody had got out of the off side door of this coach at Grantham or climbed into the train on that side. It would be contrary to all rules and regulations that anybody should do it. It is possible that somebody broke the rule, but there is no suggestion anybody did. So far as there is any evidence on the point, the guard, whose evidence the judge accepted, said he looked down the train and did not see anything after the train had started from Grantham, and did not see anything to cause him any anxiety or to suggest that any of the doors were open.

The doors of all the carriages of this train were fitted with the most modern and approved style of lock. The lock is provided with a safety catch so that, if the door, when it is slammed to or drawn to by a person entering the carriage, does not go fully home, but it is caught and held by the safety catch, and, if there is no defect in it, the door remains perfectly safe as far as it prevents anybody falling out. As far as the handle is concerned, one might say you have to give it a double action. The door can be slammed. If it is slammed the catch of the door lock pushes back and passes the safety catch and is caught by the lock when it is fully shut. When it has to be opened in one action, you must give it a full turn which requires considerable pressure and strength, or you can give it a half turn catching it against the safety catch and then give it another half turn and so pass the safety catch. If the door is caught by the safety catch, it will be perfectly safe as far as any question of the door flying open is concerned, unless somebody puts their hand outside the carriage, because there are no means of opening the door from the inside of the carriage, and gives the handle a full half turn. How did that door come to open ? It is exceedingly unlikely that the door was not properly closed when the train left Darlington which was the last stop where anybody would have occasion to use the off side of the train. Quite apart from the evidence of the guard, the train attendant, and the carriage examiners at York, it is difficult to believe that in this crowded train the door could have been on half cock, not properly closed, with the consequential rattle of the door which there would have been, and remained in that state from Darlington to Grantham which is a distance of something like 127 miles.

It is said that the train must have left Grantham in an unsafe condition, or, at any rate, if it is not explained, it is said not in a safe condition. I will deal with the question of onus of proof in a moment. It appears to me the position was this. There were three possible states in which that door may have been when the train left Grantham. Either the door was open, so that as soon as the train moved off the motion of the train and the draught would have blown it open if it was not shut at all—that is one thing—or it may have been fully closed, or it may have been not fully closed but caught on the safety catch. As I have already explained, if it was caught on the safety catch, as far as pushing open was concerned the safety catch provided complete safety ; it did not allow it to be done.

Evidence was called on both sides with regard to whether the vibration of the train could have caused the door, if it was caught only by the safety catch, to come open. The judge who heard the evidence came to the only conclusion that it was possible to come to on the evidence before him, and that was that such a thing could not happen. It was suggested by a gentleman who was an architect, and whose experience and qualification for dealing with such things as these doors was not very clear, that some sort of creeping movement could be set up by the pace of the train which would in some way affect the catch. The catch of the door covers the safety catch only by an eighth of an inch. That has been found to be safe in practice. He suggested that some sort of creeping movement could be set up in the framework of the carriage which would overcome that eighth of an inch and cause the door to fly open. But the carriage expert from the company, to whose fairness as a witness the judge paid tribute, convinced the judge that that was not possible ; in fact, the stresses and tendencies were the other way, and the faster the train or greater the vibration the greater hold the main lock would have upon the safety catch.

It therefore follows that, accepting that evidence, this door could not have opened provided it was not wide open—and as I have already said nobody can suggest it was wide open when the train left Grantham—but, if it was either closed, or, to use the convenient expression, on half cock, it could not have opened without some human intervention. Somebody must have opened it. There is no evidence as to who opened it, or as to how it came open. That leads me to consider the legal submission which was made by counsel for the appellant. He says once it is established that the accident happened through the boy falling through an open door it is for the railway company to explain how that door came to be open. Let us consider for a moment, because that is only putting up one aspect of the doctrine of *res ipsa loquitur*, what the doctrine of *res ipsa loquitur* is. When is it that in this class of case the burden of explanation is thrown on the defendant and that the plaintiff satisfies the court that the burden is on the defendant merely by showing an accident happened, because if that doctrine applies all the plaintiff need do is establish the accident happened and then call upon the defendant to explain it.

The reason for the doctrine is that the operation of the thing which caused the accident is at the time wholly under the control of the defendant. The classic case is *Scott* v. *The London and St. Katherine Docks Co.* (1), where some bags of sugar fell from the warehouse owned by the defendants on the head of a passer by. The defendants were called upon to explain how it came about that some sugar fell from their warehouse on a passer-by because the thing was entirely under their control. Likewise, when an accident happens on the railway as the railway system and the trains thereon are entirely under the control of the railway company it is for them to explain, if they can, how the accident happened and show that the accident happened without fault on their part.

It is the same doctrine which exists in the law of bailment. Property is held by a bailee, who is only liable for loss if the loss is occasioned by his negligence. The bailor asks for the return of the goods. The bailee does not produce them. It is for the bailee to show that the loss occurred without negligence on his part. The burden is not thrown in the first instance on the bailor to prove that there was negligence because in most cases, or in many cases, at any rate, it would be an impossible task. The property being in the care of or under the control of the bailee, it is for him to show that there was no negligence on his part. Can that doctrine apply in the case of a door of a railway carriage flying open? In some cases it obviously can. I am not sure whether it is right to say it obviously can. But in certain cases the plaintiff can, at any rate, give evidence which speaks for itself, and which it is possible the defendant may be able to answer, or the plaintiff may be able to show a state of facts which *prima facie* at any rate establishes a case of negligence.

Such was the case which was cited to and quoted by the judge in his judgment, the case of *Gee* v. *The Metropolitan Ry. Co.* (2). One must consider the facts of that case. None of these cases really lay down any principle of law. They only show from the circumstances of the case that there was evidence upon which the jury could find a verdict for the plaintiff. In the case of *Gee* v. *The Metropolitan Ry. Co.* (2), the facts seem to be these. When that case was decided the trains, or some of the trains, at any rate, on the Metropolitan started from Westminster station. At Victoria station, which is two stations west of Westminster, the plaintiff and his brother got into an empty compartment and before the train had got to Sloane Square, which is the next station, the plaintiff lightly leant against the off side door of the carriage and the door flew open and he fell on to the line. The obvious inference there was that the railway company had not seen that the train was in a safe condition when it left Westminster station on its journey. Of course, it is the duty of a railway company to have their train in a proper and fit condition with the doors properly fastened when it starts on its journey. On the evidence there they had not performed their duty.

Then take the case of *Burns* v. *The North British Ry. Co.* (3). That was a case, if I remember rightly, in which a lady walking along a platform at a station in Glasgow, was struck from behind by an open door of a carriage, of a train which was running into the station. As the door came up to where she was it struck her in the back and she was injured. That was a train which had been stopping at various stations along the line. The inference was that at the last stopping place on the line the door had not been properly closed and there was, therefore, a *prima facie* case of negligence.

In *Inglis* v. *The London, Midland and Scottish Ry. Co.* (4), where an accident, not unlike the present case in some respects, took place, except the fall was from a compartment, the door of a compartment was open. At the trial before the Sheriff-substitute evidence was given by all the people in the carriage to negative the fact that they had in any way interfered with the lock of the carriage door. Their evidence, accepted by the Sheriff-substitute, was that they had nothing to do with it and that nobody in the carriage from the time the train started had interfered with the door in any way. The inference, then, was that it had not been properly closed by the railway company's servants when the train left the station and, therefore, there was a case for them to answer. LORD MONCRIEFF, to whose judgment I specially refer, said this, at p. 561 :

> When the door which opens has in fact remained under the sole control of the company or its servants up to the moment of opening [which was the case of *Gee* v. *The Metropolitan Ry. Co.* (2)] the single fact of its unexplained opening may thus *per se* be relevant to infer negligence against them ; and so to operate in a manner analogous to cases of *res ipsa loquitur* by itself transferring the onus of proof. Even in such a case, however, there will be at most an analogy with, and not a proper example of, an application of the maxim. In the present case, on the other hand, there is found to have been no continuity of any single control of the door. Control by the defendants must be taken to have ended at St. Enoch's.

Here it seems to me it is impossible to say that the doors of an express train travelling from Edinburgh to London are continuously under the sole control of the defendant railway company in the sense in which it is necessary that they should be for the doctrine of *res ipsa loquitur*, or a doctrine analogous to that expression, to apply. People are walking up and down the corridors during the journey and people are getting in and getting out at stopping places. I do not want it to be thought for a moment that I am minimising the duty of the company. It is, of course, the duty of the company to see before a train leaves a station that the carriage doors are closed. I do not mean to say that I think there is a duty upon them to inspect the off side doors of the carriages at every stop. There must be reasonable inspection and they must do the best they can.

In these cases which I have been citing there was no question of the presence of one of these safety catches. Of course, the aspect of these cases changes or develops as new inventions, new precautions, are introduced. The very object of the safety catch which was fitted to this train, and as we all know to the great majority of express trains in this country, is because it is recognised there is a risk that a passenger or a servant will not drive the latch home, if I may use that expression ; not fully close the door. As I have said, it is possible—I will assume for the purpose of this case—that when the train left Grantham the door was not fully closed. There is no evidence that it was not, but I will assume that it was not. The train had not gone very far, it is true, before the accident happened, some 7 miles. I cannot help thinking that, if the door had not been fully closed somebody's attention would have been called to it by the rattling alone, but whether it was fully closed or whether it was on the safety catch, that door, it is clear from the evidence, was safe unless somebody interfered with it. There is not the smallest suggestion that any railway servant interfered with it. Therefore, I think the judge was justified in drawing the inference, and I do not see what other inference could be drawn, that somebody, either out of a spirit of mischief or in an endeavour unsuccessfully to close it, instead of pulling it to by the expedient of opening it and pulling it to again—from whatever cause some human intervention must have taken place—must have turned the handle of the door and left it open, and, if the little boy was in the lavatory immediately adjoining this door he might easily have come out and have fallen on the line.

I am certainly not prepared to hold, nor do I think any of the authorities that have been cited go the length of holding, that the mere fact that on a journey of this sort a door comes open is in itself evidence of negligence against the company so as to put upon them the burden of explaining how it came open. I am not prepared to hold that, and, therefore, there is no evidence of negligence against the company. On the other hand, the evidence seems to me to show that there was reasonable inspection, and that the carriage was fitted with a lock of the most modern and approved type which was in perfect working order, and found to be so when the carriage was examined, and, therefore, it was in a condition which, unless some evilly disposed or officiously disposed person interfered with it, was perfectly safe under the circumstances. Even if the train did leave Grantham with the off side door not fully shut, and, if that ought to have been discovered by the officials of the railway company, by the guard seeing that it was out of alignment, or by a signalman who ought to have looked at the train as it went by, I cannot say that that negligence caused the accident. The cause of the accident was the opening of this door which, it seems to me, clearly must have taken place by some human agency inside the train.

Under those circumstances, lamentable as the result is, I think the judge was right and that this appeal must be dismissed.

DU PARCQ, L.J.: I agree. This is, of course, a very important case, and for that reason I will add some words of my own. We were told by counsel for the appellant, and I can well believe it, that the father of this child had great anxiety about the case and might be reassured if he knew that it had been very carefully considered by this court. He need have no doubt about that, and, I may add, I am quite sure, although we do not differ from the conclusion arrived at by the judge, that none of us would feel any doubt that the father was only doing his duty to his child in taking the opportunity of having the case reconsidered on appeal.

In this case, as in all cases where an action is based upon negligence, the plaintiff had to prove two things. He had to prove that there was negligence on the part of the defendant company, and he had to prove that by reason of that negligence he had suffered damage. A good deal has been said, and quite properly said, about what is called the doctrine of *res ipsa loquitur*. That there is such a doctrine nobody doubts, but when it is invoked it is always necessary to be sure what the precise doctrine is. The words *res ipsa loquitur* are hardly themselves a proposition of law though they allude to one. They are a figure of speech. Sometimes what is meant by this figure of speech is that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of those facts, found that negligence was not proved would be giving a perverse verdict. Sometimes the proposition does not go as far as that but is this, that, on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known. In *Cole* v. *De Trafford* (5), to which I refer because I have reason for remembering it, PICKFORD, L.J., stated his view of the meaning of the expression in this way, at p. 528:

> I take that well-known expression to mean that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is *prima facie* evidence of such negligence.

Where there is *prima facie* evidence a jury may find a verdict for the plaintiff.

As my Lord has pointed out, one must be careful to remember when one looks at decisions like *Gee* v. *Metropolitan Ry. Co.* (2), that the question before the court was, not whether in certain circumstances negligence was to be regarded as proved as a matter of law, but whether in certain circumstances a jury was entitled to find negligence proved, or it must be said that there was no evidence on which they could find it proved. There is a great deal of danger, if I may say so, particularly in these days when very few cases are tried with juries, of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense. It is a grave error to suppose that you are necessarily going to find guidance in a case of a passenger who has fallen through a carriage door-way by directing your attention to all the other cases you can find in the books of passengers falling through carriage door-ways; and it is a truism to every lawyer to know that what one must look for is a general principle.

In this case we do get assistance no doubt by looking at cases about accidents on railways as we do by looking at cases of accidents of other kinds, but one must be careful to see what the precise facts of each case are. It is quite true, as was said in *Gee* v. *Metropolitan Ry. Co.* (2), that there is a duty upon a railway company to see that the doors of a train are properly secured. That is, perhaps, not accurately described as a proposition of law. It is the application of a general principle to the facts of the case. The general principle is that a railway company must see that its carriages are in a safe condition so far as reasonable care and skill can ensure that they are in a safe condition, and it follows from that, as any juryman would be likely to say, that, when a train has arrived at a station, and people have got in and got out, and doors have been opened, and possibly left open, because there is no obligation on passengers to shut them, the railway company's servants must see that the doors are securely shut. When one knows what the legal duty, stated generally, of the company is one hardly needs authority for that proposition.

Apart from that, as my Lord has pointed out, all we get in *Gee's* case (2), and I think in the Scottish cases which have been referred to, is the application of the general principle which was laid down in *Scott* v. *The London and St. Katherine Docks Co.* (1) that, where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. In the present case, it is not suggested that the judge has misdirected himself with regard to the law. Counsel for the appellant said he was quite satisfied with the statement of the law in the judge's judgment. If the judge had tried this case with a jury, and had put the evidence fairly before them, as he would have done, and had directed them on the law in the terms in which he stated it in his judgment, I do not think that counsel for the appellant would have suggested for a moment that a verdict for the defendant company could have been set aside as against the weight of evidence, but what counsel for the appellant would have said is that a verdict for the plaintiff would have been more consonant with the evidence. He asked us, as we are in a position to review the judgment of the judge, sitting without a jury, to say, this being a re-hearing, that we feel that we can come to a different conclusion. Obviously, we should have to be careful before we did that, because we should be doing wrong if we did not accept the view of the judge with regard to the credibility of the witnesses whom he saw and we have not seen; but apart from that consideration, after reviewing the evidence, and hearing all that counsel for the appellant had to say about it, I find it impossible to say that the plaintiff was able to prove what as I said at the beginning of my judgment it was essential to prove in order that the defendants might be found liable.

I will assume, though I am not saying at all that it is proved, that this train proceeded beyond Grantham for some distance with the door imperfectly fastened in the sense that it was on the safety catch. Be that so. Let it be granted that it was so, why then, the evidence established to the satisfaction of the judge, and I see no reason to doubt that he was right in this particular, that, even if the lock were on the safety catch, there was no danger to anybody if nobody interfered with it. If that is so, as there is nothing whatever to suggest that any servant of the railway company interfered with it so as to make it more dangerous, one is forced to the conclusion that any negligence there may have been on the part of the defendant company did not cause this accident, and that this little boy would have been perfectly safe but for the interference of some other person. On the other hand, of course, if the door was never on the safety catch but was perfectly fastened when the train left Grantham, then clearly there was no negligence on the part of the railway company at all.

It is obvious that the judge tried this case with the greatest care, and although one is seldom able to say that one would have expressed one's reasons in precisely the same way as another judge, I am, at any rate, bound to say that I can see no ground for thinking that in the result the judge came to a wrong conclusion.

I agree, therefore, that the appeal must be dismissed.

VAISEY, J.: I agree, and would only add a very few words. No one can fail to feel very great sympathy with the infant plaintiff and with his parents, and I should like to express my own sympathy with them. I am confident that everything that could be said in favour of this appeal has been said by counsel for the appellant to whose argument I, who am not very familiar with this class of case, feel myself particularly indebted; but I am in no way satisfied that the defendant company, that is, the London and North Eastern railway company, can, having regard to the known facts, and to the inferences proper to be drawn from them in the particular circumstances of the case, be made liable in damages for the injury which this poor child has suffered. Speaking for myself, I am convinced by the reasoning of the judgment of the judge in the court below, and I also fully concur in what has fallen from my Lords. The judge heard the evidence, he saw the witnesses, and I apprehend that we can only interfere with his finding if we think that he either misdirected himself in regard to the law or drew conclusions from the evidence which the evidence does not justify. I can see no ground for any such interference on either of these grounds and I agree that this appeal must fail.

Appeal dismissed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Williams & Co.*, Peterborough (for the appellant); *W. H. Hanscombe* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re A SOLICITOR.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., and Humphreys and Macnaghten, JJ.), **March 13, 1944.**]

Solicitor—Practice—Order to strike name off roll—Refusal of Disciplinary Committee to suspend publication of findings pending appeal—Provision under rules for suspending order—Whether court has inherent jurisdiction to prevent publication—Solicitors (Disciplinary Proceedings) Rules, 1942 (*S.R. & O.*, 1942, *No.* 1831/*L.* 25), *r.* 29 (1).

The Disciplinary Committee of the Law Society ordered the name of the applicant to be struck off the Roll. Under the Solicitors (Disciplinary Proceedings) Rules, 1942 (S.R. & O., 1942, No. 1831/L.25), r. 29 (1), application was made to, and refused by, the committee to suspend the filing of the order pending an appeal. To prevent further injury arising as the result of the committee's decision, the applicant applied to the court to exercise its inherent jurisdiction :—

HELD: the court has no jurisdiction to over-ride the decision of the committee.

[**EDITORIAL NOTE.** In *Re A Solicitor* (1), AVORY, J., assumed that the court has inherent jurisdiction to prevent possible mischief arising from the publication of an order of the Law Society striking a solicitor off the roll, pending an appeal. The court here decides that where the Rules under the Solicitors Act provide for such an application to be made to the Disciplinary Committee and application has been made and refused there is no inherent jurisdiction to interfere.

AS TO PROFESSIONAL DISCIPLINE AND PRACTICE, see HALSBURY, Hailsham Edn., Vol. 31, pp. 301, 302, para. 326; and FOR CASES, see DIGEST, Vol. 42, pp. 407-408, Nos. 4652-4660.]

Case referred to :

*(1) *Re a Solicitor*, [1924] 1 K.B. 699; 42 Digest 408, *4659*; 93 L.J.K.B. 478; 131 L.T. 136.

APPLICATION by a solicitor, against whom an order striking his name off the roll of solicitors had been made by the Disciplinary Committee of the Law Society, to prevent further steps being taken as the result of the findings of the Committee. The facts and arguments are set out in the judgment of the court.

I. J. Lindner for the applicant.

R. T. Monier-Williams for the respondent.

VISCOUNT CALDECOTE, L.C.J.: This application comes before the court in a somewhat inconvenient form. It is, in point of procedure, an *ex parte* motion that the court should prevent further steps being taken as the result of findings of the tribunal which has ordered the name of the applicant to be struck off the roll.

The question which has been raised is whether this court has any jurisdiction to make an order which I may describe as an order to stay further proceedings as the result of the findings of the Disciplinary Committee of the Law Society. The procedure which has to be followed in the case of a decision of the Committee adverse to the solicitor is set out in CORDERY ON SOLICITORS, 4th Edn., p. 227, and, without reading the whole passage, it may be said that the decision of the Committee together with a statement of its findings of fact is to be pronounced in public, and after pronouncement a copy of the findings and order is sent to the applicant within four days and to the registrar of solicitors within eight days. Then in due course notice of the order has to be published in the LONDON GAZETTE, and it is quite plain when that point is reached the adverse effect A upon the solicitor in question will be very serious.

In this particular case we have no papers and no affidavit, and, therefore, I am not in a position to say when the findings were made or the dates when steps consequent on the findings have to be taken. We have been informed by counsel for the applicant that certain publicity has been given to the Order of the Committee, and the Order that the applicant's name should be struck off the roll, but it is desired to prevent further injury that may arise to him B by reason of the publication of the order in the LONDON GAZETTE.

It is said by counsel for the applicant that there is inherent jurisdiction in the court to prevent the injury which the applicant will suffer until his appeal has been heard and determined. So far as I am aware, no appeal has yet been entered, but it is intended to enter an appeal.

A question of the same sort was considered by this court in *Re a Solicitor* (1), C and there AVORY, J., prefaced the judgment of the court with a statement which might almost equally well be made in this present case; he said, at p. 700:

> It is to be regretted that, owing to the fact that notice of this application was only served this morning, the Law Society has not had an opportunity of fully considering the question of jurisdiction raised before us; but it is impossible for the court to do justice in this matter without creating a precedent, which may or may not be followed in the future when further argument may be heard upon it.

D Having regard to that passage in the judgment of AVORY, J., the only judgment given, I think this court is quite free to arrive at the decision which it thinks right in the matter without treating the decision to which I have just referred as a binding authority. The learned judge went on to say:

> Assuming, as I think we are entitled to assume, that there is some ground for the appeal by the solicitor, the court must have inherent jurisdiction to make such an order as will avert the possible mischief that must arise if the registrar proceeds, as E provided by the Solicitors Act, 1919, s. 7 (2), to cause the order of the committee to be published in the London Gazette forthwith.

If these were proceedings in connection with which no rules had been made, it is much more probable that the court would consider that it had jurisdiction to make an order to prevent the injury happening to the applicant, which, in the event of a successful appeal, it would be clear he ought not to have F suffered; but when I look at the rules which have been made in connection with such proceedings as these, I find that by r. 29 (1) it is provided:

> The committee shall have power, upon the application of a party against or with respect to whom they have made an order, to suspend the filing thereof with the registrar or the secretary as the case may require . . .

In the case in which AVORY, J., gave judgment, to which I have just referred, the court there said that the application should at any rate be made in the G first instance to the Committee. In this particular case, we have been told that the application was made to the Committee, and that added to the application there was an offer of an undertaking not to practise until the appeal was heard and determined, but that the Committee thought right to refuse the application.

The question to which I come is whether or not this court has inherent jurisdiction, for none is provided by the rules or by any Act of Parliament, to H make an order suspending the publication of these proceedings, notwithstanding the fact that the Committee has declined to exercise the power which it has to prevent further steps being taken until an appeal has been heard. I find it impossible to say that the court, in these circumstances, has inherent jurisdiction, the rules having been drawn in such a way as to give jurisdiction to make such an order to the Committee, but being silent as to any powers of the court. When I find that the rules have made provision under which the Committee has power to suspend the filing of the order with the registrar with all the consequences that follow, I think that makes it necessary to come to the conclusion that while the Committee is given express power and the rule is silent as to any power of the court to override the decision of the Committee, in those circumstances the court has no jurisdiction, and, therefore, I think this application should be refused.

HUMPHREYS, J.: I am of the same opinion. This application comes before the court in that most attractive form, an appeal to the inherent jurisdiction of the court. The judges of this division have always been friendly to such an application based upon that ground, but one has to remember, however desirable it may be in order to prevent injustice not to confine within too strict limits what is known as the inherent jurisdiction of the court, it is quite another thing for this court to be invited to over-ride the terms of statutes and statutory rules and orders which have the effect of statutes, and to say, as we are invited by this application in effect to say, that, while those statutes and those rules provide no stay of proceedings upon an appeal to this court, this court will provide the necessary stay under its inherent jurisdiction. It is principally upon that ground that I base my judgment.

I only desire to add two things. The first is that it may well be that even that tentative judgment of AVORY, J., which he himself observed may or may not be followed in the future when further argument may be heard upon it, might have been different if the learned judge had been told, as we have been told, that application had been made to the proper tribunal prescribed by the rule for staying execution, or rather, to use the words of the rule itself:

> The committee shall have power, upon the application of a party against or with respect to whom they have made an order, to suspend the filing thereof with the registrar or the secretary as the case may require . . .

The other thing I want to say is this, that I entirely agree with the judgment of VISCOUNT CALDECOTE, L.C.J., and with the reasons which have prompted that judgment.

MACNAGHTEN, J.: I agree that this motion should be dismissed.

Application refused.

Solicitors: *J. Jubb* (for the applicant); *T. G. Lund* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

DENNISTOUN *v.* CHARLES E. GREENHILL, LIMITED.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **October 12, 1944.**]

Factories—Dangerous machinery—Absolute duty—Cutting machine—Guard provided—Machine accidentally set in operation—Failure to use clearing tool—Operator injured—Factories Act, 1937 (c. 67), *ss.* 14 (1), (2), 133.

The Factories Act, 1937, s. 14 (1), enacted that every dangerous part of any machinery shall be securely fenced. The appellant was employed by the respondents on a machine used for cutting off the ends of springs. The moving parts of the machine were fenced by a kind of guard. Instead of using a tool provided to clear away waste bits of springs, the appellant used his hand, and having accidentally set the machine in operation, he suffered injuries. On information brought against the respondents for contravention of the provisions of sect. 14, the magistrates found that the moving parts of the machine unless securely fenced and carefully worked were a "dangerous part of the machinery." They also found that the machine was "securely fenced in the best known method at the time having regard to the work it had to do." Upon these findings they dismissed the information. It was contended that the magistrates on the material before them were not justified in law in arriving at the decision contained in the latter part of their findings:—

HELD: (i) the Factories Act, 1937, s. 14 (1), imposed an absolute duty, not admitting of any qualification, to fence securely every dangerous part of machinery.

(ii) the finding of the magistrates that the machine was securely fenced in the best known method for the purposes for which it was used was irrelevant to the question, whether it was securely fenced or not.

Davies v. *Thomas Owen & Co.* (2) followed.

[**EDITORIAL NOTE.** In criminal proceedings for breach of the Factories Act, 1937, s. 14, the Court of Appeal here follow *Davies* v. *Thomas Owen & Co.* (2), a civil action for damages brought by the injured workman. It is held that the obligation to fence dangerous machinery securely is absolute, irrespective of whether it is commercially or mechanically practicable to do so. The serious consequences following from this decision can, it seems, only be avoided by the making of regulations by the Secretary of State settling the type of fencing which must be provided in specific industries, as in the case of the Woodworking Machinery Regulations, which were under consideration in *Miller* v. *William Boothman & Sons* (1).

AS TO DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-603, paras. 1130-1146; and FOR CASES, see DIGEST, Vol. 24, pp. 908-913, Nos. 62-85.]

Cases referred to:

*(1) *Miller* v. *William Boothman & Sons, Ltd.*, [1944] 1 K.B. 337; [1944] 1 All E.R. 333; 113 L.J.K.B. 206; 170 L.T. 187.

*(2) *Davies* v. *Owen (Thomas) & Co., Ltd.*, [1919] 2 K.B. 39; 24 Digest 908, *68*; 88 L.J.K.B. 887; 121 L.T. 156.

APPEAL by way of case stated from the decision of the justices of the peace in and for the county of Worcester on a charge of contravening the provisions of the Factories Act, 1937, ss. 14 (1), 133. The facts and the arguments are fully set out in the judgments of VISCOUNT CALDECOTE, L.C.J., and HUMPHREYS, J.

Arthian Davies for the appellant.

Christmas Humphreys for the respondents.

VISCOUNT CALDECOTE, L.C.J.: In this case, which is stated by the justices of the peace in and for the county of Worcester, a question arises which has in one shape or another been constantly before the courts.

By the Factories Act, 1937, s. 14, it is provided that:

> Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

Sect. 133 provides for a fine being imposed upon the occupier or owner of a factory if any person:

> . . . suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act . . .

That last expression, therefore, clearly brings in the requirements of sect. 14. In this case a machine was used for the cutting off of the ends of springs; the cutting tool moved up and down very rapidly while the machine was being operated by, I think, a foot press being kept down, and, unfortunately, in consequence of the operator using his hand instead of a tool which was provided for the purpose of clearing away waste bits of the springs from time to time and accidentally setting the machine in operation while his hand was in a dangerous position, the operator suffered bodily injury. When the matter came before the magistrates the type of tool in question and its general lay-out was described to them. It is not necessary to do more than refer to the conclusion of the magistrates in para. 4 (*d*):

> The tools of the press unless securely fenced and carefully worked were a dangerous part of the machinery.

Now having arrived at that conclusion it was clearly necessary for the magistrates to consider whether the machine was securely fenced. If not, the owner or occupier (the respondents in this case) would be liable to the penalty imposed by the section. There was a guard of some sort, and the magistrates were satisfied that there was no device whereby it could be improved. The appellant contented himself with the submission and the argument that the respondents were guilty of the offence charged. This was not a proceeding by way of enforcing a civil remedy such as the case of *Miller* v. *William Boothman* (1), where the plaintiff claimed damages for personal injuries sustained in consequence of an alleged breach by the defendants of their statutory duty; it was a criminal proceeding, and the question really was whether the respondents had contravened the provisions of sect. 14 of the Act.

The respondents submitted, in the first place, that the tools were securely fenced, that the fences used were adequate and could not have been improved upon, that they were the only type practicable in view of the use to which the machine was being put, and, lastly, that the injury sustained by the boy was not due to the tools not being securely fenced but to his deliberate failure to make use of the clearing tool. That last contention, in my view, is one which really the magistrates have not thought fit to consider so far as their finding is concerned, because they have confined themselves to the one contention that the tools were securely fenced. Their finding is :

> . . . that the machine was securely fenced in the best known method at the time having regard to the work it had to do . . .

and they accordingly dismissed the information ; the question upon which our opinion is desired is whether upon the above statement of facts they came to a correct determination and decision in point of law. It is said that their finding in para. 7 that :

> . . . the machine was securely fenced in the best known method at the time having regard to the work it had to do . . .

is a finding for which there is no evidence in the case at all. Counsel for the appellant submitted that it is not a finding which is really open to them at all having regard to the material before them. I further think it right to point out that it seems quite plain that that is the only question of law which arises in the case, because the submission that the injury sustained by the boy was not due to the tools not being securely fenced is a question of fact upon which the magistrates have not thought it necessary to express any opinion, and the question is, whether it is right to say, as counsel for the appellant contends, that there is no evidence upon which the magistrates could arrive at their finding.

I think the finding must be read as one which means that the machine was fenced—it was not securely fenced in the absolute sense of the word so as to make it contrary to the natural order of things that an accident should happen, but it was fenced at any rate as securely as anybody knows how to fence it having regard to the fact that it has to do the work for which it is designed. That is very much like saying, and I think it is saying, that, in their opinion, they thought that the machine could not be fenced more securely than it was fenced if it had to work at all.

The objection to enforcing very strictly the provisions of sect. 14 of the Act has been referred to by GODDARD, L.J., in *Miller* v. *William Boothman* (1). In the judgment of the Court of Appeal, GODDARD, L.J., says this, at p. 340 ([1944] 1 All E.R., at p. 335) :

> . . . if the prohibition of sect. 14 is absolute, the use of these saws [he was dealing there with a circular saw or a band saw] in a factory inevitably renders the owners liable to penalties, and it must follow that they cannot be used at all. It is unnecessary to emphasise the seriousness of such a result.

Then the Lord Justice goes on to point out that the difficulty was got over, or at any rate it was attempted to be got over, by the power given by Act of Parliament to the Secretary of State to make regulations dealing specifically with woodworking machinery such as the saws in question.

The question has been raised as to whether secure fencing must be provided if the result is to make the machine useless either commercially or mechanically for the purpose for which it is designed. In *Davies* v. *Thomas Owen & Co., Ltd.* (2), a case where damages for breach of a statutory duty were claimed, SALTER, J., said, at p. 41 :

> The workman is entitled to have secure fencing in fact and the findings of the jury show that this machine was not securely fenced. The observations of the jury to the effect that secure fencing is commercially and mechanically impracticable are irrelevant, and I think that the plaintiff has proved a breach of a statutory duty and damage caused to him thereby.

For some time past when that decision of SALTER, J., has been referred to, there has been some controversy as to whether or not it was a correct statement of the law, but that controversy has now been disposed of, at any rate so far as we are concerned to-day, by the decision of the Court of Appeal in *Miller* v. *William Boothman* (1), because GODDARD, L.J., having disposed of the cases in which the Secretary of State has power under sect. 14 (2) to make specific regulations as to the type of fencing to be used, turns to deal with the passage in the judgment of SALTER, J., to which I have just referred. GODDARD, L.J., puts a qualification upon that judgment. He says, at p. 341 ([1944] 1 All E.R., at p. 335) :

> It should, however, be qualified by saying that the statute prohibits the use of a dangerous machine which cannot be securely fenced unless it is one which is subject to special regulations, [that is to say, like the saw] and is used and constructed in accordance therewith.

But the Court of Appeal also say, at p. 341 ([1944] 1 All E.R., at p. 335) :

> We agree with the passage in SALTER, J.'s judgment, to which we have already referred.

This not being a case dealing with saws or wood-working machinery, the statement which I have read from the judgment of SALTER, J., in *Davies* v. *Thomas Owen & Co., Ltd.* (2) is one which must bind us, and I think it is sufficient to show that the argument of counsel for the appellant is one which we must accept, because the evidence here clearly shows that the fencing was not sufficient to prevent injury ; in other words, it was not securely fenced ; it was only securely fenced in the sense that it had a guard or fencing which was the best that anybody could devise if the machine was to be worked at all. That, according to the Court of Appeal, is a consideration which ought not to be entertained. Machinery must be securely fenced, and the magistrates, in finding that it was securely fenced for the purposes for which it was used, have, in my opinion, arrived at a decision which is irrelevant for the purposes of the case, or, if it is their decision, it is one for which there was no justification in law upon the material before them.

I cannot help observing that this emphasis upon the absolute nature of the provision contained in sect. 14 may have the effect of hampering the use of machines, used to-day as they are without secure fencing in the sense in which I understand the expression, but that ought not, I think, to weigh with us, and I observe, as has already been mentioned in the course of the argument, that the provisions of sect. 14 (2) give the Secretary of State power (and there are not only officials who know how to deal with these matters but there are organisations which can assist the Secretary of State if he so desires) to fix and settle the types of fencing which must be provided. Perhaps it is better that I should say no more upon that aspect of the case. I have come to the conclusion that the argument of counsel for the appellant is right and that, if fencing is only secure in so far as it is all that is possible if the machine is to be used at all, that is not securely fencing.

I think, therefore, that this appeal should be allowed.

HUMPHREYS, J. : I have arrived at the same conclusion, and my Lord has covered all the points in this case to which I should have thought it desirable to refer if I were delivering my own judgment. There are only just one or two words, I think, which it is possibly desirable to add.

In my view, there was ample evidence upon which the justices could come to the conclusion which they have in fact expressed in para. 7 of the case. What they have decided, dealing as they thought with a question of law and holding that this was the law, is :

> . . . that the machine was securely fenced in the best known method at the time having regard to the work it had to do . . .

I confess I am not at all surprised that a bench of five magistrates, presumably all laymen, should have said, having come to that conclusion upon the evidence (and, speaking for myself, I repeat that I think there was ample evidence upon which they could arrive at that conclusion) that their duty was to dismiss the information ; but I think, in holding that, they were wrong in law, because in law the meaning of the expression to be found in sect. 14, which really is the section which has to be construed here—the meaning of the words :

> . . . every dangerous part of machinery shall be securely fenced . . .

does not admit, as GODDARD, L.J., observed in his judgment in the case to which my Lord has referred, of argument. It does not say that a dangerous machine is to be fenced as securely as possible or only so far as will leave it commercially or mechanically usable ; and, therefore, I think the justices were wrong in law in adding to their finding the words :

> . . . in the best known method at the time having regard to the work it had to do . . .

If those words are taken away, I entirely agree with the judgment of my Lord that the argument of counsel for the appellant must be given effect to when he says that in this case there was no evidence at all upon which they could find that the machine was securely fenced, using those words as an absolute statement, and, indeed, I very much doubt whether the justices themselves would have held that. I think the mistake that they made was in thinking that where the owner or occupier of a factory has done all that ingenuity and science enables him to do in the interests of his workmen in fencing a particular machine, assuming that that machine has got to do the work which it is constructed to do, he has done all that the law requires. Unfortunately for the respondents in this case, the decision of the Court of Appeal says that is not so, but that what they have to do is this: they have, as the occupiers or owners of a factory, absolutely to fence every dangerous part of machinery so as to make it as safe to be used as if it were securely fenced. I think there is no evidence in this case that they did that, and, therefore, this case ought to go back to the justices with that expression of opinion. What the ultimate result of the case will be I express no opinion about at all, but I desire to agree with the observations which have been made by my Lord as to the possibility of this very serious state of things, the seriousness of which was fully recognised by the Court of Appeal, that steps may have to be taken in the future to try and put a different complexion on the matter.

BIRKETT, J.: I agree.

Appeal allowed with costs. Case remitted to magistrates.

Solicitors: *The Solicitor to the Ministry of Labour and National Service* (for the appellant); *Long & Gardiner*, agents for *Kerwood, Hobson, Thomas & Co.*, Redditch (for the respondents).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

GREENFIELD *v.* LONDON & NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (MacKinnon and Lawrence, L.JJ., Cassels, J.). **October 27, 1944.**]

Emergency Legislation—Personal injury—Fatal injury to engine-driver by reason of bomb crater on track—"War injury"—Whether direct and substantial connection between enemy act and injury—Personal Injuries (Emergency Provisions) Act, 1939 (c. 82), *ss.* 3 (1), 8.

Negligence—Bomb crater on railway track—Engine-driver ordered to proceed "at caution"—Fatal injury—Assessment of damages.

A bomb dropped by enemy aircraft caused a crater on a railway track belonging to the respondents. An engine-driver in the service of the respondents was, at the time, driving a train some distance away. There was an interruption of traffic control, but it was not known what exactly had happened. The engine-driver having been stopped by a signalman was subsequently instructed by the traffic superintendent's department of the respondents to proceed "at caution" and to keep a good look-out. It was quite dark at the time. In obedience to the instructions given the engine-driver proceeded to drive the train down the line with the result that the engine plunged into the bomb crater and the engine-driver was fatally injured. The respondents, having admitted negligence, contended that the fatal injury sustained by the engine-driver was a "war injury" within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, since it was caused "by the impact on any property of something dropped from an enemy aircraft," and that there was a direct and substantial connection between the enemy act and the fatal injury. By virtue of sect. 3 of the Act, the appellant would, therefore, be unable to recover:

HELD: (i) the injury to the deceased engine-driver was not a "war injury," since it was not caused by the "impact upon him or upon any property of anything dropped from an enemy aircraft."

(ii) The predominant cause was the admitted negligence of the respondents, through the clerk in the traffic superintendent's department, in ordering the train to proceed.

Decision of CHARLES, J. ([1944] 1 All E.R. 696) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal here reverse the court below and hold that there was no "war injury" within the Personal Injuries (Emergency Provisions) Act, 1939, s. 8. To constitute a "war injury" there must be physical injury caused by "impact," and injury caused by falling into a bomb crater cannot be said to be injury caused by impact of the bomb. Although in this case the injury occurred the same night as the bomb fell it could equally occur long afterwards: the impact of the bomb *qua* impact was over and the negligence of the defendants was the effective cause of the injury, for which they were therefore responsible.

FOR THE PERSONAL INJURIES (EMERGENCY PROVISIONS) ACT, 1939, s. 3, see HALSBURY'S STATUTES, Vol. 32, p. 1061.]

Cases referred to:

(1) *Yorkshire Dale Steamship Co.* v. *Minister of War Transport*, [1942] A.C. 691; [1942] 2 All E.R. 6; 111 L.J.K.B. 512; 167 L.T. 349.

(2) *Weld-Blundell* v. *Stephens*, [1920] A.C. 956; 36 Digest 126, *837*; 89 L.J.K.B. 705; 123 L.T. 593.

(3) *Smith* v. *Davey Paxman (Colchester), Ltd.*, [1943] 1 All E.R. 286; 36 B.W.C.C. 60.

(4) *Taylor* v. *Sims and Sims*, [1942] 2 All E.R. 375; 167 L.T. 414.

(5) *Adams* v. *Naylor*, [1944] 2 All E.R. 21; 171 L.T. 105.

(6) *Leanse* v. *Egerton*, [1943] 1 K.B. 323; [1943] 1 All E.R. 489; 112 L.J.K.B. 273; 168 L.T. 218.

APPEAL by the plaintiff from a judgment of CHARLES, J., dated May 11, 1944 and reported [1944] 1 All E.R. 696. The facts are fully set out in the judgment of MACKINNON, L.J.

F. W. Beney, K.C., and *W. A. L. Raeburn* for the appellant.

Sydney Turner, K.C., and *S. R. Edgedale* for the respondents.

MACKINNON, L.J.: The facts are not in dispute. The plaintiff is the widow of an engine driver who was employed by the defendants. On the evening of Mar. 3, 1943, he was driving the engine of a train proceeding from London towards Ipswich. At about 9.10 he was stopped at the signal-box at Shenfield. The signalman was aware that the track circuit was broken between Shenfield and Ingatestone, and his telephone communication with Ingatestone was not working. He had good reason to suppose that this state of things was due to a bomb having dropped on or near the line between these places, which are about three miles apart.

The signalman communicated these facts by telephone to a superior officer of the defendants at Stratford, and asked what instructions he should give to Greenfield. If that official had acted with reasonable care he would have told the signalman not to allow Greenfield's train to proceed until gangers sent out from Shenfield northwards, and from Ingatestone southwards, had ascertained that the line was in a reasonably safe condition and one of them had so reported at Shenfield. The official failed so to act with reasonable care and told the signalman to direct Greenfield to proceed "at caution" towards Ingatestone and to keep a good look out.

The signalman having conveyed this order to Greenfield, he obeyed it. The night was very dark. The train went on until, at about 9.45, the engine plunged into a hole or crater, caused about 30 to 40 minutes earlier by a bomb dropped from a German aeroplane. That Greenfield was obeying the order to proceed cautiously is not disputed, and is perhaps sufficiently shown by the fact that none of the carriages in the train was affected, and no passengers injured. Unhappily, Greenfield and his fireman, Barrett, were both killed.

Upon these facts, Greenfield's widow issued a writ against the defendants claiming damages for negligence under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants admitted the alleged negligence, and their only defence is based upon the Personal Injuries (Emergency Provisions) Act, 1939, ss. 3, 8, which received the Royal Assent on the day when the present war began. Sect. 3 of that Act provides that "in respect of a war injury sustained by any person" no compensation or damages shall be payable by a defendant to a claim under the Workmen's Compensation Acts, 1925 to 1938, or the Employers' Liability Act, 1880, or by a defendant in certain common law actions. Among such common law actions is a claim for damages for injury by negligence. The one and only question therefore in this case is: Was the injury which killed Greenfield a war injury?

To answer that question, one has to turn to sect. 8, in which there is a definition of "war injuries." The material part of that is that "war injuries" means physical injuries caused by certain things. Greenfield's injury was a physical injury, but was it caused by one or other of the things specified? In my opinion his physical injury was not "caused" by (i) the discharge of any missile (by the enemy), nor (ii) the use of any weapon (by the enemy), nor (iii) the doing of any other injurious act (by the enemy). Therefore, I think, his injury was not a war injury within that part of the definition which is headed (*a*). There remains the part headed (*b*). There was clearly no "impact" upon Greenfield "of any enemy aircraft . . . or of anything dropped from any enemy aircraft." But it is suggested that the physical injury to Greenfield was caused by "the impact on any property of something dropped from an enemy aircraft." I do not agree with this suggestion. It is true that the hole into which the engine fell was caused by a bomb from an enemy aeroplane. And Greenfield's injury was caused by his engine falling into the hole. But I cannot think that his injury was caused by the impact of the bomb upon the defendants' railway line.

If, while his engine was on its way, a German bomb had fallen on or close to it, and Greenfield had been killed by the explosion, he would clearly have suffered a war injury under (*a*). If, while the engine was proceeding, a German bomb had fallen on a bridge and shattered it, so that parts of the bridge fell on Greenfield and injured him, then I think he would have, under (*b*), suffered an injury "caused by the impact on property" of something dropped from an enemy aircraft. In my view the addition in (*b*) of "impact on any property" to "impact on any person" is to cover the case of a bomb which does not hit a person but hits something near him (e.g., a house), which thing, or parts of which thing, in their fall or dissolution injure the person. We were referred to certain cases in which the difficult provisions of this Act have been considered. I confess I have not found them of much help in applying those provisions to the facts of this case. We were also referred to some of the many cases (such as the *Yorkshire Dale* case (1)) in which the meaning of "cause" has been debated, with the discussion of various epithets such as proximate, predominant, effective, determinate, etc. Most of such cases arose on the construction of marine insurance policies, and in particular on the F.C.S. clause and the effect of "consequences of hostilities."

The only question in this case is what is the meaning of the apparently simple words "physical injury *caused* by" certain things. So far as those cases do assist me, I think they support my conclusion that the injury to Greenfield was not *caused* by the impact upon him or upon any property of anything dropped from an enemy aircraft.

In the result, I think this appeal should be allowed.

The judge, in case we should allow this appeal, fixed the damages. There is a cross appeal by the defendants on the ground that he estimated the damages at too high a figure. The principles upon which this court reviews the assessment of damages, both when they are said to be too high or too low, are well known. We do not interfere merely because we might ourselves have given rather more or rather less, but only (*a*) if it appears that the judge below has omitted some relevant consideration, or admitted some irrelevant consideration, or (*b*) if we think that the amount fixed is so excessive, or insufficient, as to be plainly unreasonable. In this case I think the damages fixed by CHARLES, J., were on the liberal side. If I had been in his place, my figure might have been smaller. But I do not think the defendants make out that it is a case in which we ought to interfere with his finding.

In the result, the appeal will be allowed, with costs here and below, and judgment entered for the plaintiff for the damages assessed by the judge.

LAWRENCE, L.J.: The question in this case turns upon the construction of sect. 8 of the Act. It is evident from sects. 3 and 8 that the Act contemplates, among others, injuries which are caused in the legal sense, that is directly caused, both by negligence and by enemy or allied acts of war, but such causes must, as a general rule, be contemporaneous or they would not be direct (c.f., LORD SUMNER, in *Weld-Blundell* v. *Stephens* (2)).

But we have not to consider the subject of legal causes in general, but the particular words of sect. 8. These words all relate to acts which are not continuing but immediate —" the discharge of a missile," " the use of a weapon," " combating or repelling the enemy," " the impact of a bomb." Such acts may be contemporaneous with and jointly with acts of negligence cause injury. But where, as here, the impact of the bomb *qua* impact is over and done with, the impact cannot truly be said to cause injury ; it is the crater, not the impact of the bomb, which directly causes the injury, and it may be that the crater will cause an injury years after the impact.

The respondents' counsel, to meet this difficulty, contended that it was a question of degree, and because the injury was here caused at 9.45 and the bomb dropped at 9.10 the same night, they contended that the matter should be regarded as one incident and the injury could properly be said to have been caused by the impact. There was no evidence that any bomb fell after 9.10, but whether any did or not, it is not in my view a question whether the injury is caused during what may be considered one incident or raid, but whether it is caused by impact. Reliance was also placed upon the *dicta* of SCOTT, L.J., in *Smith* v. *Davey Paxman* (*Colchester*), *Ltd.* (3), where he referred to the intention of an enemy who might drop a delayed action bomb or set a booby trap. But I am unable to agree that the enemy's intention has anything to do with the construction of the words of sect. 8.

The interpretation I put on the words of sect. 8 accords with all the authorities with the exception of that in *Taylor* v. *Sims and Sims* (4), and I am unable to agree with the view of the judge in that case on this point. In particular, the view of the majority in the minefield case, *Adams* v. *Naylor* (5) supports my view of the words " combating or repelling the enemy " being limited to actual fighting.

The argument of counsel for the respondents that the case may be tested by considering the case of an action brought against joint tort feasors, one of whom was a bomb dropper who was not an enemy but an ordinary tort feasor, in my opinion ignores the fact that we have to consider not an ordinary case of a joint tort but the words of sect. 8. For these reasons, as well as the reasons given by my Lord and CASSELS, J., I agree that the appeal must be allowed.

CASSELS, J. : I agree that this appeal succeeds. There are only a few observations that I desire to add to the judgment which has been delivered. I would agree with CHARLES, J., in saying that this case is not easy to decide and that different judges may well take different views. This appeal has raised consideration of the oft-debated question of causation. If the death of this man was the result of war injuries, as defined by the Personal Injuries (Emergency Provisions) Act, 1939, s. 8, then by sect. 3 of the same Act no damages are recoverable at Common Law from the respondents on the ground that the injuries in question were attributable to some negligence for which they are responsible. If the death of this man was caused by the admitted negligence of the respondents and not caused by any of the happenings enumerated in sect. 8 of the Act, then damages at common law are recoverable.

Among the words used before the word " cause " in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (1), are " proximate," " effective," " dominant," " predominant," " real," and " efficient," and it was said in that case at p. 61 that :

> This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards.

Counsel for the respondents invited the court to put the words " direct " or " substantial " before the word " cause," so that the words in sect. 8 would be " directly caused by," or " substantially caused by," and he added that the real question here is, " Was there or was there not a direct and substantial connection between the enemy act and the injury ? " and he contended that if there was, the case was within the statute.

All this involves an examination of the very short facts of this case. On Mar. 3, 1943, at 9.10 p.m., an enemy bomb made a crater on the respondents' railway line. The train on which these two men were working was brought to a standstill by signals several miles away. It was known that the track circuits had failed, thus putting the signalling system out of operation. At 9.45 p.m., having been negligently ordered by a chief clerk in the office of the traffic superintendent to proceed "at caution," the engine of this train overturned in the crater and the two men lost their lives in consequence of the physical injuries which they sustained. Were these injuries caused by the doing of an injurious act by the enemy or by the impact on any property of anything dropped from enemy aircraft, to pick out the applicable words of A sect. 8? Of course, if there had been no crater, the engine would not have overturned in it. But if there had been no order to "proceed at caution," the engine would not have overturned in the crater. It was not the act of the enemy by injurious act or impact which put the engine down into the crater; it was the negligent order to proceed, as it happened from safety to danger, which led the engine to the crater. Enemy action created the crater: the respondents' negligence put the engine into it. B

Counsel for the respondents contended that an enemy act has to be regarded as a direct cause except where there is a continuing nuisance which causes the accident (*Leanse* v. *Egerton* (6)); or where there is no causal nexus between the enemy act and the injury (*Smith* v. *Davey Paxman & Co.* (*Colchester*), *Ltd.* (3)). With respect, I cannot agree that this is exhaustive. Though there may be, in the history of the events leading up to the accident, an enemy act, some C negligence independent of the enemy act may be the effective cause. The facts of one case do not always assist in determining the legal effect of the facts in another case, and I am not sure that illustrations serve a very useful purpose, but if a negligent driver of a motor car, by high speed and failure to keep a proper lookout, overturns his vehicle into a hole, which he might, by the exercise of reasonable care, have avoided, and this injures his passenger to whom he owes a duty to take care, I should find it difficult to believe that the effective cause D of the injuries was by enemy action which some time before the accident, in fact before the driver started, had made the hole, and not the negligent driving.

I observe that at one time the respondents were alleging that the accident was caused by negligence of the engine-driver, in that he failed to drive at a cautious speed or to keep a proper lookout. If the negligence precedes the enemy action, the latter may well be the effective cause of the injuries; but if the enemy E action comes first and the negligence follows, the inquiry as to the effective cause of the injuries may have a different result, depending upon the particular circumstances. Each case must depend on its own facts, and dealing with the facts in this case and ascertaining their legal effect, and applying the test laid down in the *Yorkshire Dale Steamship Co.*'s case (1), and for the reasons given by my Lords, I think it is clear that the injury of this man was not a war injury within the meaning of those words in the 1939 Act, but was an F injury of which the predominant cause was the admitted negligence of the respondents, through the clerk in the traffic superintendent's department, in ordering the train to proceed.

On the question raised as to the damages, I also agree with my Lords.

This appeal is allowed, with costs, and judgment will be entered for the amounts found by CHARLES, J., in the case. G

Appeal allowed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *W. H. Hanscombe* (for the respondents).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re DUPREE'S TRUSTS, DALEY AND OTHERS *v.* LLOYDS BANK, LIMITED AND OTHERS.

[Chancery Division (Vaisey, J.), **October 25, 1944.**]

Charities—Charitable gift—Gift for encouragement of chess playing by boys or young men under the age of 21 *years—Definite geographical limitation—Educational value.*

The donor executed a deed of gift in 1932, made between him, certain acting trustees, and Lloyds Bank, Ltd., as custodian trustee. The deed recited that certain shares to the value of £5,000 had been transferred to the bank by the donor, and declared that the bank was to pay the income arising from the trust fund to the acting trustees to be applied in promoting annual chess tournaments for the encouragement of chess playing, and in awarding prizes in connection with such tournaments, open to boys or young men under the age of 21 years and resident in the City of Portsmouth. The acting trustees were four in number, the Lord Mayor of Portsmouth, the Town Clerk of Portsmouth, the chairman of the Portsmouth Education Committee, and the headmaster of Portsmouth Grammar School, or their successors. The first prize was to be £100, the other prizes were to be fixed by the acting trustees, who were directed not to pay the prizes in cash but to apply them for the benefit of the winners. The question to be determined was whether this constituted a valid charitable gift:—

Held: since the encouragement of chess playing was of definite educational value, and since the trust was for the benefit of a well-defined and limited area, the deed constituted a valid charitable gift.

[**EDITORIAL NOTE.** In *Re Nottage* [1895] 2 Ch. 649, at p. 656, Lopes L.J., said, "I am of opinion that a gift the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public." Here Vaisey J., not without hesitation, holds that the promotion of chess playing among young men is a good charitable object, but it is to be noted that (*a*) there was evidence that chess is of sufficient educational value to be adopted as part of the curriculum in certain schools and (*b*) the trust was for the benefit of a well-defined area, as part of the educational activities of the Borough of Portsmouth.

As to Gifts for Educational Purposes see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and for Cases, see DIGEST, Vol. 8, pp. 245-247, 264, 265, Nos. 51-70, 258-267.]

Summons by the trustees under the donor's deed to determine whether or not a gift to promote annual chess tournaments among the boys and young men under 21 in the city of Portsmouth created a valid charitable trust. The facts are fully set out in the judgment.

H. Wynn-Parry, K.C., and *Raymond Jennings* for the plaintiffs.

H. O. Danckwerts for the Attorney-General.

Wilfrid Hunt for the other defendants.

Vaisey, J.: This case raises an interesting point upon which it is quite possible that opinions might differ. Shortly, I have to decide whether the encouragement and promotion of chess playing among boys and young men of the city of Portsmouth is a good charitable object.

The matter arises in this way. The late Sir William Dupree, who lived in Portsmouth, executed a deed of gift which bears the date of June 30, 1932. In that deed he is the party of the first part and is defined as the donor. The parties of the second part were the then Lord Mayor of Portsmouth and the chairman of the Portsmouth Education Committee—at that time those two offices were held by the same person—and the Town Clerk of Portsmouth and the then headmaster of Portsmouth Grammar School. They and their successors are defined in the deed as trustees. Finally, the party of the third part is Lloyds Bank, Ltd., whose position was and is that of a custodian trustee.

The recitals are to the effect, first, that the donor wished to promote a chess tournament for the encouragement of chess playing, to be competed annually by boys or young men under the age of 21 years, resident in the city of Portsmouth, and to provide for prizes to be awarded in connection with the tournament, and that, in furtherance of these wishes, he had transferred into the name of the bank certain shares representing a sum of £5,000.

The witnessing part of the deed provides, first, that the donor declares that the income arising from the shares or from the property for the time being representing the shares defined as the trust fund, should be applied in promoting and paying the expenses of the chess tournament, in which there was to be an annual competition. In the second place, the deed provides that the trustees, for the purposes of the deed, are normally to be four in number: the Lord Mayor of Portsmouth for the time being, the Town Clerk of Portsmouth for the time being, the chairman of the Portsmouth Education Committee for the time being, and the headmaster for the time being of the Portsmouth Grammar School. In the third place, it provides that the management of the tournament should be under the control of the trustees. In the fourth place, the income arising from the trust fund is directed to be paid by the bank as custodian trustees and the acting trustees for the purpose, in the first place, of providing the cash prizes to be awarded at the tournament. The first prize was to be £100, and the other prizes "such amounts as the trustees might from time to time decide."

There is an addendum that the prizes should not be paid in cash but are to be provided by the trustees for the benefit of the winners, as they might think fit, for the advancement in life of such winners.

The rest of the document contains clauses which I may define as machinery. They throw no light on the problems which arise in the case, but I should say that there is no power in the deed at any time to have recourse to capital, and the foundation is obviously contemplated to be permanent in its character. The game of chess (which, to those who follow it, as well, perhaps, as to those who do not follow it, is regarded as something rather more than a mere game) is, of course, an institution with a very long history behind it. It is not necessary for me to enlarge upon that. Indeed, there are, in that aspect of the matter, some matters of doubt and controversy, but the game, I think, admittedly, is of Oriental origin and possesses this somewhat notable feature, that it is essentially a game of skill into which elements of chance enter, if at all, only to a negligible extent. It is a game which, I suppose, is played all over the world, at any rate all over the European world. Those who attain to skill in it enjoy international contacts, which are not without interest, and, possibly, advantages.

I have some evidence which enables me to say—and, indeed, I think I might have said it even without that evidence—that the nature of the game is such as to encourage the qualities of foresight, concentration, memory and ingenuity. Even unguided by actual evidence, I should not have been surprised if the conclusion could have been reached that the game is essentially a game which possesses an educational value.

There are many pursuits which possess an educational value which may be followed to excess, and the matter is in no way concluded by any such consideration as that. Chess players may become so obsessed by the interest of their pursuit that they may neglect other duties. But the same thing may be said of those who range the mysterious country of higher mathematics or who indulge in the study of classical authors.

I am not surprised to learn from the evidence that there are schoolmasters and persons actually concerned with the business of education who regard the playing of chess as something which is of such value educationally that, in some places, it is actually a part of the school curriculum.

For instance, I have the evidence of Mr. Kipping, who has, for twenty years, been the headmaster of Wednesbury High School in Staffordshire, a school at which there are 265 boys, or thereabouts, from the age of 10 upwards. Ever since the year 1927, Mr. Kipping tells me, the teaching of chess has formed part of the school curriculum at Wednesbury. The amount of time devoted to chess in school hours is something less than two periods of fifty minutes each in the week. There are inter-school chess matches between Wednesbury School and certain schools at Wolverhampton. There are prizes in the shape of challenge cups, offered for competitions in this pursuit. Chess is not only taught at the school but takes a prominent place in the school life and ranks as one of the normal school games. Mr. Kipping says;

> My experience as a member of the teaching profession has convinced me that chess teaches concentration, self-reliance and reasoning and is a most useful training for the mind.

That, apparently, is not a mere expression of opinion, for it is confirmed by the fact, as he says, that the forms which have been taught chess specially have been among those "which were most satisfactory in work." Then there is the evidence of Mr. Horn, who is headmaster of the Armstrong Street Boys' School at Grimsby, which is a still larger school, having about 530 boys on the register. Mr. Horn has had 38 years of experience of teaching in senior boys' schools and has been headmaster for 11 years. He says that for 14 years chess has been taught at this Grimsby School at times during regular school hours, and, apparently, occupying a sort of half and half position between work and play. He says that, as a result of his experience of the teaching of chess, he has formed the opinion "that the qualities developed are concentration and foresight."

Mr. Rose, who is Director of Education for the County Borough of West Bromwich and has held that post since 1932, has been a teacher for 15 years, and on administrative work as Inspector of Schools and Assistant Director and Director of Education for 17 years. He says:

> My practical experience has enabled me to form the opinion that the teaching of chess has a real educational value. It encourages the powers of concentration and reasoning and this has been reflected in the improvement in the position in form and average percentage of marks at the end of term examinations of pupils at the West Bromwich Grammar School after they have commenced to play the game seriously.

I think this case may be a little near the line, and I decide it without attempting to lay down any general propositions. One feels, perhaps, that one is on rather a slippery slope. If chess, why not draughts: if draughts, why not bezique, and so on, through to bridge, whist, and, by another route, stamp collecting and the acquisition of birds' eggs? When those particular pursuits come up for consideration in connection with the problem whether or no there is in existence a charitable trust, the problem will have to be faced and dealt with. I say nothing about that. Nor do I say that, if this trust had been without a geographical limitation, if it had been for the promotion of chess playing *in vacuo* or at large, the area of what is regarded as charitable might not have been over-stepped. But, having regard to the evidence before me, and having regard to what is known about the game of chess by everybody, and, in particular, to the fact that the encouragement of chess playing here is for the benefit of a well-defined area, and, also, the fact that it is of the essence of the constitution of the trusteeship that two of the trustees should be closely connected with educational activities in the borough, I think I am bound, in the present case, to hold that there is a good charitable trust, and answer the question by declaring that the trusts constituted by the deed of June 30, 1932, are valid charitable trusts.

Inasmuch as there is a difficulty now in providing for an annual prize of £100 and further prizes in accordance with the strict letter of the deed, I shall direct that a scheme be established for the future administration of the trust to be approved by the court. The formulation of the scheme will be referred to Chambers.

Declaration that gift valid. Costs of all parties as between solicitor and client payable out of estate.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the plaintiffs); *The Treasury Solicitor* (for the Attorney-General); *Coode, Kingdon, Cotton & Ward*, agents for *R. W. Sherwin & Sons*, Portsmouth (for the other defendants).

[*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

BARKER *v.* BARKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **April 4, 1944.**]

Divorce—Separate income of guilty wife—Settlement for benefit of child of marriage during minority—Child in custody and care of father—Supreme Court of Judicature (*Consolidation*) *Act*, 1925 (*c.* 49), *s.* 191.

A husband had obtained a decree of divorce on the ground of his wife's adultery, and he was given the custody of the only child of the marriage, a son aged 10 years. The husband had an income of under £800 a year. The wife's income, about £1,700 a year, was principally derived under her father's will from her share of the income of her father's estate, which share was to be increased on the death of her mother. Under that will, the wife's share after her death was left to such of her children or remoter issue as she might by deed or will appoint, and, failing such appointment, to all her children in equal shares on attaining their majority; she also had a power to appoint by will the income of the whole or any part of her share to any surviving husband for life or any less period. The wife had executed an irrevocable deed of appointment of one-half of the capital of the fund to take effect, after her death, on the son's attaining the age of 21. The registrar recommended that the wife should assign to trustees her life interest to secure for the child one-quarter of her annual income during her life. The husband applied to the court to confirm the registrar's report:—

HELD: the wife should assign to trustees one-quarter of her life interest under the will of her father on discretionary trusts for the maintenance, education and benefit of the child until he attains the age of 21 years, the balance remaining out of the annual income to sink back at the end of each year into the settlement created by the will of her father.

[**EDITORIAL NOTE.** It was decided in *Midwinter* v. *Midwinter* (1) that the income of a guilty wife could be assigned to a child for life. The problem, here, however, is that the wife had already executed an irrevocable deed of appointment of half the *corpus* to take effect after her death on the son's attaining twenty-one. The order recommended by the registrar, therefore, would have had the effect of causing a merger at twenty-one of the son's life interest with his interest under the deed of appointment, which might have been harmful to him and likely to put him in a better position than his mother. The difficulty is overcome by ordering assignment to trustees on discretionary trusts for the benefit of the child until he attains twenty-one, and not for life.

AS TO SETTLEMENT OF WIFE'S PROPERTY, see HALSBURY, Hailsham Edn., Vol. 10, p. 797, para. 1265; and FOR CASES, see DIGEST, Vol. 27, pp. 514-517, Nos. 5541-5575.]

Case referred to:

(1) *Midwinter* v. *Midwinter*, [1892] P. 28; 27 Digest 515, *5542*; 61 L.J.P. 1; 65 L.T. 438; *subsequent proceedings*, [1893] P. 93.

APPLICATION by a husband for confirmation of the registrar's report in favour of his claim in an application under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1).

E. Holroyd Pearce for the husband.

R. Bush James, K.C., and *Ifor Lloyd* for the wife.

H. E. Salt for the trustees of the will.

HODSON, J.: The husband is a professional man in receipt of an income of under £800 a year. The income of the wife is principally derived from her share of the income of the estate of her father. For the last two years the wife's income has been at the rate of £1,702 a year. The husband claims that the wife should be ordered to assign her life interest under her father's will to trustees to secure a quarter of the annual income during the joint lives of himself and the child for the benefit of the child. The wife has executed an irrevocable deed of appointment of one-half of the capital of the fund to take effect, after her death, on the son's attaining the age of 21.

The validity of the exercise by the wife of her power of appointment has not been challenged in these proceedings. She has stated on oath that it has always been her intention to exercise her power over the capital of the fund to the extent of one-half in favour of her son, and I am proceeding on the footing that the validity of the deed of appointment is not likely to be effectively challenged.

It has been argued on behalf of the wife that, in view of the benefit which has been given to the child by the deed of appointment, no such order as is claimed should be made, on the ground that, so far from putting the child in as good a position financially as he would be if the home had not been destroyed, it might

be harmful to him, and, further, might have the effect of putting him in the
position during his mother's lifetime of being very much better off than his
mother. It was further argued that the husband would obtain benefit from
the order sought to be made so long as the child was under his control, which
would be inconsistent with his professed desire to obtain no benefit for himself.
It was also pointed out that the wife's income was liable to fluctuation, and
likely to fall in the future. She offered, in the alternative, to undertake to abide
A by any order that the court might make against her from time to time for the
maintenance of the child and argued that the giving of such an undertaking now
would destroy, so far as necessary, the restraint on anticipation which would
arise during coverture. She did not, however, offer any security or suggest
any means by which she should make it impossible for her to place herself in
such a position as to be unable to comply with the order if, for example, she were
to assign her interest to some other person. She also contended that, if such
B an order were made as was sought by the husband, the proportion of the income
which should be devoted to the child should be smaller than one-quarter.

The trustees of the will of the wife's father pointed out that, while not in any
way opposing any order the court thought fit to make, nevertheless, the effect
of the order which the husband desired would be that, on attaining the age of
21, the child would be entitled to call for one-quarter of the corpus of the property
in possession by the combined effect of the assignment of that part of his mother's
C life interest and the deed of appointment. This result would be manifestly
contrary to the intentions of the testator, and not necessarily in the best interests
of the child. It was, therefore, suggested as an alternative scheme that, to
avoid this merger of interests and at the same time to provide for the child
during his minority or afterwards, a proportion of the income of the wife should
be assigned to trustees during the joint lives of the child and his mother on
D discretionary trusts for his benefit, maintenance, and education, with a provision
that the unexpended balance of the income should sink back into the settlement
created by the will.

The husband opposed these counter proposals and adhered to his original
application, relying on the fact that there was no precedent for such an order
as was proposed by the trustees of the will, and, in particular, on the authority of
Midwinter v. *Midwinter* (1), where an order was made *inter alia* providing for
E the assignment of the income of a guilty wife to children for the whole of their
lives. It was pointed out in that case that under the Matrimonial Causes Act,
1857, s. 45, now replaced by the Act of 1925, s. 191, there is no obstacle to
provision being made for a child during the whole of his life. That case, however,
does not provide an illustration of the problem which presents itself here, as
there was no question of the merger of a life interest and a reversionary interest.

In my judgment, the scheme put forward by the trustees of the will is fair
F and reasonable, and the amount fixed by the registrar is not open to objection,
but the provision for the child should not extend beyond 21. At that age, if
his mother is still living, he will, if necessary, be able to raise money by mortgaging
his reversionary interest under the deed of appointment. The wife will,
therefore, be ordered to assign to trustees one-quarter of her life interest under
the will of the wife's father, Frank Hickman, on discretionary trusts for the
G maintenance, education and benefit of the child of the marriage until he attains
the age of 21 years, the balance remaining out of the annual income available
to the trustees to sink back at the end of each year into the settlement created
by the will of Frank Hickman. There will be no limitation of the discretion
of the trustees by the order, but there will be liberty to apply in case difficulty
arises in the future in the exercise of their discretion by the trustees. There
will be no order as to the appointment of trustees of the settlement save liberty
H to apply in default of agreement. The settlement itself will, in default of agreement,
be referred to one of the conveyancing counsel of the court to settle and
approve a proper deed or instrument to be executed by all the necessary parties.
The report of the registrar as to costs will be confirmed, subject to the addition
of a certificate for two counsel.

Registrar's report confirmed with variation.

Solicitors: *Finnis, Downey, Linnell & Price* (for the petitioner); *Gordon, Dadds &
Co.* (for the respondent); *Moodie, Randall, Carr & Brown* (for the trustees).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

McMORRAN *v.* A. E. MARRISON (CONTRACTORS), LTD.

[KING'S BENCH DIVISION (Asquith, J.), **September 25, 1944.**]

Emergency Legislation—Essential work—Unauthorised dismissal of employee—"Specified person"—Essential Work (Building and Civil Engineering) Order, 1942 (*S.R. & O.*, 1942, *No.* 2044).

By the Essential Work (Building and Civil Engineering) Order, 1942, a specified person employed on a building undertaking at a scheduled site cannot have his employment terminated without the permission of a national service officer, except for serious misconduct. The plaintiff was engaged in 1942 by the defendants, who were builders, as a general foreman. Early in 1943, he became an area supervisor, but he failed to give satisfaction, and was transferred to a new building site, the Brent Site, as a general foreman, from which position he was dismissed. He claimed damages for wrongful dismissal on the ground that he was dismissed without the leave of the national service officer. It was agreed that the Brent Site was a scheduled site within the Essential Work (Building and Civil Engineering) Order, 1942. Art. 8 (4) of that Order requires that every entry in the schedule and every notice shall specify the persons employed or any class or description of such persons. The notice notifying the employer of the scheduling of the Brent Site referred only to "all persons employed from time to time by persons carrying on undertakings":—

HELD: (i) this was a sufficient specification of the plaintiff to satisfy the Order.

(ii) on the facts, the plaintiff was employed as a general foreman on the scheduled site.

(iii) the plaintiff had not been guilty of serious misconduct.

(iv) the plaintiff was entitled to recover arrears of wages from his ostensible dismissal until he obtained other employment, notwithstanding the earlier determination of the Brent Site job.

[**EDITORIAL NOTE.** It is here argued that, under the Essential Work (Building and Civil Engineering) Order, 1942, in order to "specify" a person or a class or description of persons it is necessary to give their names or their type of work, such as "all carpenters." The court holds this to be unnecessary, provided they are unambiguously identified. A class may be identified by a common characteristic, and, therefore, "all persons employed by persons carrying on undertakings" on a (named) scheduled site is sufficient.

AS TO ESSENTIAL WORK (BUILDING AND CIVIL ENGINEERING) ORDER, 1942, see BUTTERWORTH'S EMERGENCY LEGISLATION [14] 135].

Case referred to:

(1) *George* v. *Mitchell and King*, [1943] 1 All E.R. 233.

ACTION for damages for wrongful dismissal, and for a declaration of wrongful dismissal in contravention of the Essential Work (Building and Civil Engineering) Order, 1942. The facts are fully set out in the judgment.

H. H. Harris for the plaintiff.

Harold Brown for the defendants.

ASQUITH, J.: This case turns mainly on the construction of a complicated Statutory Rule and Order.

The plaintiff in the action claims damages for wrongful dismissal and a declaration that he was in fact wrongfully dismissed by the defendants in contravention of the Essential Work (Building and Civil Engineering) Order, 1942. There was a small subsidiary claim in respect of the loan of certain ladders, but this the defendants do not now resist.

On June 16, 1942, the plaintiff was engaged by the defendants, who are builders, as a general foreman. In early 1943, he was transferred or promoted to the job of area supervisor or travelling supervisor. As general foreman he directed operations on one site, or on one site at a time; as area supervisor it was his duty to supervise all the sites on which the defendant's employees were working.

On Feb. 8, the defendant's general manager, one Wilcocks, according to his own evidence visited all the sites which the plaintiff was supposed to be supervising, and found him present at none of them. Again, according to Wilcocks, whose evidence on this point I accept, the plaintiff gave no explanation of his absence until between 3.0 and 4.0 in the afternoon of that day, when he explained that he had had to attend to certain private business connected, I think, with a Building Society. The plaintiff's account, which is somewhat different, agrees with Wilcocks' to this extent; that while on one day the plaintiff had secured leave of absence to attend to his private affairs, on a succeeding day he absented himself for some hours without permission.

On Feb. 18, work was begun by the defendants on what is called a Nissen hut, for the purposes of a canteen, on a site which is called the Townsend Lane Site or the Brent Site—I will call it the Brent Site for brevity. On Feb. 18 or 20, the plaintiff was transferred by Wilcocks to this site, and there, as is conceded, he performed the functions of a general foreman. Whether he acquired the status of general foreman is one of the chief issues in the case. No longer, at any rate, did he supervise, as before, a number of sites or all the sites on which the defendants were executing War Department or other contracts.

On Apr. 15, the work on the Brent Site being still in progress, Wilcocks, on behalf of the defendants, dismissed the plaintiff from the defendant company's service. At first the dismissal was summary, but on the plaintiff pointing out that under the terms of his agreement of service he was entitled to 7 days' notice, 7 days' notice was in fact given. It was given on Apr. 23, and expired on May 1. It is on this dismissal that the plaintiff rests his claim. He contends that it was a wrongful dismissal, on the ground that he could not validly be dismissed without the leave of the national service officer, and that this leave had not been obtained. His case is that the Brent Site was a site scheduled under the Essential Work (Building and Civil Engineering) Order, 1942; that he was a specified person within the terms of that Order employed on this site, and that in those circumstances the terms of the Order forbade his dismissal without the national service officer's leave. It is necessary, accordingly, to consider the terms and language of this Order so far as they are relevant.

The Order is S.R. & O., No. 2044 of 1942. Pt. II of that Order relates to Scheduled Undertakings, and Pt. III applies to Scheduled Sites, as these terms are respectively defined in Pt. I of the Order. Where the whole undertaking is scheduled the provisions of Pt. II apply, and particularly art. 2, subsect. (1), and art. 4, subsect. (1) (*a*). Art. 2 (1) of Pt. II provides that:

> Subject to the provisions of this part of this Order, if the Minister is satisfied that (*a*) a building or civil engineering contracting undertaking is engaged in essential work; and (*b*) it is expedient for securing the defence of the realm or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community so to do; he may enter the name of the undertaking in a Schedule of Undertakings to be kept by him as respects any persons employed in the undertaking or any class or description of such persons (which persons are hereinafter in this part of this Order referred to as "specified persons"), and he shall serve upon the person carrying on the undertaking a certificate that the undertaking is a scheduled undertaking in respect of the specified persons.

Art. 4 (1) (*a*) is perhaps the most important in the Order for the purposes of this case; it provides that:

> Subject as hereinafter provided, where a person carries on a scheduled undertaking the following provisions shall apply: (*a*) the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any specified person [I leave out the immaterial words] except with the permission in writing of a national service officer.

Pt. III of the Order deals, not with undertakings as a whole, but with individual sites, on which a building undertaking is carrying on works, and such enables the Minister of Labour to schedule any site. The provisions applicable to Scheduled Sites as art. 8, subsects. (1) and (4) and art. 9. Art 8, subsect. (1) runs as follows:

> If the Minister is satisfied that any works carried on by a building or civil engineering contracting undertaking at any particular site are essential works, he may enter such works and such site in a schedule to be kept by him, and such works and such site are hereinafter in this part of this Order referred to as "scheduled works" and "scheduled site," and he shall serve upon the person for whom the scheduled works are being carried out or upon the person mainly responsible for carrying them out or upon both such persons a notice that the works are scheduled works and that the site is a scheduled site.

In the same article, subpara. (4) provides:

> Every entry in the schedule and every such notice as aforesaid shall specify (*a*) the persons carrying on undertakings engaged in scheduled works on the scheduled site or any class or description of such persons to whom this part of this Order is to apply; and (*b*) the persons employed by persons so specified or any class or description of such persons to whom this part of this Order is to apply; and accordingly this part of this Order shall, as from the date fixed by such notice, apply so far as concerns the scheduled works and the scheduled sites to all persons specified under subparas. (*a*) and (*b*).

Then art. 9 applies the provisions of arts. 4, 5, 6 and 7 of the Order to Scheduled Sites. It will be remembered that art. 4, on the face of it, applied only to scheduled undertakings and required the consent of the national service officer to dismissal in respect of such undertakings in certain circumstances. The effect of art. 9 is to extend that requirement to Scheduled Sites and the persons specified in art. 8 (4).

The result of those provisions it seems to me is that a specified person employed on a building undertaking at a scheduled site cannot have his employment terminated without the permission of a national service officer, unless, indeed, he has his employment terminated for wilful misconduct, in which case special provisions apply to which I will refer in a moment.

Now there is no dispute that what I have called the Brent Site was at the time a scheduled site, and, if the plaintiff on Apr. 23 was (*a*) a specified person, and (*b*) employed on a scheduled site within the language of the Order, he was wrongfully dismissed, or, to be accurate, his employment was not validly terminated unless, indeed, he was dismissed for misconduct.

The case of *George* v. *Mitchell & King* (1) decides that a dismissal without the national service officer's permission in a case where the Order requires such permission to be got, is not only an offence under the Order, but is for civil purposes a nullity; the workman continuing, in law, to be in the employment of the employer and entitled to wages at the contract rate unless and until his employment is validly determined or he obtains other employment.

First, then: Was this plaintiff a specified person? Art. 8 (4), which I have read, provides that:

> Every entry in the schedule and every such notice as aforesaid shall specify . . . (*b*) the persons employed by persons so specified or any class or description of such persons to whom this part of this Order is to apply.

It is argued for the defendants that the plaintiff was not a "specified person" at all in this case, because he was not mentioned by name in the notice which notified to the employer the scheduling of the site. What the notice did, in fact, was first of all to announce that amongst other sites the Townsend Lane Site, that is, the Brent Site, had been scheduled. Then it went on in this fashion: that the Minister further gives notice that he specifies provisionally as set out in the list below: (*a*) the persons carrying on undertakings in the scheduled works on the scheduled sites, and (*b*) the class or description of persons employed by those persons in those works on that site to whom the Orders are to apply; and then below there is appended the list referred to. This list sets out the persons referred to in (*a*) and (*b*) which I have just read. First of all, it specifies the persons carrying on the undertaking, and then it goes on in this way:

> All persons employed from time to time by persons carrying on undertakings, other than the excepted undertakings referred to above, except in the case of structural steelwork erection . . .

and then follows certain classes of steelwork apparatus erectors, helpers, and so on.

What is argued is that before a person can be said to be "specified," the Order requires the Minister to specify either the person or a class or description of persons; that specifying persons, as distinct from class or description, necessarily imports giving their names; that specifying a class or description necessarily involves specifying a type of worker, such as "all bricklayers" or "all carpenters," and as the list in this notice does neither of those things precisely, there has been no valid specification and the Order does not apply.

I dissent from this argument. Persons can, in my view, be specified without being named, provided they are unambiguously identified, but, in any case, there was here, as I hold, a valid specification of a class of persons employed on the site. To specify a class surely means no more than to designate a group of persons by reference to some common characteristic, which may be positive or negative. "All barristers who have chambers in the Temple," is, in my view, a perfectly good specification of a class; so also is the phrase: "All persons working in the Temple, except barristers' clerks." This objection, therefore, in my view, fails.

It is further objected that the plaintiff was not employed on the Brent Site within the meaning of the Order and notice, and the ground of this objection is that he was promoted towards the end of 1942 from general foreman to area supervisor, and that, although from Feb. 18 onwards he performed the functions of a general foreman at the Brent Site, he retained the status of an area supervisor. The relevance of this objection is that an area supervisor is a member of the headquarters staff, and it is common ground that such a member could not be, and could not be said to be, employed on any particular site. Hence he would not be covered by the Order or notice.

This argument, in my view, also fails. I see no evidence that he retained the status of area supervisor after Feb. 18. He did no work at the headquarters office; he did not supervise or visit any site other than the Brent Site; he worked there continuously from Feb. 18 till his dismissal by notice given on Apr. 23. Until he started on the Brent Site entries in relation to his salary appeared in a special book limited to head office staff, and he is described in such book as "travelling supervisor," whilst from the time he started work on the Brent Site entries in relation to his pay appear instead on the ordinary pay sheets, and he is described therein as "general foreman."

According to Wilcocks, the plaintiff was relegated to this single site because he had been unsatisfactory as a travelling supervisor, having on Feb. 8 omitted during most of the day to visit any of the sites he was supposed to supervise.

It seems to me that the proper inference from all those facts is that, as from Feb. 18, he reverted to the grade in which he had been originally retained by the defendants, namely, that of a general foreman. This is supported by the correspondence. When the plaintiff's solicitors on May 4, 1943, write to the defendants saying that until recently the plaintiff had been employed by the defendants as general foreman, the defendants' solicitors in their reply of May 6, in no way challenge that allegation, and it is not until June 7 that the defendants take the point for the first time that the plaintiff was employed at the material time as a travelling supervisor. (They then say that he was originally engaged in that capacity, which is inaccurate.)

In those circumstances, I feel bound to draw the inference, as I have said, that at the time of his dismissal he was a general foreman, and that point fails.

The next argument of counsel for the defendants was that the plaintiff was dismissed for serious misconduct within the meaning of art. 4 (1) (*a*), and that the Order in such a case does not require the assent of the national service officer to the dismissal. Art. 4 (9) deals with the proper procedure where the dismissal is for serious misconduct, and provides as follows:—

> The dismissal of a specified person for serious misconduct shall, in the first instance, be provisional only, and if (*a*) within the period allowed by para. (1) of the next succeeding article he requires the national service officer to submit the matter to a local appeal board: and (*b*) the national service officer then directs the reinstatement of the specified person under para. (3) of that article; the dismissal shall be treated as having been ineffective; but if the specified person fails to require the matter to be submitted as aforesaid within the time so limited or the national service officer notifies him and the person carrying on the undertaking that he does not intend to direct his reinstatement, the dismissal shall be treated as having been always operative.

Now I find that neither was the plaintiff in fact guilty of serious misconduct nor was such misconduct the ostensible ground of his dismissal, and that, therefore, the exception carved out of art. 4 (1) (*a*) in cases of dismissal for serious misconduct does not apply. A very large body of particulars and evidence was directed to the issue of misconduct *vel non*. With the exception of the plaintiff's absence from duty on Feb. 8, I do not find that any of those particulars are proved. As to the events of Feb. 8, the defendants forgave the plaintiff for his absence without leave and retained him for many months afterward; though it is true they limited his operations to one site, the Brent Site, where an eye could be kept on him and his presence or absence easily checked. It was not, indeed, for absenteeism he was discharged at all. He was present on all and every day at the Brent Site.

The express ground for his dismissal was, as I find, that he confessed to Wilcocks on Apr. 15 that he had lost interest in the Brent Site job; his heart was not in it. He attributed this loss of interest to the absence of proper materials and facilities for carrying on the work, an excuse which Wilcocks did not accept. A lack of interest or enthusiasm is not, in my view, serious misconduct, but, apart from this, in the correspondence preceding action, between the defendants and their solicitors on the one hand, and the plaintiff's solicitors and the national service officer on the other, where do the former suggest that A the plaintiff was dismissed for serious misconduct? On June 7 the defendants wrote that his discharge was carried out in accordance with the terms of the service agreement. I think this plea of misconduct first appears in the Defence, lodged six months after the material time. By then, no doubt, the defendants' advisers had had an opportunity of pondering over the terms of art. 4 (1) (*a*) and (9) of the Essential Work Order. In the circumstances outlined, and on my findings of fact, the plaintiff cannot be said to have been discharged for B serious misconduct, and this ground of defence also fails.

Lastly, it is argued that the damages, or to be accurate, perhaps, the arrears of wages recoverable in respect of the period after the plaintiff's ostensible dismissal and before he obtained other employment—that is, before July 12—ought to be limited to the period between May 1 and May 27; his notice of dismissal taking effect on May 1. The Brent Site job was completed on May C 27, hence it is argued if he had not been dismissed on May 1, he would, in any case, not have been employed beyond May 27, and cannot claim on the footing that because his dismissal was ineffective he must be treated as still in the employment of the company between May 27 and July 12. In support of this argument the defendants cited a passage in the judgment of SCOTT, L.J., in *George* v. *Mitchell & King* (1), in which SCOTT, L.J., said, at p. 237, that when the national service officer's leave is necessary to terminate a contract, and is D not obtained:

> . . . without such leave the obligation of the employer to go on paying "the normal wage" will continue as long as both the employed person and his proper work continue to be "available" . . .

Hence, it is argued, the normal wage will not continue if the proper work of the employee ceases to be available. *George* v. *Mitchell & King* (1) was decided on the wording of a somewhat different Essential Work Order from that involved E in the present case, and the other members of the court did not echo this particular part of the judgment of SCOTT, L.J. But, apart from this, I do not think there is any evidence that there would not have been work available for the plaintiff as a foreman builder on some other job after May 27.

The only reference I can find in the material Order to the availability of work as a condition of the employee's right to a normal wage is in art. 4 (1) (*d*), which F provides:

> . . . without prejudice to any terms and conditions of employment more favourable to specified persons that may be provided for by the Conditions of Employment and National Arbitration Order, 1940 [I leave out certain words] the person carrying on the undertaking shall in respect of every prescribed period pay to every specified person a sum which is not less than the normal wage for the prescribed period if that person is during the normal working hours (i) capable of and available for work; and (ii) willing G to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking.

Those provisions merely concern a case where work usual to the kind of employment—what SCOTT, L.J., calls "his proper work"—is not available, but other work is available to him. The effect of the provision in the present case, if any, would be that after the purported dismissal the plaintiff would H still be entitled to his normal wage as a general foreman, notwithstanding that work as a general foreman might not have been available to him, provided that other work which he could reasonably be asked and would be willing to perform might be available. In this case, there is nothing to suggest that work as a general foreman or such other work would not have been available after May 27.

In the result, the claim succeeds for the declaration asked for, and also for £105 5*s*., which was asked for under the heading of damages for wrongful dismissal, and is due either as such damages or, as I think more properly, as arrears of wages on the basis that the employment continued till July 12, and there will be judgment for that sum with costs.

Judgment for the plaintiff with costs.

Solicitors: *A. E. & C. Burton* (for the plaintiff); *Donald Darlington & Nice* (for the defendants).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

R. *v.* HUNTBACH, *Ex parte* LOCKLEY.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Croom-Johnson and Cassels, JJ.), **May 11, 1944.**]

Coroner—Inquest—Verdict of suicide—No evidence to support verdict—Inquisition quashed—Fresh inquest ordered before another coroner—Coroners Act, 1887, (*c.* 71), *s.* 6 (1, b), (2)—*Coroners (Amendment) Act,* 1926 (*c.* 59), *s.* 19.

A young man, employed as a haulage hand in a pit in Staffordshire, was found dead in a disused and unventilated heading. His death was due to asphyxiation. An inquest was held, and the coroner recorded a verdict that the death of the man was due to suicide while his mind was temporarily unbalanced. The only facts established by the evidence given at the inquest were that the man, having gone down on the afternoon shift, was allotted a task which he found too heavy for him and was then ordered to report for a haulage job in another district. He was not seen again and when a search was made for him, his body was discovered in the disused heading which had been fenced off and marked "no road":—

HELD: there was no evidence before the coroner to support a verdict of suicide. Suicide is never to be presumed, and the inquisition should be quashed, and an order made for a fresh inquest to be held by another coroner.

Southall v. *Cheshire County News Company, Ltd.* (1) applied.

[**EDITORIAL NOTE.** This case illustrates the rule that however attractive a theory may be built up from which suicide can be inferred, this is not sufficient to support a finding of suicide by a tribunal. Suicide is a crime and must accordingly be proved by facts and not by conjecture.

AS TO QUASHING INQUISITION AND A NEW INQUEST, see HALSBURY, Hailsham Edn., Vol. 7, pp. 684-690, paras. 1094-1104, and FOR CASES, see DIGEST, Vol. 13, pp. 252-256, Nos. 298-344.]

Cases referred to:

(1) *Southall* v. *Cheshire County News Company, Ltd.* (1912), 5 B.W.C.C. 251; 34 Digest 333, *2703*.

(2) *Evans (Richard) & Co., Ltd.* v. *Astley,* [1911] A.C. 674; 34 Digest 331, *2693*; 80 L.J.K.B. 1177; 105 L.T. 385; 4 B.W.C.C. 319; *affg.*, [1911] 1 K.B. 1036.

(3) *Bender* v. *Zent (Owners),* [1909] 2 K.B. 41; 34 Digest 328, *2676*; 78 L.J.K.B. 533; 100 L.T. 639; 2 B.W.C.C. 22.

APPLICATION for an order of *certiorari* by the mother of the deceased, and under the authority of the Attorney-General, to quash the inquisition on the inquest held on the deceased man by the coroner for Stoke-on-Trent, Staffordshire, on Aug. 26, 1943, and for an order that a fresh inquiry be held. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

H. H. Maddocks for the applicant.

Vernon R. M. Gattie for the respondent.

VISCOUNT CALDECOTE, L.C.J.: This matter comes before the court under the provisions of the Coroners Act, 1887, s. 9. An addition has been made to the provisions of that Act by the Coroners (Amendment) Act, 1926, s. 19, an enactment which is stated to be "for the removal of doubts." In the course which this case has taken I do not think that the provisions of sect. 19 necessarily require consideration and the matter, therefore, arises in my view only upon the provisions of the Coroners Act, 1887, s. 6.

The facts which I need state in my judgment are very simple. A young man of 22 years of age, who was a haulage hand in a pit in Staffordshire, was found in a heading asphyxiated. All efforts to revive him failed. The circumstances are stated in the evidence which was given at the coroner's inquest which naturally followed the discovery of the body of this man Lockley. The evidence was that having gone down one day to the afternoon shift he was allotted a task which he found heavier than he liked and he asked for other work. After some coming and going between officials who were in the pit at the time he was looked for and the body was found, as I have said. The inquest which was held was one which the applicant here, the mother of the dead man, says was of such a nature that the court ought to exercise the powers of sect. 6 in quashing the inquisition on the inquest.

The Coroners Act, 1887, s. 6, provides:

> (1) Where Her Majesty's High Court, [I omit immaterial words] . . . is satisfied . . . where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of enquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held touching the said death, . . . and where an inquest has been already held may quash the inquisition on that inquest.

This application is accordingly for an order of *certiorari* to bring up and quash the inquisition on the inquest which has been held. The way in which the case for the applicant is put, as I understand it, is that the verdict given by the coroner was such as to make it necessary, in the interests of justice, that another inquest should be held. The verdict of the coroner was that the cause of the death was suicide by exposure to fire damp while his mind was temporarily unbalanced. Objection is taken to that finding as one for which there was no evidence whatever and that is really the only point in this case.

I wish to say at once that there is no aspersion whatever or no criticism on the coroner's action in this matter except the criticism to which everybody who sits in a court is exposed that a mistake has been made. I should like to make it quite plain that, in my judgment, it is clear that the coroner sought to exercise his duties with diligence and with care and his affidavit shows plainly that he sought to discharge his duty in accordance with the law, but the criticism that has been made is that he gave his verdict upon evidence which was not sufficient to show that the death of this man was a case of suicide. It is, therefore, necessary to consider in a little more detail than I have done hitherto what the evidence was.

On the day in question this man left home at about 2 o'clock in the afternoon, apparently in his normal health. His sister said that he had some grievance in the pit owing to his being moved when miners from the new Haddon Colliery joined the Berryhill men. At 3 o'clock on that afternoon Lockley came to the fireman employed in a particular district in the pit to commence work. Parker told Lockley to carry Cardox shells from the main haulage level into the conveyor face as he had done on the previous shift. Having been told that, he left Parker, who thought that he had gone to No. 7 unit to commence work in accordance with the instructions which he received. Parker then left the pit bottom and went to No. 7 unit and met the deceased. Parker says that he knew nothing about Lockley having nursed a grievance, but Lockley said: "I am not going to do that job; it is too heavy." Parker was in this difficulty, however, that he had no place in which to put Lockley and no work to give him and so he told him to report to the afternoon overman, Mr. Burgin, at the pit bottom and Lockley left the No. 7 unit.

About an hour later Parker was met by Burgin, who asked him whether Lockley had reported back to him (Parker). That was in consequence of a conversation which Burgin had had with Lockley who had gone back to the pit bottom and who spoke to Burgin. Burgin was told by Lockley that he did not want the job of carrying shells to the face because it was too heavy for him. Burgin told him to report to Mr. Parker and if he did not want him, he was to report to the Ten Foot fireman for a haulage job there. Lockley replied: "Righto" and finished the telephone conversation which was the way in which he had got into touch with Burgin. Neither Parker nor Burgin saw Lockley again. Thereafter owing, I gather, to some natural anxiety, search was made for him and his body was found in a heading which we are told had been closed or disused for some months at any rate in consequence of the prevalence of an excessive quantity of gas.

I ought to say that evidence was also given by a man called Lyth who had a conversation with Lockley to this effect. Lockley asked him where Burgin was, from which it seems clear that he was looking for Burgin. Lockley said : "I have got no job." Lyth said : "Come to me at the engine house and I will get in touch with Burgin," and then the telephone conversation which I have stated took place. After the conversation Lockley said to Lyth : "I am going to the 10 foot seam," and having been told by Lyth to be careful to go down the back travelling road as the main haulage road was in motion, Lockley said : "I know my way. I have worked that district before," and then Lockley left him. He says that he did not see Lockley alive again. The colliery officials who then made the search which resulted in the finding of the body were themselves overcome by the gas in the heading. I think it right to say that their conduct was a piece of simple, self-less heroism of a quality which is constantly taking place in the pits of our country. As the result of those efforts Lockley's body was brought to what would have been a place of safety if he had not suffered from this asphyxiation so severely as to lose his life.

From the evidence which I have recited I feel that I am driven to the conclusion that there was nothing upon which anybody could properly say that there was evidence of suicide which was the gist of the coroner's verdict. I am satisfied that if the coroner had been sitting with a jury and had given a proper direction to them, he would no doubt have gone over with them the matters mentioned in his affidavit—although perhaps not at such great length—but he would have told them : "Whatever you may guess at, there is no basis of proved fact upon which you can return anything more than an open verdict." I am satisfied that the coroner would have had to tell the jury and that he would have told the jury that there was a gap in the information which they could consider which nobody could ever fill, that nobody would ever know what this man had done although they might form various surmises for themselves, and that in those circumstances their verdict should be an open one.

I may perhaps call attention to the fact that the Coroners Act, 1887, s. 4 (3), limits the duties of a jury to evidence which establishes facts and not merely gives rise to surmises. Sect. 4 (3) is in these terms :

> After [*viewing the body and*] hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, . . .

Those words "so far as such particulars have been proved to them" seem to me to emphasize the duty of the coroner, or of the jury as it was at that time, to confine himself or themselves to finding such particulars as have been proved by evidence.

Here the coroner seems to me to have been attracted by the theory—and I think that it remained a theory to the end of the case—that this man had deliberately made up his mind to escape for ever, as he said, from the grievance under which he was suffering. Two paragraphs in particular in the coroner's affidavit illustrate how much the coroner was basing this verdict upon guesswork instead of upon particulars which had been proved in evidence.

Para. 9 of the coroner's affidavit says :

> I believe it established by the evidence of the colliery witnesses that the deceased said he knew the way to No. 10 district ; and that he set out and presently forced his way into the fenced-off and unventilated No. 3 heading by knocking some nailed, vertically placed boards back and splaying them out. He then must have climbed through, in spite of his knowledge of the need for ventilation, and in disregard of a chalked sign on the boards, saying : "No Road." This indicated to me a peculiar but significant determination.

Para. 11 is :

> Reviewing the proved facts (as I regarded them), it seemed clear that Lockley was in a mood of disinclination to work.

There is not a tittle of evidence of any disinclination to work. There was an indication of a disinclination to do a particular piece of work and the officers in the pit, the overman, and the manager, seemed not a bit disturbed by his statement that the work was too heavy for him.

The coroner goes on :

> . . . yet his physical activity in forcing the barrier and proceeding so far up the

unventilated heading indicated not lassitude, but a passionate expenditure of strength beyond the powers of a normal man.

I cannot find that those conclusions are anything more than the expression of a very attractive possible theory, that is to say attractive in its probability. But, as I have said more than once in this judgment, it is not probability which determines verdicts but proved facts, and if the facts cannot be proved, there is no alternative but to return an open verdict.

We have been referred to the case of *Southall* v. *Cheshire County News Company, Ltd.* (1). That was a workman's compensation case. An arbitration had been held by the county court judge into the death of a workman named Southall. The point of that case was that the man was said to have committed suicide under circumstances which were the result of an injury which it was admitted that he had received. The county court judge found that the death resulted from the accident which caused the suicidal tendency and awarded the dependants a sum of money. The Court of Appeal held that there was no evidence to justify the finding of the judge. Lord Cozens-Hardy, M.R., at p. 252, said :

> Suicide is never to be presumed. In the next place there is no evidence of suicidal tendency. The man's son says he never threatened suicide. There is no one who says he anticipated suicide. Strange to say, there is the report of the doctor made on the very day before the accident. He did not think there was any suicidal tendency. The judge seems to have thought it was more likely that the man committed suicide than anything else. The judge is not entitled to act upon a surmise of that nature.

Then he cites Lord Atkinson's judgment in *Evans & Co., Ltd.* v. *Astley* (2), where Lord Atkinson says, at p. 679 :

> One not infrequently finds, in cases under this Act, surmises more or less shrewd of this or that arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inference can reasonably be drawn.

Then Lord Cozens-Hardy, M.R., goes on to say, at p. 253 :

> In the present case there is no evidence to support the finding of suicide.

That, as I have said, was a case under the Workmen's Compensation Act, and not a case of an inquest by a coroner, but the law, as stated by the Master of the Rolls and by the other members of the Court of Appeal, seems to me to apply to the circumstances of this case, and as the coroner, however he may take his evidence, is bound by evidence and can find only facts which are proved in evidence and not the result of guesswork, I think that here the coroner was betrayed into a mistake in the verdict at which he arrived.

The question then arises of what ought to be the result. That is to be determined in the light of the Coroners Act, of 1887, s. 6, and if we find that it is necessary or desirable, in the interests of justice, that another inquest should be held—that is to say necessary or desirable by reason of insufficiency of inquiry or otherwise—we should make that order.

In exercising the powers under sect. 6 (1), I think that we must quash the inquisition which has been held and inasmuch as in my view it is necessary in the circumstances of this case that a proper inquisition should be held, I think that we should exercise our powers to order another inquest to take place. I think that it is necessary as well as desirable, in the interests of justice, that it should take place. The coroner will confine himself to establishing facts so far as he can by evidence and then giving a verdict which is supported by the facts which have been proved.

The power to order another inquest can be exercised by ordering that it should be held by another coroner of the county. I think that this is a proper case in which to make such an order.

Counsel for the applicant, has suggested a name and in the absence of any objection to that gentleman holding the inquest I am content that he should hold the inquest which I think is necessary in this case, and indeed I think that that is the course which the respondent to this application would himself prefer. He has committed himself to a particular view and I think that it would be asking a great deal of him if we were to require him to reverse his view. At any rate I think that it would be more satisfactory, and probably more desirable from the respondent's point of view, that the inquest should be held by another coroner. That does not suggest any criticism or aspersion upon the conduct or behaviour of the coroner in this case. My judgment is confined to the single point that I think that no evidence was given at this inquest upon which a verdict of suicide could properly be found.

CROOM-JOHNSON, J.: I agree. The coroner in this case says in his affidavit that he had no hesitation but a natural regret in returning the verdict that he did return. He appears to have mistakenly confused two things, namely, the filling up of gaps in evidence, which is one thing, and the drawing of the necessary and proper inferences from facts when ascertained. I do not think that in this case there is any evidence upon which a coroner's jury properly directed could have come to this conclusion, and when it is borne in mind, as was pointed out by LORD COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., in the case of *Southall* (1) that suicide is never to be presumed and that there should be a presumption against suicide it is apparent that there were in this case no facts tendered to the coroner which even started, in my judgment, to dispose of that presumption the other way. I think that this coroner—no doubt in what was possibly not a very easy case—drew inferences which he manifestly thought that he was entitled to draw from the evidence, but I think that in so doing he went beyond his power to draw inferences and filled up gaps in the evidence which made the information which was before him wholly insufficient to enable him to arrive at the conclusion that this was a case of suicide while the balance of the deceased man's mind was disturbed.

I agree, for the reasons given by my Lord, with the course which it is proposed to adopt.

CASSELS, J.: I agree with what my Lord has said about the coroner in this case being actuated by a desire only to discharge his duty according to law. In my view there was no evidence on the depositions to support the verdict that was returned by the coroner. Suicide is not a verdict at which one can arrive by a process of exhaustion or ruling out the likelihood of other explanations. It is a crime, and the presumption is against it. (See FARWELL, L.J., in *Bender* v. *Owners of Steamship Zent* (3)).

I agree that this inquisition should be quashed and that a fresh inquest should be ordered to be held before Mr. S. A. Burne, the coroner for North Staffordshire.

Inquisition quashed, and order for fresh inquest.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the applicant); *Luke & Son* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

Re ABBOTT. PUBLIC TRUSTEE *v.* ST. DUNSTAN'S, BRITISH HOME & HOSPITAL FOR INCURABLES AND TRUSTEES OF WESTERN OPHTHALMIC HOSPITAL, AND LADY RUBY LILIAN DUGAN.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 19, 20, 1944.**]

Wills—Construction—Bequest—"All other contents of my home or at the bank"—Whether choses in action included—"To be sold"—Whether cash included.

By her will the testatrix, after making certain specific bequests and dealing with some pecuniary matters, disposed of her clothes and then directed: "All other contents of my home or at the bank to be sold and the proceeds divided equally between" three named charities. There was no residuary gift. The appellant, one of the next of kin of the testatrix, contended that the gift did not include (*a*) cash at the residence, the bank or at the nursing home to which the testatrix was taken before her death, (*b*) a sum of cash on current account at the bank, (*c*) stocks and shares, and other choses in action, the certificates for which were at the residence, the bank or the nursing home. It was suggested that the words "to be sold" excluded the cash which would otherwise have passed under the gift. For the respondent charities it was contended that the testatrix could not have intended to die intestate as to part of her property :—

HELD : (i) the direction to sell would not exclude cash from a gift which would otherwise clearly include it.

(ii) on the true construction of the will, the words "all other contents of my home" must be treated as governing the words in the gift and limiting its scope. The words could not be given an extended meaning such as "all my property," and, therefore, (*a*) there was no evidence in A
the will that the testatrix intended to dispose of all her possessions, and (*b*) the gift did not include choses in action even though the certificates thereof were in the home or at the bank.

[**EDITORIAL NOTE.** The court here considers the presumption against intestacy. In the view of the Master of the Rolls, too much reliance should not be placed upon this presumption, in view of the capricious behaviour of testators, and he regards the words used by the testator as limiting the scope of the bequest to property normally at home B
or in fact deposited at the bank. The will was home-made and no phrase which would normally be used by an uninstructed layman to dispose of the whole property was made use of. As a result the court hold that cash on current account and choses in action are excluded from the bequest. The direction to sell is held not to affect the passing of cash which would otherwise pass, as too pedantic a phraseology is not to be expected in a will of this kind.

AS TO THE GENERAL RULE FOR THE CONSTRUCTION OF WORDS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 192-194, para. 246 ; and FOR CASES, see DIGEST, C
Vol. 44, p. 576, Nos. 3946-3982.

AS TO PRESUMPTION AGAINST INTESTACY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 204-207, paras. 258-260 ; and FOR CASES, see DIGEST, Vol. 44, p. 565, Nos. 3825-3839.]

APPEAL by the defendant, R. L. Dugan, one of the next of kin of the testatrix from an order of COHEN, J., dated May 24, 1944. The facts are fully set out D
in the judgment of LORD GREENE, M.R.

R. F. Roxburgh, K.C., and *M. G. Hewins* for the appellant.

J. Neville Gray, K.C., and *E. M. Winterbotham* for the respondent charities.

C. L. Fawell for the respondent, the Public Trustee.

LORD GREENE, M.R. : This appeal, by one of the next of kin of the testatrix relates to certain items of property which COHEN, J., held to pass to three E
charities, as legatees under a gift in what everyone seems to agree was a home-made will. Had this lady, who possessed substantial means, expended a modest sum on having her will drafted for her, this question—and it is not an easy one —would never have arisen. However, apparently, she did not do that.

The testatrix lived in a flat and her bankers were the Westminster Bank, Kensington branch. At the date of her death she had property of various kinds, which are set out in a schedule to the summons. There are sixteen F
heads under which that property is catalogued. The question we have to decide relates only to nine of them. I will just mention the others. Item 1 is personal chattels at her residence. They were substantial in value and realised just under £2,000. No question arises upon that item, because it is agreed, as Cohen, J., held, that they passed under the bequest in question. Item 2 is personal chattels at the bank. We are told those consisted mainly of jewellery. G
They realised, or were worth, some £3,600. No question arises as to them because it is conceded that they must be treated also as passing under the bequest (which I have not yet read) of the contents of the home, the principle applicable being that of the cases where temporary removal from a home has been held not to exclude such property from a gift of the contents of the house or home. Similarly, in the case of item 3, personal chattels at a nursing home. That item again was regarded (and, it is conceded, rightly regarded) as a case of H
temporary removal. The other two items as to which there is no dispute were item 15, a sum of about £46 income tax recoverable, and item 16, certain dividends which were quoted ex-dividend at the date of her death.

The items which are in dispute consist of cash at the residence : stocks and shares, of which the certificates were at the residence : two post-war credit certificates : a sum of cash on current account at the bank : cash in a deed box at the bank : shares, of which the certificates were in the deed box at the bank : bearer bonds held in safe custody at the bank ; a sum of cash at the nursing home: uncashed dividend warrants and an order cheque endorsed by the testatrix, both at the nursing home: and uncashed dividend warrants at the nursing home, which she had not endorsed or signed.

By the will the testatrix appointed the Public Trustee as her executor. She dealt with certain mementoes mentioned on a paper. Then she went on:

> My clothes—except furs and lace—to the United Kingdom Beneficent Association, Westminster. All other contents of my home or at the bank to be sold and the proceeds divided equally between [she names the three well known charities who are respondents to the appeal]. In no case is this money to be used for building, but the interest for the benefit of patients and pensioners. No account of this my will is to appear in the press.

She then gave directions with regard to a painting which she wished to have destroyed.

There is one matter which I think I can conveniently get out of the way at once. COHEN, J., held that the cash at the residence, the cash in the deed box at the bank, and the cash at the nursing home, passed under the gift. It is conceded that the cash at the bank and the cash at the nursing home must be treated as though it was in fact in the residence, as it would normally be there but in the circumstances was removed, obviously for some temporary purpose, to the bank and the nursing home where the testatrix was taken before she died. Therefore, those items are to be regarded as having been in the residence and would pass under the gift save for one circumstance, which, it was suggested, prevents them from so passing. That circumstance is that the testatrix directs the subject matter of the gift to be sold. It is suggested that these words would be sufficient to exclude the cash which would otherwise have passed. To imagine, in a will of this kind, that the testatrix would have been expected to say: "All other contents of my home at the bank to be sold, excluding, of course, the money" (which need not be sold because it cannot be sold) is carrying a passion for accuracy to the point of fussiness. I think it is quite unarguable to suggest that the reference to sale can exclude the cash from a gift which would otherwise clearly have included it.

The real question arises as to the other items of greater substance, including, in particular, the money on current account and the shares and stocks to which I have referred. Those are all substantial matters. When I turn back to the language of the gift, it is quite clear that, as it stands, it makes no sense—"all other contents of my home or at the bank." Something, therefore, has to be done, in order that a sensible meaning can be extracted from those words. On behalf of the respondent charities it is said that, if the will be regarded as a whole, an intention can be extracted from it, on the part of the testatrix, to dispose of the entirety of her property. It is pointed out that everything she possessed was either connected with her home or was connected with her bank, with two admitted exceptions, namely, the last two items in the catalogue, the claim for income tax recoverable, and the dividends payable after her death. Therefore it is not suggested that the language does in fact cover, on any construction, the whole of her property, but I agree that those two things are things which she might very well have forgotten. In support of the argument it is, as usual, said: "We cannot suppose that this lady intended to die intestate." Speaking for myself, I have always thought the suggested presumption against intestacy a very dangerous line of thought. It involves speculation as to the intentions of a class of persons, namely testators, which, as anybody with experience knows, is a highly capricious class. Some persons deliberately die intestate; some deliberately die intestate save as to certain items. It is very dangerous to place too much reliance on the supposed wish of testators in general not to die intestate. In my opinion, it is quite inadmissible to place any reliance upon it where, by so doing, violence is done to some clear disposition in a will.

Therefore, for reasons which I will mention in a moment, I do not find it possible to approach this will on the footing that its general language and layout suggest a desire to deal with everything that the testatrix possessed. My reason for saying that is this. If there is one thing in the language of this bequest with which, in my opinion, it is not legitimate to tamper, it is the phrase: "all other contents of my home." That, at least, in this otherwise crabbed sentence, is as clear as noonday. Those words, whatever else is done with the sentence, must be left, as it seems to me, in the exact form in which they were written. The words do not suggest to my mind that the testatrix was using them in the sense of " all other my property " or " all other my possessions.". They have, and to the ordinary, uninstructed layman must, on the face of them have —as it appears to me, some restricted scope. If this lady, drafting her own will, as she appears to have done, had meant to give away the whole of her property in her house or elsewhere, the first type of phrase that would have occurred to her mind would have been " all my possessions," " everything I possess," " all my property," or something of that kind ; instead of which, she chooses a phrase (and we are not entitled to assume that she did not deliberately choose it) which, on the face of it, has a restricted significance.

Taking my stand on that piece of firm ground, it seems to me that we have a very good clue to what the language means. Counsel for the respondent charities suggested that the words should be read " all other contents of my home, all at the bank." That does one act of violence to the language, which I think is not without importance, because it strikes out the word " or " ; and to substitute the word " all " for the word " or " does not seem to me to be legitimate. It is quite true that misuse of the word " or " is one of the commonest things to find in written documents and in speech, even among educated people, but I do not think one is entitled to assume here that it is misused. To my mind it does convey a strong impression that what the testatrix is thinking of is a class of thing or a class of property which may have one of two locations, something which you might find at one place or might find at the other. If that be the force of the word " or," the more natural meaning of the sentence as it seems to me, would be "all other contents of my home whether at my home or at the bank." That gives, at once, the clue to the class of property with which the testatrix is dealing. I find it impossible not to treat the words " all other contents of my home " as governing the words in the gift, which limit the scope of the bequest. The testatrix remembers that property of hers of substantial value, which normally would be found in the home (and this is not disputed) was in fact at the bank. That was the item, on which no dispute arises, described in the summons as "personal chattels at the Kensington branch of Westminster Bank, Ltd., other than those (if any) specifically bequeathed," the value of which, as I have said, was some £3,600. We are told that they consisted mainly of jewellery which she had deposited there. Having regard to that, it was quite natural that in deciding to bequeath the contents of her home she would use language which was intended to show that in that phrase she included property which would normally be at her home for her use but was, in fact, deposited at the bank.

I cannot, myself, see how the construction suggested by counsel for the respondent charities can be extracted from those words without giving to the words "all other contents of my home," a meaning which *prima facie* they do not bear. Those words seem to me to be the firm ground on which one must stand in order to construe this gift. What do those words mean : " all other contents of my home " ? It is not disputed that, taking those words apart from some special context they would not include choses in action of which the evidence or the document of title, so to speak, happened to be locally situated in the home. Shares, of which the certificates are in the home, cheques, and so forth, would not pass under such a gift. That construction has the effect of excluding all items physically connected with the home itself which were not actually chattels but were choses in action, of which the evidence or the certificate was in the house. Those are item 5, share certificates ; item 6, post-war credits ; item 12, uncashed dividend warrants and a cheque at the nursing home, and item 13, uncashed dividend warrants, also at the nursing home, which have not been signed. None of those would be included in that gift. Indeed, that is not contested, except on the argument that the phrase " contents of my home " must be given some extended meaning which I find myself unable to put upon it. The construction which I favour also excludes the cash on current account, certificates in the deed box at the bank, and bearer bonds at the bank. Those are all excluded.

I should mention one argument which I think was accepted by COHEN, J. It does not arise now, of course, having regard to the view I take on the construction of the clause, but I mention it to show that I have not failed to appreciate it. It would appear that COHEN, J., was able to reconstruct the words "or at the bank" in such a way as to include everything with which the bank was connected, which would cover the current account and the deposited securities. On that basis he seems to have found himself able to give an extended meaning to "all other contents of my home," with the result that, just as in the case of the bank, so in the case of the home, the securities would be covered. It is not necessary to examine that argument because, on the construction I favour, the foundation for it disappears.

In the result, in my opinion, the appeal should be allowed, save as regards the items of cash at the flat, at the bank, and at the nursing home.

FINLAY, L.J.: I am of the same opinion.

MORTON, L.J.: I agree. As we are differing from the judgment of COHEN, J., I should like to add a few observations. I start with this. The gift in question cannot possibly be construed as a residuary gift. It is clearly a specific gift. The only question is: What is included within its ambit? It is to be observed that, after dealing with certain financial matters, gifts of pecuniary legacies and an annuity, the testatrix turns to her personal belongings and she deals with her clothes. She gives her clothes, except furs and lace, to the United Kingdom Beneficent Association, Westminster. Linked up with that bequest of her clothes comes the words "all other contents of my home or at the bank." She directs that the contents are to be sold and the proceeds divided equally between three charities. She then gives a direction as to the use of the money and a direction that no account of her will is to appear in the press. Then she turns back to another item of personal belongings, namely, an oval oil painting.

There being no residuary gift, if there is any gift at all of the testatrix's stocks and shares and her balance at the bank and other choses in action, it must be found within these words "all other contents of my home or at the bank." COHEN, J., felt able to construe those words as follows: "all other contents whether at my home or at the bank". Starting from that point, he arrived at the conclusion which my Lord has already stated. If I had felt able to start from that point, I might well have arrived at the same conclusion but, for my part, I prefer to retain intact the phrase "all other contents of my home," and to consider what is the effect of combining that phrase with the words "or at the bank." In regard to the manner in which the phrase should be construed, I do not desire to add anything to what has been said by LORD GREENE, M.R., with all of which I entirely and respectfully agree.

It is, of course, possible that this lady, considering all her property was either at her home or at the bank, was intending to dispose of all that she had by those words. But it seems to me quite impossible to extract from the words that she has used a gift of all her property. It is also possible, that, having dealt with the legacies and annuities and chattels in her home and at the bank, she simply omitted to go on to dispose of her stocks, shares and other choses in action. It seems to me that it would be mere guesswork if we were to include those items of property within the gift in question.

I agree with the order which LORD GREENE, M.R., has indicated.

Appeal allowed save as regards the items of cash at the flat, at the bank and at the nursing home. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Leach, Sims & Co.* (for the appellant); *Ranger, Burton and Frost* (for the respondent charities); *Kingsford, Dorman & Co.* (for the respondent, the Public Trustee).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re HOLFORD'S SETTLEMENT, LLOYDS BANK, LTD. *v.* HOLFORD AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), **October 20, 1944.**]

Powers—Special powers and general power to appoint—Exercise—Whether intention to exercise expressed in will.

In a settlement made while unmarried the testatrix had reserved three powers of appointment in respect of the trust fund. One was a special power in favour of her issue provided that such appointment was made without transgressing the rule against perpetuities. Another was a general testamentary power of appointment subject to preceding trusts in favour of the issue. The third was a special power of appointment in case of her marriage in favour of her husband of a life interest forfeitable on alienation. By her will the testatrix provided *inter alia* : " I give all the remainder of my property . . . over which I shall then have power of appointment or disposition by will . . . " and " My trustees shall pay the income of the said moneys unto my husband during his lifetime. After the death of my husband my trustees shall stand possessed of the trust fund and of the income thereof upon trust to divide the same into as many equal parts of shares as there shall be children of mine living at my death." A moiety of the share of each child was settled so as to transgress the perpetuity rule. The question for the decision of the court was whether the testatrix had by her will expressed an intention to exercise any and which of the three powers of appointment :—

HELD : the will contained no expression of intention to exercise either of the special powers of appointment but only the general power.

Re Weston (4), *Re Sanderson* (10), and *Re Beresford* (11) applied.

[**EDITORIAL NOTE.** The cases relating to the exercise of a special power of appointment by will are confused and extremely difficult to reconcile. The rule to be applied, as, expressed by SARGANT, J., in *Re Ackerley* (3), is that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it. In the application of the rule the decided cases fall into two groups ; those where, on balance, the intention to exercise the power was held to be present, and those where it was not. The case here reported falls within the second group, represented by *Re Sanderson* (10), where NEVILLE, J., following *Re Weston's Settlement* (4), held that there can be no intention to exercise a special power when the testator deals with all his property in the mass, making no distinction between property to which he is absolutely entitled and that over which he has only a power of appointment. Here the property purported to be disposed of was blended with provisions for payment of debts and legacies and other matters quite inapplicable to the property in settlement. Further, the special power of appointment to the husband contained a proviso for forfeiture on alienation by the husband, a matter not referred to in the will, and the special power of appointment to the children was not to transgress the perpetuity rule : the testamentary appointment did so transgress. On a consideration of these points VAISEY, J., holds that the special powers are not exercised by the will.

AS TO INTENTION TO EXERCISE POWER OF APPOINTMENT, see HALSBURY, Hailsham Edn., Vol. 25, pp. 549-553, paras. 986-991 ; and FOR CASES, see DIGEST, Vol. 37, pp. 449-453, Nos. 522-555.]

Cases referred to :

(1) *Re Slack's Settlement, Re Slack, Butt* v. *Slack*, [1923] 2 Ch. 359 ; 37 Digest 449, *519* ; 93 L.J.Ch. 46 ; 129 L.T. 628.

(2) *Von Brockdorff* v. *Malcolm* (1885), 30 Ch.D. 172 ; 37 Digest 480, *771* ; 55 L.J.Ch. 121 ; 53 L.T. 263.

(3) *Re Ackerley, Chapman* v. *Andrew*, [1913] 1 Ch. 510 ; 37 Digest 454, *562* ; 82 L.J.Ch. 260 ; 108 L.T. 712.

(4) *Re Weston's Settlement, Neeves* v. *Weston*, [1906] 2 Ch. 620 ; 37 Digest 451, *540* ; 76 L.J.Ch. 54 ; 95 L.T. 581.

(5) *Re Swinburne, Swinburne* v. *Pitt* (1884), 27 Ch.D. 696 ; 37 Digest 453, *550* ; 54 L.J.Ch. 229.

(6) *Re Milner, Bray* v. *Milner*, [1899] 1 Ch. 563 ; 37 Digest 453, *551* ; *sub nom. Re Milner, Milner* v. *Bray*, 68 L.J.Ch. 255 ; 80 L.T. 151.

(7) *Re Cotton, Wood* v. *Cotton* (1889), 40 Ch.D. 41 ; 37 Digest 451, *539* ; 58 L.J.Ch. 174.

(8) *Ferrier* v. *Jay* (1870), L.R. 10 Eq. 550 ; 37 Digest 451, *537* ; 39 L.J.Ch. 686 ; 23 L.T. 302.

(9) *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677; 37 Digest 452, *542*; 70 L.J.Ch. 428; 84 L.T. 761.
(10) *Re Sanderson, Sanderson* v. *Sanderson* (1912), 106 L.T. 26; 37 Digest 457, *585*.
(11) *Re Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E.R. 566; Digest Supp.

SUMMONS taken out by the trustees of a settlement made by the testatrix to determine whether certain powers of appointment reserved to the testatrix under the settlement were exercised by her will. The facts are fully set out in the judgment.

Arthur Newman Hall for the trustees of the settlement.
Maurice Gravenor Hewins for an appointee under the settlement.
M. J. Albery for the infant appointees under her settlement.
Berrisford Stanley Tatham for the next of kin.

VAISEY, J.: This summons raises a question of a kind which very frequently comes up for decision in this court, and, therefore, a number of authorities have been cited to me which guide me, somewhat uncertainly, to the conclusion which I have reached.

Stated quite shortly, the point is whether the will of Mrs. Kathleen Holford did or did not exercise all or any of the powers of appointment which were vested in her under the provisions of a settlement dated May 18, 1928, which she made while she was a spinster, her name then being Kathleen Swain.

The plaintiffs, Lloyds Bank, Ltd., are the trustees of that settlement. The first defendant, Lindsay Tillestone Holford, is the husband of the lady, and the other defendants are, first, her three children, all of whom are infants, and, lastly, her sister, Mica Mary Slattery, who is joined to represent the hypothetical class of next of kin, which constitutes the class of persons who are the ultimate beneficiaries under the settlement.

The settlement, to which I will now turn, is dated, as I have said, May 18, 1928, and the parties to it are Kathleen Swain, afterwards Mrs. Holford, of the one part, and the plaintiff bank of the other part. It recites that the lady, who is therein defined as the settlor, had recently attained the age of 21 years, and that she was then entitled for her own benefit to certain investments, which are set out in the schedule to the deed, and are, as I gather, of the present value of about £6,000. The recital further states that the lady, desiring to settle those investments that she had, after taking proper advice, resolved to reserve no power of revocation and that the investments in question had been transferred into the name of the bank.

Cl. 1 of the settlement defines the investments in their original or changed condition as "the trust funds," and proceeds to declare the trusts upon which the bank are to hold them. The first trust is a trust to pay the income to the lady for her life. The second trust is a trust of the funds and the income thereof as from the settlor's death:

> . . for such one or more exclusively of the others or other of the issue of the settlor at such age or time or respective ages or times and if for more than one in such shares and with such executory and other trusts for the benefit of the said issue of some or one of them and with such provisions for the maintenance education advancement and benefit of all or any of the said issue at the discretion of the bank or of any other person or persons and upon such conditions and with such restrictions and in such manner as the settlor by deed with or without power of revocation and new appointment or by will or codicil shall at any time or times without transgressing rules against perpetuities appoint.

Here, then, is the first power of appointment reserved to the lady by the settlement—a special power of appointment in favour of her issue.

The next trust is a trust in default of appointment for all the children of the settlement, with the usual provision as to hotchpot. Then there follows a power of advancement. Then comes a power exercisable by the lady "in the event of and after the determination and failure respectively" of the preceding trusts, and in the meantime subject thereto, of general appointment by will; so here is the second of the powers to be found in this document, a general testamentary power of appointment subject to the preceding trusts in favour of the children or issue.

Finally:

> In default of and subject to any and every such appointment as last aforesaid [that is the general power of appointment] the bank shall stand possessed of the trust funds

and the income thereof and of so much of the same as aforesaid [that is to say, so much of the same as had not become absolutely vested under the preceding trusts] upon trust for such person or persons as under the Administration of Estate Act, 1925, would have become entitled to the trust funds at the death of the settlor if she had died absolutely entitled thereto intestate domiciled in England and a spinster or (if in fact she shall have married) a widow.

Cl. 3 of the settlement reserved to the settlor a further special power, that is to say, a power at any time or times by deed :

> . . . executed in contemplation and consideration of marriage or by will or codicil, that all or any part of the income from the trust funds, which shall accrue after her death and during all or any part of the life of the husband, she may have if he shall survive her shall be in trust for him.

Then there follows a proviso determining any interest so appointed in the event of the alienation or attempted alienation by any husband to whom any such appointment may have been made. Cl. 4 of the settlement contains power to vary the investments. There are other clauses providing for various matters in the nature of what I may call machinery, to which it is unnecessary for me to make any further reference.

The settlor, then Miss Swain, intermarried with the first defendant in 1933, and there were three children of the marriage. On Mar. 26, 1936, she made her will. After appointing executors and trustees who were, in point of fact, her husband and the last defendant, and after bequeathing personal chattels to her husband, the testatrix, by cl. 3 of her will, made the following disposition :

> I give all the remainder of my property whatsoever and wheresoever both real and personal of or to which I shall be seised possessed or entitled at my death or over which I shall then have power of appointment or disposition by will including all property (if any) in which I may have an entailed interest in possession unto my trustees upon trust to sell and call in the same with power to postpone such sale and calling in indefinitely without being responsible for loss And I direct that the income of the unsold part thereof for the time being shall be applied in the same manner as if it were income of investments of the proceeds of sale and calling in thereof.

By cl. 4 of her will she directed the trustees, out of the proceeds of such sale and calling in, and out of her ready money to pay her funeral and testamentary expenses and debts and legacies given by the will or by any codicil. In point of fact there were no legacies.

Cl. 5 contains a direction for the investment of the residue of the moneys. Cll. 6 and 7 are in these terms :

> 6. My trustees shall pay the income of the said moneys (which with the investments for the time being representing the same are hereinafter called " the trust fund ") unto my husband the said Lindsay Tillestone Holford during his lifetime. 7. After the death of my husband my trustees shall stand possessed of the trust fund and of the income thereof upon trust to divide the same into as many equal parts of shares as there shall be children of mine living at my death.

By cll. 8 and 9 the testatrix settles the shares of her children. Each child was to receive the income of his or her share on attaining 21, and during the remainder of his or her life and upon the death of the child, the share was to be held in trust for the child or children of the deceased child as that child should by will appoint, and, in default of appointment, equally.

I have said that the testatrix settled the share of each child but, strictly speaking, she settled one-half of the share of each child, the other half presumably going to the child absolutely at 21.

The will was proved on Oct. 23, 1943, and the value of the testatrix's estate, according to the act of probate, was a little less than £3,000.

The question is : Did the testatrix intend to exercise by her will, or, to put it more accurately, has she by her will expressed an intention to exercise, any and which of the three powers of appointment which were reserved to her by the settlement of May 18, 1928 ?

It will be observed those three powers are, first, the power of appointment among the lady's issue ; secondly, the power to appoint a life interest forfeitable on alienation to her husband—those being both special powers of appointment—and, lastly, a general power of appointment which can only be effectively exercised in the event of the failure of the lady's issue.

I will consider first the question of the exercise or non-exercise of the special powers. I preface what I have to say by adopting as my own the words with which EVE, J., began his judgment in *Re Slack's Settlement* (1), at p. 362 :

> I might well commence my judgment with the initial observation of PEARSON, J., in *Von Brockdorff* v. *Malcolm* (2), that this is a case which no judge could decide without misgiving. With all respect I find a difficulty in some of the cases cited, in satisfactorily identifying in the instrument the words relied upon as exercising the power or establishing an intention to exercise it, but I must bear them in mind and take care that in construing this will I avoid any conclusion which may seem to be inconsistent with them.

For my part, I find these cases extraordinarily difficult to reconcile. The principle, I think, is clear. The difficulty lies in the application of it. What is the principle ? It has been stated in various ways, in differing words, but I know no better exposition of it than that contained in *Re Ackerley* (3), where SARGANT, J., in a passage frequently quoted in later decisions, said this, on p. 514 :

> It is often said that in order to exercise a special power there must be either (i) a reference to the power, or (ii) a reference to the property subject to the power, or (iii) an intention otherwise expressed in the will to exercise the power. (See THEOBALD ON WILLS, 7th Edn., p. 248, and *Re Weston's Settlement* (4)). This is no doubt a good practical way of stating the rule. But when more closely examined the first two alternatives are seen to be in reality only particular examples of the rule embodied in the third alternative, as, indeed, is implied in the use in that alternative of the word "otherwise." And accordingly I should prefer to state the rule thus, namely, that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it ; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. I say "in general" because, for instance, where, as here, two powers exist with reference to the same property, it might well be that a reference to the property would not indicate any intention to exercise more than one of the powers.

The difficulty in each case is to find the intention by the process of balancing the considerations on one side against those on the other side. In case after case, judges have confessed to the difficulty with which they have allowed one of the two scales to outweigh the other. In *Re Ackerley* (3), from which I have just quoted, the question was as to whether a special power to appoint the income of a fund in favour of a husband during his life was well exercised by a will which was quite short, so far as material, and simply consisted of these words :

> I give, devise, appoint and bequeath, all my estate, property and effects, whatsoever and wheresoever, both real and personal, which I have power to dispose of by my will, to my said husband absolutely . . .

In that case the property was not the lady's property, of course, nor had she power to give it absolutely to the husband, but, in spite of those two elements of inappropriate expression, the court came to the conclusion that effect must be given to the word "appoint" and to the general intention of the testatrix that, whatever she could give to her husband he was to have.

It was held that the will did execute a special power on this ground. There was but one power there, and, if it had not been held to be executed by the will, no effect would have been given to the word "appoint."

I will call attention to a few of the cases on either side and then attempt to express the reasons which lead me to follow the one line of case rather than the other.

In *Re Swinburne* (5), a judgment of PEARSON, J., the headnote is as follows :

> A testatrix had, under the will of a brother who had pre-deceased her, a power to appoint his property by will among his nephews and nieces and the children or child of deceased nephews and nieces. She, by her will, gave all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds (which she described as "my said trust funds") upon trust to pay costs and expenses, and to pay her debts and funeral expenses and certain pecuniary legacies, and then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power ; and upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power. And she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail : Held, that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised.

It will be observed there that there is reference to property "over which she might have any testamentary power of disposition," clearly pointing to an intention to exercise some power so far as she could do it. True it was, that direction to pay costs and expenses and to pay her debts and funeral expenses and pecuniary legacies was wholly inappropriate to the property which was the subject of the power, and, indeed, had no effect whatever upon it. Nevertheless, it was held, upon the principle of *reddendo singula singulis*, this direction could be held to apply to the lady's free property, and was not sufficient to displace the previously expressed intention to exercise any testamentary power of disposition which the lady might have.

That is a very strong case where PEARSON, J., came to the conclusion that there was, on the will before him, a sufficient intention expressed to exercise the special power.

Re Milner (6), before STIRLING, J., is a case very similar to *Re Ackerley* (3). There the lady had a special power of appointment of a life interest in favour of her husband and by her will, after giving legacies to other persons out of her separate estate or out of the estate and effects over which she had a disposing power, she proceeded in these words as set out in the headnote:

> I give bequeath and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband absolutely.

Having no other testamentary power of appointment, she died in April, 1883, and it was held that the power was well exercised. On p. 565, STIRLING, J., after referring to *Re Cotton* (7), quotes the rule as stated by PEARSON, J., in *Von Brockdorff* v. *Malcolm* (2):

> The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man whose intention you know nothing except what you find in his will.

That concludes the quotation from PEARSON, J., cited by NORTH, J., in *Re Cotton* (7). Now I read the words of STIRLING, J., at p. 566:

> In applying a rule of this kind, little assistance is to be got from decisions on wills differing in form and expression. I may state, however, that where a will is found containing a general expression of intention to execute any disposing power to which the testator may be entitled the court has repeatedly refused to infer the contrary intention from such circumstances as a direction to pay debts or funeral expenses, or legacies, or bequests in favour of persons not objects of the power.

Then, after referring to other cases, and also to *Re Cotton* (7), he sums up the indications on each side in that case, and comes to the conclusion, at p. 566:

> On the whole, applying the rule stated as well as I can, I am of opinion that the power has been exercised.

Von Brockdorff v. *Malcolm* (2), is the case from which I have already quoted the opening words of PEARSON, J., as stated by EVE, J., in *Re Slack* (1). There the testator had, under a settlement, a power of appointment over certain leasehold and other personal estate, among his children or grandchildren or other issue. Then he made a will containing no reference to the power and gave, as set out in the headnote, all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which, at the time of his decease, he should have any disposing power by his will to trustees, upon trusts partly for persons who were objects of the power, and partly in excess of the power.

It was held that the use of the word "beneficial" did not conclusively show that the testator could not have intended to exercise a power which he could not exercise for his own benefit or the benefit of his estate. The learned judge came to the conclusion that, upon the will, taken as a whole, "a special indication of an intention to exercise the power" could be found. It was also held "that the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative."

In *Ferrier* v. *Jay* (8), MALINS, V.-C., dealt with a case in which there was both a general power and a special power. There was a general power to appoint

£500 "and a special power to appoint the residue of certain property." As set out in the headnote, the lady there:

> . . . gave all her real and personal estate whatsoever and wheresoever, and of which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral and testamentary expenses, and then to divide the residue between the objects of the special power.

It was there held that the special power was well exercised. MALINS, V.-C. in his judgment on p. 553, deals with the point about the direction to pay debts, and says:

> Now, when she directs her own debts to be paid we may suppose that she intended that they should come out of that portion of the property over which she had a general power, and, upon the well known rule of *reddendo singula singulis*, it may well be supposed that she meant her debts to come out of that property which was, in effect, her own, and the rest to pass to those who were the objects of the special power.

I think those are the representative cases in which it was held that the balance of indication in favour of exercising the power was, in the view of the court, the predominant one.

On the other side I will refer, first, to *Re Cotton* (7), from which I have already quoted. There as set out in the headnote:

> A testatrix devised, bequeathed, and appointed her residuary estate, including all property over which she should have at her death a power of appointment, on trust, after payment thereout of debts, testamentary and funeral expenses, to apply so much as the trustees should think fit of the income during the minority and spinsterhood of her only child, a daughter, for her maintenance and to accumulate the surplus, and on the daughter attaining twenty-one or marrying the whole to her for life, with remainders over. The testatrix had a power of appointment among her children over property settled in default of appointment on such children at twenty-one or marriage.

It was held by NORTH, J., that the power was not well exercised.

The next case in which the decision was against the effective exercise of the power was *Re Weston's Settlement* (4). There, as reported in the headnote, there was a settlement under which sums were settled under trust that after the decease of the survivor of a husband and wife:

> . . . for all and every the children and child of the marriage in such parts and shares as the survivor should by will or codicil appoint.

The husband survived his wife and, after specific bequests:

> . . . he gave, devised, bequeathed and appointed all the residue of his "estate," "real as well as personal," unto trustees, upon trust to convert into money such parts of "the said trust premises" as should not consist of money, and out of the proceeds to pay his funeral expenses and debts, and to pay and divide the residue of "such trust moneys and premises unto and equally between" his sons A., P. and R.

Then:

> The testator then empowered his trustees to postpone the conversion of his "real and personal estate" . . .

And gave them certain powers of management. He then declared:

> . . . that no property not actually producing income which should form part of his estate should be treated as producing income.

Then he declared:

> . . . that the trustees might invest the "trust moneys representing the shares" of P. and R. [that is, two of the children] during their respective minorities in certain specified securities, and that during their minorities the trustees should pay the whole income of those shares to A. as their guardian for their maintenance.

It was held that the will did not operate as an exercise of the special power given by the settlement.

In that case BUCKLEY, J., referred to *Von Brockdorff* v. *Malcolm* (2), and called attention to the fact that the testator in that case directed the conversion into money of such part of "the said trust premises" as did not consist of money. He calls attention to the fact that, as regards the property subject to the power he could not direct conversion; therefore, as BUCKLEY, J., says, at p. 625:

> Either, therefore, he has directed the conversion of the property subject to the power—which he could not do—or that property is not within the words "trust premises." In this I find a first indication that he was not dealing with the property which was subject to the power. Then he gives his trustees power to postpone the conversion "of my said real and personal estate."

Then the learned judge says, at p. 625 :

> If he was disposing of the property which was subject to the power, he was here giving power to postpone the conversion of that property. But he had no power to direct either its conversion or the postponement of its conversion. This is a second indication that he was not dealing with the property the subject of the power. Then there is a power to manage and let " my real and leasehold estates " . . .

and a direction to invest. Then the learned judge calls attention to the fact that all those directions are really ridiculous, even if they were supposed to be applicable to the property the subject of the power. Then the learned judge A says this, at p. 626 :

> He here treats the share of the beneficiary in the aggregate sum as being property as to whose investment he is competent to give directions. Reading the whole will, therefore, I find the word " appoint " on the one side of the balance, and all the several considerations to which I have adverted on the other. In my judgment the scale falls against the inference to be drawn from the use of the verb " appoint."

Then he refers to *In re Mayhew* (9), a decision of FARWELL, J., and to *Re Cotton* (7), B and he notes, at p. 626 :

> . . . even in a will which contained words to that effect, [that is, a general reference to the power] NORTH, J., nevertheless, upon indications similar to those upon which I rely, held that the power was not exercised.

The result was that BUCKLEY, J., in *Re Weston's Settlement* (4) held that the will did not exercise the special power. C

In *Re Sanderson* (10), before NEVILLE, J., the headnote is as follows :

> A testatrix who had a special power of appointment among her children by her will gave, devised, bequeathed and appointed all her real and personal estate not thereby otherwise disposed of (including all property over which she had a power of appointment) unto her trustees upon certain trusts, including a trust to pay the income to her husband for life, and from and after his decease in trust for all her children in equal shares : Held, that the testatrix by dealing with all her property in the mass could not be considered to have shown an intention to exercise her special powers, although she D used the word " appoint."

Re Weston's Settlement (4) was there followed and approved.

NEVILLE, J., in one of those short judgments for which he was noted, from which there was always exclusion of all irrelevant matter, said, on p. 27 :

> A testator cannot be held to have by his will exercised a special power of appointment unless it be shown that he had an intention to exercise the power. Where a testator is E found dealing with all his property in the mass, without making any distinction as to his various kinds of property, and not drawing a difference between the property of which he was absolutely entitled from that over which he had only a power of appointment, I do not think I can hold that there was any intention on the part of the testator to exercise his special powers of appointment. Certain cases have been cited to me where the use of the word " appoint " has been held to show an intention to exercise special powers of appointment. If these decisions stood alone, I should not feel justified in differing from them, especially as I am very much disinclined to draw fine distinctions F in construing wills, as the only result of so doing is to embarrass testators. However, the will in this case is not like those in question in those cases, but appears to be very similar to that before BUCKLEY, J., in *Re Weston* (4), and I do not think I can do otherwise than follow that decision. The reasons for that judgment are to a very great extent applicable to this case, and I approve of them in full. I have no doubt that in this case, considering the whole will, the testatrix had no intention of exercising her special powers of appointment.

One of the cases to which I desire expressly to refer is the recent case of *Re* G *Beresford's Will Trusts* (11), where MORTON, J., as he then was, came to a conclusion similar to that reached by BUCKLEY, J., in *Re Weston* (4), and by NEVILLE, J., in *Re Sanderson* (10). In the headnote to *Re Beresford* (11) :

> The testator had a special power of appointment among his children over the residue of his sister's estate exercisable by will. In two clauses of his will, one making a specific legacy and the other giving certain chattels to a trustee to hold upon certain trusts, H he used the words " I give and appoint." In these clauses the word " appoint " was clearly surplusage. The clause dealing with his residuary estate was, so far as material, as follows : " I give devise bequeath and appoint " the residue of the estate " to which I shall be entitled or of which I shall have any power to dispose at my decease " to the trustee upon trust for sale and conversion to apply the proceeds to the payment of debts, testamentary expenses and duties on legacies given free of duty, with directions for investment, followed by a life interest to his widow, who was not an object of the power, and, subject thereto, for his children, who were objects of the power : Held : the testator had not by his will exercised the special power of appointment.

After referring to the cases, including most of those to which I have referred, MORTON, J., says, at p. 571, there is a difficulty in reconciling the reasoning in all these cases :

> . . . but, if there is any difficulty in reconciling the reasoning in the two groups of cases, I should prefer to follow that in *Re Cotton* (7), *Re Weston's Settlement* (4), and *Re Sanderson* (10).

He did follow that line of reasoning, and held that the will in the case before A him did not exercise the special power of appointment.

That being the position, and with my mind to some extent clarified by the cases, but I think, also, to some extent, confused by them, I turn to the will which is before me, and I find there, as was found in *Re Sanderson* (10) a perfectly clear blending together of that which the testatrix thought that she was disposing of and the large number of provisions for the payment of debts, the payment of legacies, for investment, for postponement of sale and conversion, all of which B are utterly and completely inapplicable to the property which was the subject of the settlement of May 18, 1928. I do find an intention to give an income to the husband for his lifetime, but I find no hint or suggestion, in giving him that, that she was bound to subject him to conditions of forfeiture.

When we come to the trusts in favour of the children, the testatrix, if she had this settlement even to the remotest degree in her mind, would have been C reminded by her advisers that the power to appoint among her children was expressly limited to an appointment which did not transgress the rule against perpetuities ; but when she comes to appoint to her children she does transgress the rule against perpetuities by attempting to settle one-half of a share on each of them upon trust for children and grandchildren, which would clearly go beyond the limits which that rule allows. The only indication that I can find in Mrs. Holford's will are the words which appear in cl. 3, " my property over D which I shall then have power of appointment or disposition by will." She had a general power of appointment or disposition in certain events, namely, the general power of appointment reserved to her under head 5 of cl. 1 of the settlement. I cannot regard that general reference to a power of appointment or disposition as sufficient to outweigh the other indications from the will, which seem to point against any express intention to exercise either of the two special powers. If the only power which the testatrix had was a power to appoint the E life interest to her husband, I incline to the view that the will might be held to have exercised that power. That may be, to some extent, guesswork, and I do find in this will an intention to give the husband whatever she could for his life. But the difficulty which I have in coming to that conclusion in this case is, that I cannot possibly hold that she exercised the special power in favour of her husband and did not exercise the special power in favour of her children.

F There is so much in this will, as there was in the cases of *Re Weston* (4), *Re Sanderson* (10), and *Re Beresford* (11), which points against the view that the testatrix was exercising those special powers, that I feel bound to hold that she exercised neither of them. I suppose she did exercise the general power, and I so hold, but so far as the special powers are concerned, following the cases which I have cited on that side of the line of authority, I feel constrained to hold, and I do hold, that this will did not exercise either of the special powers.

G One cannot help feeling here that there must have been some incaution when the lady's will was being drawn up. I have already pointed out that the value of the trust fund under the settlement was about £6,000, while her free estate is somewhere in the neighbourhood of half that amount. Whether her advisers knew of the existence of that settlement, or whether she herself knew of it, or had it at all in mind, I cannot say ; but it seems to me that, looking, as I am bound to look, only at the words of the will, as I find them, I am constrained H to hold that these words contain no expression of intention to exercise either of these powers, and I shall make the appropriate declarations accordingly. Under question 1 of the summons I declare that the will operated to exercise the general power of appointment, but not either of these special powers.

Declaration accordingly. Costs of all parties, as between solicitor and client, to be paid out of the trust funds.

Solicitors : *Richardson, Sadler & Co.* (for the plaintiff trustees) ; *J. R. Pullon* (for the defendants). [*Reported by* A. E. BLACK, ESQ., *Barrister-at-Law.*]

Re NOAD, MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* NOAD AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 25, 1944.**]

Wills—Construction—Direction for payment of death duties out of residuary estate—"Gifts or settlements made in my lifetime"—Whether annuities payable by third parties under contracts with testator included—Testator "economic source" of benefits—Prima facie meaning of "gifts or settlements," unless restricted by context, sufficient to cover any benefaction.

By a clause in his will the testator directed that any legacy duty, estate duty, or other duty payable on his death in respect of any gifts or settlements made in his lifetime should be paid out of his residuary estate. Subsequently the testator executed two deeds whereby, as part consideration for the purchase of his share in a business, the other parties to the deed agreed to pay certain annuities to the testator's daughters after his death. The point in issue was whether the annuities payable under this transaction were gifts or settlements made by the testator in his lifetime, within the meaning of the clause in the will:—

Held: since the words "gifts or settlements" were used in a full and comprehensive sense, they covered any benefaction or provision of which the testator was the economic source. The annuities payable under the transaction were, therefore, gifts or settlements within the meaning of the clause in the will.

[**EDITORIAL NOTE.** The court here, reversing the court below, adopt a broad construction of the phrase "gifts or settlements." As the testator was, in the phrase used by Uthwatt, J., in *Re Schebsman* (1), the "economic source" of the benefits enjoyed by the annuitants under his will they can be regarded as "gifts or settlements" although, since they arose in consequence of an agreement between the testator and third parties, the annuitants would have no right of action to enforce payment: for all practical purposes the testator had made a testamentary gift. *Re Schebsman* (1) is distinguishable owing to the context in which the word "settlement" appeared.

As to Words given their Ordinary Meaning, see HALSBURY, Hailsham Edn., Vol. 34, pp. 192-197, paras. 246-251; and for Cases, see DIGEST, Vol. 44, pp. 574-583, Nos. 3911-4054.]

Case referred to:

*(1) *Re Schebsman, ex parte the Official Receiver. The Trustee* v. *Cargo Superintendents (London), Ltd. and Others*, [1944] 1 Ch. 83; [1943] 2 All E.R. 768; *affg.*, S.C. [1943] Ch. 366; [1943] 2 All E.R. 387.

Appeal by the annuitants from an order of Vaisey, J., dated July 13, 1944. The facts are sufficiently set out in the judgment of Lord Greene, M.R.

Geoffrey Cross for the plaintiff trustees.

R. F. Roxburgh, K.C., and *H. E. Salt* and *D. H. Cohen* for the annuitants.

J. Neville Gray, K.C., and *J. D. Myles* for the infant defendants and the guardian *ad litem*.

Lord Greene, M.R.: These two appeals from the decision of Vaisey, J., raise the same point, which is quite a short one. The testator by his will, cl. 8, gave the following direction:

> I declare that in case any legacy duty, estate duty, or other duty shall be payable on my death in respect of any gifts or settlements which I may have made in my lifetime, any such duties shall be paid by my trustee out of my residuary estate.

The short question is whether the duties, whatever they may be, and however they may be exigible in respect of a certain transaction, are, by virtue of that clause, payable out of residue, or are to be borne by the persons benefiting under the transaction.

The transaction in question is to be found in a deed of Feb. 4, 1942, which is a date between the will and a subsequent codicil on the one hand, and the testator's death on the other hand. The parties to it are two partners who had previously been in partnership with the testator, and the testator himself. It was a transaction of a perfectly natural kind which not infrequently takes place on the dissolution of a partnership. On the dissolution there were two deeds; by one the testator sold his share in the partnership to the other two partners, and retired: the other is the deed with which we have to deal. This latter was made in pursuance of a term in the first deed, as appears by the second recital, which says that it was a term of the dissolution that the two continuing partners should enter into this deed and should thereby undertake to pay "the annuities hereinafter mentioned." The body of the deed contains covenants by the two continuing partners as from the death of the testator to pay three annuities: £1,000 a year for life to the appellant, Mrs. Uniacke, one of the testator's daughters; and to each of the other two daughters of the testator, Mrs. Shoosmith and Miss Noad, £500 during the remainder of their joint lives and £1,000 to the survivor for her life. Then there was a provision that if the testator should die before Dec. 31, 1945, these annuities were to be increased. The only paragraph which need be mentioned is to be found in cl. 2, by which the continuing partners charged all their respective interest in the property and assets of the partnership firm with the payment of the annuities.

It is contended on behalf of those interested in residue—and VAISEY, J., so held—that the transaction which that deed brings about cannot be described as one of gift or settlement within the meaning of the will, cl. 8.

In my opinion the question is not one of burden of proof. The simple duty of the court is to construe the words in their context. The question whether or not some *prima facie* meaning is to be attributed to them, and, if so, whether that *prima facie* meaning is to be modified by the context, is merely another way of saying that the question is a pure question of construction which the court must endeavour to answer as best it can. VAISEY, J., took the view that the phrase "any gifts or settlements" in cl. 8 was *prima facie* of a limited description. With all respect, I do not take that view. It seems to me that the two words together, separated by the word "or" in such a context as this, are used in a full and comprehensive sense and are quite sufficient to cover anything that can properly be described as a benefaction or a provision, even if, when used in a somewhat narrower or more technical sense, the word "gifts" would not cover it. It is not suggested that what was done by the deed would not properly be described as a provision for the daughters; nor, in my opinion, could any one say that it would be improperly described as a benefaction in favour of the daughters.

Is the word "gift" then to be construed in such a narrow sense as to exclude a transaction of that character? The actual legal nature of the transaction can be ascertained, I think, from reading the judgments of this court in *Re Schebsman* (1). I do not propose to read them myself—they have been referred to in argument—but I think this much emerges. First of all, to use the convenient phrase of UTHWATT, J., in his judgment in that case, the testator was "the economic source" of the benefit which the ladies enjoy under this document. Next, the effect of the document is that, apart from a joint cancellation of the deed by the parties or a unilateral release of the covenant by the testator or his executor, the testator, by this deed, has put in motion a process which will inevitably result in money coming regularly into the hands of these ladies, which will be their money; and nobody can take it away from them.

It is perfectly true that, apart from a point which I will mention presently, they have no right to sue for the money. But the inevitable result of this deed apart from cancellation or release, will be that the money will reach them for their benefit. That will be money of which the testator was "the economic source." It was provided out of the rights which he, as one of the partners, was entitled to enforce against his co-partners under the partnership agreement. It is not necessary for us to see that agreement. But, clearly, what is done is that he takes part of his rights in the shape of this covenant by the surviving partners. He, therefore, provides the benefit which will inevitably, subject to what I have said, flow to these ladies.

To say that a transaction of that nature is to be excluded from the category of "gifts or settlements" referred to in the will, cl. 8, seems to me to be based on much too subtle a view of the meaning of this language. For all practical purposes, this is as much a gift as if the testator had bought an annuity in their name or done any of the other things which every one in ordinary language would describe as a gift. If the testator, after this deed was executed, had been asked: "Have you given your daughters anything?" I think he would have been extremely pedantic if he had replied: "No, I have not given anything to them, but I am the economic source of benefits which I have caused my partners to covenant to give them." If he were extremely accurate and had read the judgments in *Re Schebsman* (1), he might, no doubt, have answered in that way, but it is not the natural way in which an ordinary person would speak.

It seems to me that for the purposes of this will, these are gifts or settlements. VAISEY, J., taking the narrower view, did not so decide. He was also, I think, affected by the view taken in *Re Schebsman* (1), that the transaction there (which was in some respects very much like this one) was not a settlement within the meaning of the Bankruptcy Act, 1914, s. 42 (1). But, in my opinion, the observations with regard to that section in *Re Schebsman* (1) do not assist here, because the word "settlement" in that section was construed by the court in a restricted sense by reason of the context in which it appeared. No such limiting context appears here, and the meaning of the word, for the purposes of that section, does not help in deciding the question before the court.

I am of opinion that the order of the judge should be reversed and the appropriate declaration made.

FINLAY, L.J.: I am of the same opinion.

MORTON, L.J.: I agree.

Appeal allowed, declaration accordingly. Costs of the appeal to be paid out of the residue.

Solicitors: *Blyth Dutton & Co.* (for the plaintiff trustees); *Peacock & Goddard,* agents for *Russell & Co.,* Malvern (for one of the annuitants); *Isaacs, Lewis & Mills,* agents for *Burt, Brill & Edwards,* Brighton (for the other two annuitants); *Williamson, Hill & Co.* (for the infant defendants and the guardian *ad litem*).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WARREN *v.* GURNEY AND ANOTHER.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 3, 1944.**]

Gifts inter vivos—Property bought by father—Conveyance in name of daughter—Title deeds retained by father—Presumption of advancement—Claim by daughter to be beneficial owner of property—Claim for possession of title deeds against executors of father's estate.

Evidence—Admissibility—Contemporaneous declarations of donor sufficient to rebut presumption of advancement even if uncorroborated—Subsequent declarations of donor only admissible when against his interest.

In 1929, the appellant, then a spinster, was engaged to be married to her present husband. In that year her father bought a house, "Fairview," and paid £300 for it. The conveyance was taken in the name of the appellant though the father retained the title deeds which were still in his possession at the time of his death, which occurred in 1944. On Sept. 6, 1943, the father signed a document, headed "my wish" in which he gave directions respecting "Fairview" to the effect that the property was to be divided between his three daughters. The appellant claimed to be entitled as the owner of "Fairview" to the possession of the title deeds. The respondents, executors of the will of the appellant's father, denied that the appellant was the owner of "Fairview" and contended that she was a trustee of the property for her father. The county court judge, having admitted the document headed "my wish" and having heard evidence of witnesses as to the declarations of the donor at the time when "Fairview" was bought, found for the respondents. It was contended that the document headed "my wish" was inadmissible and that the judge, on the admissible evidence, was not justified in coming to the conclusion that the presumption of advancement was rebutted:—

HELD: (i) a document being in the nature of a subsequent declaration by the alleged donor was only admissible if the declaration was against the donor's interest.

(ii) the contemporaneous declarations of the alleged donor were sufficient to rebut the presumption of advancement, even if they stood alone.

[**EDITORIAL NOTE** It was observed by KNIGHT BRUCE, V.C., in *Scawin* v. *Scawin* ((1841) 1 Y. & C. Ch.Cas. 65), that the retention of title deeds by a father is not conclusive to rebut the presumption of advancement arising from purchase of property in the name of a child, although they are "sinews of the land," in COKE's words. Here, however, there were contemporaneous declarations of the father which, taken together with the retention of the deeds, are held sufficient to rebut the presumption. Subsequent declarations leading to a contrary conclusion are, on general principle, held inadmissible.

AS TO PRESUMPTION OF GIFTS, see HALSBURY, Hailsham Edn., Vol. 15, pp. 715-719, A paras. 1246-1250; and FOR CASES, see DIGEST, Vol. 25, pp. 510-513, Nos. 67-88.]

H. H. Harris and *F. S. Hanania* for the appellant.

R. C. Hutton for the respondents.

MORTON, L.J.: In this case Catherine Violet Warren, wife of Denis Warren, claimed in the county court to be the beneficial owner of a house known as "Fairview," Longhope, in the county of Gloucester. She claimed to be entitled B as the owner to the possession of the title deeds of that property. She claimed, as against the defendants, who were the executors of the will of her deceased father Elijah Gurney, possession of the title deeds, which were in the hands of their solicitor. The defendants set up that they are the executors of the plaintiff's father's will and they admit that they are detaining the title deeds and they say that they are entitled to detain them as the plaintiff is not the C beneficial owner of "Fairview," but is now, and was at the time of her father's death, a trustee of the property for her father.

The undisputed facts are that in the year 1929 the plaintiff was a spinster, Catherine Violet Gurney, and she was engaged to marry her present husband, Denis Warren. In that year her father, Elijah Gurney, bought "Fairview" and he paid £300 for it. The conveyance was taken in the name of the plaintiff.

It is well established that when a parent buys a property and has it conveyed D into the name of his child, there arises a presumption that the parent intended to make a gift or advancement to the child of that property. Of course, that is a presumption which can be rebutted by evidence that that was not the father's intention. The father retained the title deeds of the property and he still had them in his possession when he died in the year 1944.

The county court judge held that the onus was on the defendants to justify their claim to retain the title deeds, and, of course, he was right in so holding, E having regard to the presumption which I have already mentioned. He heard the evidence of three witnesses for the defendants and two witnesses for the plaintiffs and held, to quote the last sentence of his judgment, that the plaintiff had no beneficial interest in that property and held it as trustee for Elijah Gurney until his death, and since that event for his personal representatives and in the premises the defendants had justified their retention of the deeds. F In other words the county court judge held that the defendants had successfully rebutted the presumption of advancement.

Three points were taken by counsel for the appellant. First of all, he contended that the judge was wrong in admitting as evidence a document headed "my wish," which he held was signed by Elijah Gurney, which was dated Sept. 6, 1943. In my view counsel's contention under that heading was quite correct. The document headed "my wish" was not admissible in evidence. G It was in the nature of a subsequent declaration by the alleged donor, which was not against his own interest, and it is clearly established that subsequent declarations by the alleged donor are only admissible if they are against his interest. The reason for that is quite obvious. If the rule were otherwise it would be extremely easy for persons to manufacture evidence, even although at the time when they made the purchase they in fact intended the child to have the gift of the property.

H The second contention put forward by counsel for the appellants was that, on the admissible evidence, the judge was not justified in coming to the conclusion that the defendants had rebutted the presumption of advancement. In my view, there was ample evidence to justify that conclusion of the judge. In the first place, there is the fact that the father retained the title deeds from the time of purchase to the time of his death. I think that is a very significant fact, because title deeds, as it was said in COKE ON LITTLETON, are "sinews of the land." One would have expected the father to have handed them over, either to the plaintiff or her husband, if he had intended the gift. It is to be noted that the judge accepted the evidence given by the plaintiff's mother, Mary Ann Gurney, and by her brother, Meyrick George Gurney, and rejected the evidence of Denis Warren, the plaintiff's husband, where it conflicted with that given by those two witnesses.

I do not intend to travel all through the evidence given before the county court judge, but I wish to read one portion of it only, which, it seems to me, is of the utmost importance. Meyrick George Gurney gave evidence as follows:

> I am the son of Elijah Gurney and his executor. In 1929 father said he had thought of buying one of the properties for plaintiff: asked me which I thought best.

Pausing there, the words "for plaintiff" might, if they had stood alone, seem to indicate that a gift was intended, but that possible meaning is displaced by what follows:

> I said "Fairview." Father said he had been talking to Warren. Father said Warren had said if father bought the house he would pay for the house as he could. I went with father to Wadeson, the solicitor. Father required property made in my sister's name, so that there could be no trouble at a later date, as Warren had to pay for it at a later date. Father said he should keep the deeds as security.

There are other passages of importance in the evidence. There are passages in the evidence of Mary Ann Gurney, containing statements as to contemporaneous declarations by the testator. There are certain statements made by the plaintiff herself against her own interest: for instance, the statement that she had not enough money to pay any rent. But I need not go further into the evidence. It seems to me, on the passages which I have referred to alone, the county court judge was fully justified in coming to his conclusion. The passage I have read from the evidence of Meyrick Gurney is a passage of the evidence of a witness whom the judge believed, and it seems to me that those contemporaneous declarations are quite sufficient to rebut the presumption even if they stood alone.

It is quite clear that contemporaneous declarations by the alleged donor are admissible in evidence. I am satisfied that there was ample evidence upon which the judge could found his conclusion, and, indeed, it is difficult to see how, on the evidence which he believed, he could have reached any other conclusion.

The last point raised by counsel for the appellant was this. He said that, on the evidence, and on the findings of the judge, his client was entitled to become the absolute owner of this property on the payment of a sum of £250 into the estate. I express no view as to whether that contention is or is not correct, because, even if it were correct, it would clearly not justify the plaintiff's claim to be handed the title deeds now. If that contention were correct she could only have them on payment of £250, which has never in fact been paid.

For these reasons, I think that this appeal should be dismissed with costs.

LORD GREENE, M.R.: I agree, and have nothing to add.

FINLAY, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Willis & Willis,* agents for *Taynton & Son,* Gloucester (for the appellant); *Gibson & Weldon,* agents for *Leslie J. Slade,* Newent, Glos. (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law*].

TALLENTS *v.* BELL & GODDARD.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 3, 1944.**]

Animals—Dogs—Damage to rabbits—Whether rabbits kept for commercial purposes "cattle"—Dogs Act, 1906 (c. 32), *ss.* 1, 7.

The appellant kept rabbits for the purpose of selling them to butchers. It was proved that on two occasions dogs broke into the rabbit hutches and did considerable injury to his rabbits. On the second occasion only two dogs belonging to the respondents were actually found in the hutches. The appellant contended *inter alia* that the damage came within the meaning of the Dogs Act, 1906, ss. 1 and 7:—

HELD: the expression "cattle" did not include rabbits kept for commercial purposes and, therefore, the Dogs Act, 1906, ss. 1 and 7 did not apply.

[**EDITORIAL NOTE.** The court here holds that as sect. 7 of the Dogs Act, 1906, expressly includes certain animals, namely, horses, mules, asses, sheep, goats and swine, in the definition of " cattle," there is no justification for including anything so remote from the ordinary meaning of the word as rabbits. An interesting suggestion is made, but rejected by the court, that a distinction should be made in these " worrying " cases between dogs specially addicted to hunting and others.

As to Injuries to Cattle, see HALSBURY, Hailsham Edn., Vol. 1, pp. 568, 569, para. 975 ; and for Cases, see DIGEST, Vol. 2, pp. 247-250, Nos. 307-324.]

Cases referred to :

*(1) *Buckle* v. *Holmes*, [1926] 2 K.B. 125 ; Digest Supp. ; 95 L.J.K.B. 547 ; 134 L.T. 743.

*(2) *Barnes* v. *Lucille, Ltd.* (1907), 96 L.T. 680 ; 2 Digest 245, *290.*

Appeal by the plaintiff from a decision of His Honour Judge Tucker, Worksop County Court, dated June 20, 1944. The facts are fully set out in the judgment of Finlay, L.J.

S. C. Isaacs for the appellant.

D. A. Scott Cairns for the respondents.

Finlay, L.J. : The action was brought by the plaintiff, who is an owner of rabbits and an allotment holder. It appears that he and some other allotment holders in a group of allotments at Dinnington were in the habit of keeping rabbits for commercial purposes ; that is to say, they sold them to butchers. Unfortunately, on two occasions the plaintiff's hutches were broken into and considerable injury was done to his rabbits by dogs. He brings his action with regard to two dates, one being July 7, and the other Oct. 9. He proved that on both those occasions damage was done to his rabbits.

The first occasion, July 7, can be dealt with very shortly indeed, because the county court judge has said that he was not satisfied that the damage on that occasion was done by the two dogs of the two defendants. One may think there was, perhaps, some suspicion against the dogs, but it is quite impossible to interfere with a pure finding of fact of the county court judge of that nature, the finding being that, on the evidence, he was not satisfied that these were the dogs who then attacked the rabbits. Of course, in a neighbourhood of this sort, there must be many other dogs about, and it is clear the finding of the county court judge on that point cannot be interfered with.

The position is quite different with regard to Oct. 9, for on that occasion the two dogs were found actually in the hutches. There is no contest that in fact on that occasion they did succeed in breaking in and were worrying the rabbits. The real question in the case is whether, as to that date, Oct. 9, a date when the facts are really admitted, the defendants are liable. The two defendants owned, or had in their possession, two dogs, one dog being of the nature of a lurcher, and the other a beagle, or something of that sort. The dogs obviously, from the description of them, were dogs not unfamiliar in the country, and perhaps not unfamiliar in mining districts.

The plaintiff proved that this damage was done, and he proved on the second occasion the damage was done by the dogs of the defendants. The dogs were actually found there. They were taken away and we are informed that the defendants, in view of what had happened on that night, destroyed their dogs. The question in the case really is whether we can say that the judge was wrong in finding, as he did find upon those facts, facts which were really admitted, that the plaintiff had not established the liability of the defendants. As I understand it, what is said is this. The judge based, and very naturally based, his decision very largely upon the judgment of this court in *Buckle* v. *Holmes* (1). That case related to a cat. It was there held that for mischief done by a cat in following the common instincts of its kind, its owner is not liable, in the absence of evidence that he had knowledge of some special vicious propensity on the part of the cat ; that is to say, in effect *scienter* must be established.

Counsel for the appellant with great propriety, frankly admitted that, subject to one other point, to which I will refer briefly in a moment, he must distinguish *Buckle* v. *Holmes* (1). In my opinion, in his attempt to distinguish that case he really fails. We have had read to us the judgment of Bankes, L.J., and it appears to me that it really covers this case.

The attempt was made to suggest that these were dogs of a character which would be specially addicted to hunting and, therefore, might be expected to follow and worry animals if they happened to meet them. There seems to be no foundation at all for any distinction between dogs. The nature of a dog is perfectly well known. For myself, I see no ground at all for saying that because a dog is a lurcher or, indeed, belongs to any other breed, therefore it is to be taken out of the ordinary category of dogs. It is a dog with the habits of a dog. I think it quite plain that if you are going to make out a case in respect of damage done by a dog, you must establish *scienter*; that is to say, you must show that the plaintiff knew that this particular dog, not dogs in general, was a dog which, by reason of its habits was likely to cause damage by reason of the fact that it had in the past done the same sort of thing which it was alleged to have done in the case in question. The most familiar illustration is, perhaps, that of a dog biting a human being. In that case the meaning of the doctrine of *scienter* simply is that it must be shown that the owner knew that the particular dog had a propensity that way.

The case of *Barnes* v. *Lucille, Ltd.* (2), when it is looked at, appears to be merely an illustration of the doctrine of *scienter*. There the judge found as a fact that the dog had a propensity to bite people, and that the defendant was aware of that fact. It is pointed out in the judgment of Lawrence, J., at p. 681, that that was a fact, and that, whether he would find the same way himself or not, he was bound by that finding of fact. Once that is seen it is quite apparent that that case is simply an illustration of the application to the particular facts of the doctrine of *scienter*.

Then it is suggested, somewhat faintly, by counsel for the plaintiff, that the owners were negligent in letting the dogs run, when they knew that there were rabbits in the neighbourhood. Apparently these particular rabbits were about a mile and a half away. For all I know, there may have been rabbits very much nearer. However that may be, that contention appears to be a hopeless contention. It is impossible to say that if there are rabbits or other animals in the neighbourhood, then a dog, as far as known a perfectly innocent dog, is not to be allowed to run. As everybody knows, it is impossible to keep dogs always on the chain. Therefore, I think that contention is a hopeless one.

In my view, equally hopeless is the last contention, which was based upon the Dogs Act, 1906. There it is enacted that the owner of a dog should be liable in damages for injury done to any cattle by that dog. Cattle, in sect. 7, is said to include, " horses, mules, asses, sheep, goats, and swine." It seems to me clear that rabbits cannot possibly be said in that state of things to be included in that definition of " cattle." It only requires to be stated, I think, to be quite clear. Some things, which normally would not be cattle, are expressly included. If the legislature had intended to include a thing so remote from the ordinary definition of " cattle " as rabbits, it most certainly would have included them in the section about horses, mules, asses, sheep, goats and swine. They have not done so, and, accordingly, it follows that the Dogs Act can have no application.

The position here with regard to *scienter* was quite plain. Both defendants were asked about their knowledge. Both said that they had never known the dogs to attack rabbits before, and that they had never had any complaint. On these facts, it seems to me to be clear that the judge had ample material on which he might find as he did. He gave a very careful judgment, and I see no reason at all to interfere with it.

The appeal fails and must be dismissed.

Lord Greene, M.R.: I have nothing to add, except that I would like to express my appreciation of the very careful note of the evidence which the learned county court judge took.

Morton, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Ridsdale & Son*, agents for *S. H. Clay*, Worksop, Notts. (for the appellant); *Jackson & Jackson*, agents for *J. W. Fenoughty, Dunn & Co.* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

THOMPSON *v.* PARK.

[COURT OF APPEAL (Goddard and du Parcq, L.JJ.), **February 28, 1944.**]

Injunction—Interim injunction—Contract—Schoolmaster—Licensee on premises—Revocation of licence—Forcible re-entry—Trespass.

The plaintiff and the defendant were schoolmasters and each had a preparatory school. By an agreement in writing the two schools were amalgamated, as from the beginning of the autumn term, 1942, and carried on in the building owned by the plaintiff. Differences arose and notice to terminate the agreement was given by the defendant and accepted by the plaintiff. The defendant failed to leave by the end of the Christmas term, 1943, and his furniture was removed from the premises by the plaintiff. Maintaining that he still had a right to enter under the agreement, the defendant and some others forced their way into the plaintiff's house on Jan. 15, 1944. The plaintiff sought an interim injunction to restrain the defendant from trespassing and continuing to trespass on the plaintiff's premises :—

HELD : the defendant was a licensee on the premises. As the plaintiff had revoked the licence, the defendant re-entered the premises as a trespasser and the plaintiff was, therefore, entitled to an injunction.

[**EDITORIAL NOTE.** The court has a difficult jurisdiction to exercise on an application for an interim or interlocutory injunction, but here the justice of the case was clear. The defendant was clearly a trespasser and therefore liable to have an injunction given against him. The court grant it on the ground that to uphold the decision of the judge in chambers and refuse it would have the effect of preserving a position brought about by the criminal acts of the defendant.

AS TO WHEN AN INTERLOCUTORY INJUNCTION WILL BE GRANTED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 27-29, paras. 41-44 ; and FOR CASES, see DIGEST, Vol. 28, pp. 372-374, paras. 65-76.]

Cases referred to :

(1) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838 ; 30 Digest 515, *1708* ; 14 L.J.Ex. 161 ; 4 L.T.O.S. 433.

(2) *Kerrison* v. *Smith*, [1897] 2 Q.B. 445 ; 30 Digest 512, *1675* ; 66 L.J.Q.B. 762 ; 77 L.T. 344.

APPEAL from a decision of ASQUITH, J., in chambers. The facts are fully set out in the judgment of GODDARD, L.J.

F. W. Beney, K.C., and *M. O'Connell Stranders* for the appellant.

J. W. Morris, K.C., and *H. Malone* for the respondent.

GODDARD, L.J. : This is an appeal by the plaintiff against the refusal of ASQUITH, J., to grant an injunction to restrain the defendant from trespassing and continuing to trespass upon the plaintiff's house, which is called Broughton Hall, Eccleshall, in the county of Stafford. If the interim injunction is not granted by the judge it is very seldom that this court grants one, but in this case the court is agreed that it is essential that the injunction should go. The circumstances are these : the plaintiff is a schoolmaster, who apparently has had a preparatory school for a good many years. Down to about 1940, or somewhere thereabouts, he had his school at Stevenage. I suppose that for reasons connected with the war he moved it to this large house in Staffordshire and because the house was larger than he required for the accommodation of his own boys he seems to have, either by advertisement or in some other way —it matters not which —got in touch with the defendant, who had a school at Church Stretton, in the adjoining county of Shropshire, and the suggestion was made that these two schools should be carried on in the same building. An agreement was entered into between the parties that, as from the beginning of the autumn term, 1942, the two schools should be amalgamated on the following terms :

> (1) For internal purposes, e.g., work and games, the two schools shall function as one ; but for external purposes, e.g., parents, "Brockhurst" shall retain its separate identity and collect its own fees. (2) A minimum of 20 to 25 places shall be reserved in the school for "Brockhurst" boys. In the event of the defendant not being able to fill a "Brockhurst" vacancy the plaintiff shall be entitled to do so, should he have no vacancy of his own, and will compensate the defendant by offering him another vacancy when such becomes available.

Then there are certain financial provisions and provisions as to the education of certain members of the defendant's family. Then it is provided:

> Cl. 8: This agreement shall continue in force for the duration of the war with a minimum of three years.
>
> Cl. 9: If on the expiration of this agreement no new agreement is negotiated for the continuance of this amalgamation the defendant shall have the option exercisable over a period of three months, of buying out the plaintiff.
>
> Cl. 10: If the defendant exercises the above option the plaintiff shall be given reasonable time in which to make his arrangements for moving out, up to twelve A months if he so desires, and this agreement shall then continue in force up to the end of the term preceding the plaintiff's departure. In the event of the option not being exercised the defendant shall have six months in which to make his arrangements for moving elsewhere, this agreement continuing in force for the additional period of six months.

The only other fact that I think I may mention for the moment is that during the currency of this agreement the reversion of the property Broughton Hall—of B which the plaintiff was tenant for 21 years—came into the market and the defendant seems to have bought it and so put himself in the position of being the reversioner and the plaintiff's landlord. That, of course, gives the defendant no additional rights in the matter at all because the house is the plaintiff's house for 21 years.

Very soon differences seem to have broken out between the parties. As C this action is continuing I do not propose to say more than this, that a certain notice was given by the defendant—which it is said is a provisional notice only —to terminate the agreement, and that was accepted by the plaintiff. Whether that notice did or did not put an end to this agreement it is not necessary to inquire. The plaintiff evidently thought that it did. The defendant thought it did not, because he found that he could not get another school to which to go and he formed the opinion that he was entitled to remain on at Broughton. D I am going to assume for the purpose of my judgment to-day that the defendant was right about that. So far as his contractual rights are concerned, without in any way deciding them—because they will be decided by the learned judge who tries the case—I will assume that the defendant was right and that he had got a contractual right under this agreement and that the agreement had not been terminated.

Accordingly, the plaintiff, who after all was the lessee of this house and E who was paying the rent of it, asked the defendant to go as far back as the end of the last summer term and during the long summer holiday but, as the defendant had not been able to find other accommodation, he took up an accommodating attitude to this extent, that he said: "You may come back for the autumn term and at the end of the autumn term you will have to leave." He was the owner of the house. In law the defendant was nothing but a licensee. This agreement passed no interest or title in the property—it is not under seal—nor does F it profess to do so. He told the defendant in the clearest possible way that he would have to go at the end of the Christmas term and, as he showed no inclination to do that, the plaintiff felt obliged to write and tell the parents of the boys who formed the defendant's school that he would not be able to receive them back at Broughton. A great deal has been said about the plaintiff's conduct in doing that. It seems to me that at any rate, it was fair of him to G give the parents notice that he was not going to have these boys back and, therefore, that so far as he was concerned they would have to make other arrangements. It appears that they did not or that some of them did not, but that was not his fault. The Christmas holidays came. We do not know whether the defendant took any steps to find other premises, but at any rate he took no steps to remove himself from the plaintiff's house and, accordingly, the plaintiff proceeded to take the defendant's furniture and equipment and H store it in outbuildings in the place. The plaintiff was the owner of the house and he was entitled to withdraw the licence if he wished to do so, although it may be that he would be liable in damages if in withdrawing the licence he broke the contract.

Now what was the defendant's reaction to this? If he thought that he had a grievance which could be lawfully asserted the courts were open to him. I am not saying what the result of any application by him would have been because none was made, but it seems to me that from the outset he or his advisers should have realised, as perhaps they did, that this is not the sort of agreement which any court could specifically enforce. You cannot specifically enforce an agreement for two people to live peaceably under the same roof. It is an impossibility. You cannot do it, and I do not believe for one moment that any court would consider that this was a class of agreement fit for the remedy of specific performance, although, of course, if the contract is broken, the defendant has got a common law remedy in damages, and I realise that the A damages might be, if he is right and the other side is wrong, exceedingly heavy. However, not seeking the intervention of the court, he proceeded to take the law into his own hands and to remedy the grievances, under which he felt that he was suffering, in a manner which seems to me to have been wholly deplorable, all the more so when one considers that he is a man who is in charge of small boys at a preparatory school and ought, amongst other things, to be inculcating into them a respect for authority and discipline. What he did was this. He B arrived at the house and tried to get in at the back door. He was accompanied by his brother an officer in uniform, and about twelve men. Whether they were there for the purpose of overawing or whether they were brought there for the purpose only of removing the furniture, there is no doubt what they did. A riot took place. There is no question about that. It was a riot at common law. Finding that their way into the house was being disputed some of these people, who were apparently encouraged by the defendant went round and C proceeded to break down the front door of the premises and get in in that way. Having got in, they proceeded to take the locks off or to force the locks of some 32 rooms and altogether they behaved in a way which can only be described as absolutely outrageous. I should say that before doing that the defendant had done something else. The water supply at these premises is by a pump some little way from the house. He had gone there and disconnected the pump D so that this place was to be left without water.

Having got back into the house, to use the words of the statute, 5 Richard II, *c.* 7, "with strong hand and with multitude of people," he has established himself in the house, and he then says:

> I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and, therefore, I want the *status quo* preserved.

E The *status quo* that could be preserved was the *status quo* that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a court of law that we ought to help the defendant, who has trespassed and got himself into these premises in the way in which he has done and say that that would be preserving the *status quo* and that it would be a good reason for not granting an injunction. The strength of the argument which was put forward by counsel on his behalf was that, assuming F that there had been a breach of contract on the part of the plaintiff—it was said that we ought to assume for this purpose that at any rate it was not proved that there had not been one—the defendant had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on these premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee, once his licence is withdrawn, has no right G to re-enter on the land and say "I will stay there." If he does, he is a common trespasser. The law is, I believe, quite properly laid down in the passage in SALMOND ON TORTS, 9th Edn., at p. 258, which DU PARCQ, L.J., read in the course of the argument.

> He who is ejected from land by the licensor in breach of his licence, or is otherwise disturbed by the licensor in the exercise of it, has even at common law, and notwith- H standing *Wood* v. *Leadbitter* (1), a good cause of action in contract—*Kerrison* v. *Smith* (2) —If, however, the licensee insists, notwithstanding the revocation of his licence (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law a trespasser or other wrongdoer, and liable in an action accordingly at the suit of the licensor. The rule is an illustration of the difference between a legal *power* to do a thing effectively and a legal *right* or *liberty* to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term.

As this is an interlocutory proceeding it is convenient, instead of going through a large number of cases, simply to state the opinion of a leading text-book writer of great authority, with which I entirely agree.

It may be said : Why did the learned judge refuse the injunction in so clear a case ? I think the interests of the boys at this school must have impressed him, but in this class of case the court is not exercising its paternal jurisdiction over infants. If we were exercising the paternal jurisdiction of a Court of Chancery over infants the interests of the infants would be the paramount consideration, but we cannot allow the fact that the trespasser has introduced a number of small boys on to the plaintiff's property against his will to influence our decision as to whether he should be restrained from continuing the trespass on the land. If we allowed that fact to influence our decision, it would simply mean that anybody who wanted to continue a trespass or assert the rights of a squatter would be well advised to provide himself with two or three children and then turn round and say : "The interests of these children have to be considered and, therefore, do not turn us out." We cannot in a case of this sort consider the matter from the point of view of the boys. If their parents chose to send them back knowing the difficulties between the two headmasters they did so at their own risk. They were warned by the plaintiff that he was going to admit them again on to his property, and he had a perfect right to say that. For these reasons, in my opinion, it is quite clear the plaintiff is entitled to an injunction to restrain trespassing on this land pending the trial of the action.

DU PARCQ, L.J. : I agree with all that has been said by my Lord and will add a few words of my own only because we are differing from the judge in chambers on a matter of some importance. Very often, when an application is made for an interim or an interlocutory injunction, the court has a very difficult jurisdiction to exercise. Very often it is impossible to make an order which on the face of it may not do some injustice to one party or the other. It is impossible to go fully into the facts at that stage of the case, and, with the best will in the world, an order may be made which will afterwards be regretted, but I am bound to say that it appears to me that in this case no difficulty of that kind presents itself at all.

I do not know—and it is impossible that we should know—how this case is likely to be decided when it is heard. It may be that it will be found that the plaintiff has broken his agreement ; it may be that it will be found that the defendant was given a good notice, or that he wrongfully repudiated his agreement ; it may be that the plaintiff will have to pay heavy damages to the defendant, or that the defendant will have to pay heavy damages to the plaintiff ; I do not know. I am speaking now of those matters which arise in the case apart from what took place on Jan. 15. But there is one thing of which we can be perfectly certain, and that is that the moment any court has to adjudicate upon this matter and consider the facts it must say that when the defendant entered the plaintiff's premises on Jan. 15 he had no right whatever to be there. When it is said that we should leave things as they are until such time as it is possible to hear the case, I am bound to ask : Why should we ?

There is not the slightest doubt that the plaintiff had the power to say : "You shall not come into my house," and, when that was said, if the defendant did go in, he was a trespasser and a wrongdoer. That is what he was on Jan. 15, and it is as a trespasser and a wrongdoer that he has remained there, and we are both agreed that the sooner he gets out the better. I agree that this injunction ought to be granted.

Appeal allowed.

Solicitors : *Simon, Haynes, Barlas & Ireland* (for the appellant) ; *Kingsford, Dorman & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WILFRED OLIVER *v.* ARTHUR RICHARD GOODGER.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **October 13, 1944.**]

Food and Drugs—Milk—Milk tested while standing at appointed collecting point—Contract completely executed by producer—Whether milk still in producer's possession—Possession—Food and Drugs Act, 1938 (c. 56), *s.* 24.

The respondent entered into an agreement with the Milk Marketing Board to sell to the Board all the milk produced at his farm. The agreement provided that the respondent should place the milk at a collecting point appointed by the Board, and that the property and risk in the milk should pass to the Board at the place of delivery when the milk was unloaded from the vehicle by which it was transported, and that the Board should arrange and pay for transport of the milk from the appointed collecting point to the place of delivery. The appellant tested a churn of milk produced on the respondent's farm and which he found at a point on the side of the main road, this being the appointed collecting point under the agreement. Water had been added to the milk and the respondent was charged under the Food and Drugs Act, 1938, s. 24, with unlawfully having in his possession for the purpose of sale milk to which water had been added. The magistrates found that the milk was not in the respondent's possession, and on appeal:—

HELD: when the milk was tested the respondent had placed the milk at the appointed collecting point and had done all that he was required to do under the agreement. There was, therefore, sufficient evidence to support the decision of the magistrates.

[**EDITORIAL NOTE.** "Possession" of milk under the Food and Drugs Act, 1938, s. 24, is here held to mean possession in the popular sense, that is, possession in fact, and not constructive possession. The farmer had delivered his milk to the place appointed by the Milk Marketing Board, and at the time the sample was taken he was no longer in possession so as to make him liable for adulteration, for there was no longer that "manual custody" referred to by ERLE, C.J., in *Bourne* v. *Fosbrooke* (1865), 18 C.B.N.S. 515.

AS TO ADULTERATION OF MILK, see HALSBURY, Hailsham Edn., Vol. 15, pp. 208-213, paras. 383-349; and FOR CASES, see DIGEST, Vol. 25, pp. 126-131, Nos. 474-509.]

APPEAL by way of case stated from a decision of the magistrates for the county of Norfolk sitting as a Court of Summary Jurisdiction at Downham Market on Dec. 13, 1943. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Vernon Gattie for the appellant.

Linton Thorp, K.C., and *Glencairn Cunningham* for the respondent.

VISCOUNT CALDECOTE, L.C.J.: The respondent in this case stated was a farmer and milk producer. By a contract in writing he agreed to sell to the Milk Marketing Board all the milk produced at his farm, subject to certain immaterial exceptions. The case sets out cl. 8 of the contract in which the respondent warranted that every consignment should be marketable, and cl. 9 (2) provided that milk should be deemed to be unmarketable if it was of such quality or in such a condition at the time of delivery to the consignee as to be unsuitable for sale for human consumption. The case stated then sets out further extracts from the agreement. Cl. 5 is as follows:

> Subject to the provisions of cl. 9 hereof, the property and risk in the milk will pass to the Board at the place of delivery when the milk is unloaded from the vehicle by which it is transported or in the case of rail borne milk at the time when it is made available by the railway company for collection by the consignee.

The agreement also provides in cl. 4:

> The producer shall permit the Board to arrange and pay for transport of the milk from the farm collecting point to the place of delivery. The producer shall have the milk ready for collection at the farm collecting point at such times as the Board may appoint and the Board shall not be liable to transport, accept or pay for any milk which is not so ready at the appointed time. The farm collection point means such a point within reasonable distance of the farm as the Board may direct, and in the absence of other direction means the point at which the producer usually puts his milk for collection.

The appellant, who is a sampling officer under the Norfolk County Council visited the farm and he found a churn containing a quantity of milk standing on the side of the main road outside the farm gateway awaiting collection and transport by lorry by the Model Dairy, Wisbech, to the place of delivery pursuant to the contract. The proper steps were then taken by the sampling officer for an analysis of the milk, and it was then found that water had been added. The respondent was then charged with an offence under the Food and Drugs Act, 1938, s. 24, with unlawfully having had in his possession for the purpose of sale milk to which water had been added. Upon that the magistrates came to the opinion that the milk contained added water but the milk had in fact been sold and delivered to the Milk Marketing Board although the property had not passed, and passing over some findings which I think are immaterial to this case, they find that the milk was not in fact in the possession of the respondent, he having appropriated it to the contract and conveyed it to the spot agreed for collection, and then they go on :

> If it were in the possession of the respondent it was not so for the purpose of sale for human consumption and that at the material time nothing more remained to be done by the respondent in connection with the said milk.

Upon that finding the magistrates in the case stated have submitted the question to this court as to whether they interpreted correctly the contract or whether the legal effect was that at the time when the appellant took the sample, the milk was in the possession of the respondent for the purpose of sale by him within the meaning of the section. That being the question left to us, I think it disposes of the doubt, if there was any doubt, as to what is the material time for the purposes of this case. In my judgment, the material time is the time at which the appellant took the sample, and at that time the milk in question was in the churn on the platform presumably at the collecting point just outside the farm premises of the respondent. Whether the milk was in the respondent's possession is a question which the magistrates have decided in favour of the respondent ; they have said it was not in his possession. I do not propose to deal with this case as a question of fact. I do not think it would be right for us, the facts being fully stated, to deal with it as a question of fact upon which it is impossible for us to interfere with the magistrates' decision, but at the same time it seems to me to be a question of evidence, and the question for us is whether, upon the evidence, the magistrates were entitled to come to the decision which they reached.

The fact is, as found by the case, that the Milk Marketing Board required the seller of the milk to put it in a place which they would fix. It was, as I have read, a place within reasonable distance of the farm which the Board may direct and the respondent obeyed the directions of the Milk Marketing Board as he was by his contract bound to do and put the milk at that point. The question is whether having done that, he remained in possession, as undoubtedly he had been up to that point of time. Possession is not a term of art ; it is not a word which has any definition placed upon it by the Sale of Goods Act, and I think the statement made by LORD READING, L.C.J., about possession in another Act of Parliament, that it should be given a popular and not a narrow construction, is a statement which should guide us in the present case. The farmer, the milk producer, had done what he was required and directed to do and put the milk at the place selected by his purchaser. That had the effect of taking possession out of the respondent. Whether possession was then transferred to the Milk Marketing Board or to somebody else, who might be a carrier seems to me to be immaterial, the only question being whether possession remained in the producer, as undoubtedly it had up to the time he had complied with the directions of the Milk Marketing Board. I think there was material in this case upon which it was perfectly within the power of the magistrates to arrive at the opinion which they reached. For that reason I think the proper decision in this case is that the magistrates came to a right decision in point of law.

HUMPHREYS, J. : I am of the same opinion and for the same reasons.

BIRKETT, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *H. Christopher Davies*, Norwich (for the appellant) ; *Metcalfe, Copeman & Pettefar* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* CROFT.

[COURT OF CRIMINAL APPEAL (Lawrence, Lewis and Wrottesley, JJ.), **January 21, 1944.**]

Criminal Law—Murder—Agreement to commit suicide—Survivor not present when suicide committed by other party—Whether accessory before the fact—Countermanding of agreement—Conduct required.

The appellant Croft, a married man, was charged with the murder of Joan Norah Lewis. The appellant and Lewis had formed a passionate attachment to each other and had discussed the question of each of them committing suicide. They finally resolved to do so and they spent the night of Oct. 15, 1944, together in a summer house. The appellant, in pursuance of their resolution, had brought his revolver, loaded and cocked. It was his evidence that, as they sat together, Lewis took the revolver and discharged it, wounding herself in the left breast. As she suffered great pain, she requested the appellant to summon help. Thereupon, according to his evidence, he climbed out of the window and had taken a few paces from the house when he heard another shot. He went back and found the girl had, either accidentally or intentionally, shot herself through the head. The appellant based his appeal against his conviction on the ground of misdirection of the jury by the judge, and he contended in particular that a survivor of two parties to a "suicide pact" who is not present when the crime is committed cannot be held to be an accessory before the fact :—

HELD : (i) a mutual agreement to commit suicide amounted to such a counselling, procuring, inducing, advising or abetting as constituted the survivor an accessory before the fact even if he was not present when the other party to the agreement committed suicide.

(ii) in order not to be held guilty as an accessory before the fact the survivor must establish that the advising, counselling, procuring or abetting previously given was expressly countermanded.

[**EDITORIAL NOTE.** In all the reported cases on "suicide pacts" the survivor was present at the commission of the offence and he was treated as an aider and abettor. Here the court decides for the first time that where there is a mutual agreement to commit suicide the survivor, if absent, may be treated as an accessory before the fact. The Court of Criminal Appeal expressed a similar view, *obiter*, in *R.* v. *Symonds* (*The Times*, Dec. 19, 1922). The accessory is entitled to an acquittal if his advice to commit suicide has been expressly revoked or countermanded, but it is held on the facts here that the prisoner's conduct did not amount to a sufficient countermanding or determination of the agreement to secure him an acquittal.

AS TO AGREEMENTS TO COMMIT SUICIDE, see HALSBURY, Hailsham Edn., Vol. 9, p. 430, para. 739 ; and FOR CASES, see DIGEST, Vol. 15, pp. 790, 791, Nos. 8527-8531.]

Cases referred to :

*(1) *R.* v. *Leckey*, [1943] 2 All E.R. 665.
(2) *R.* v. *Dyson* (1823), Russ. & Ry. 523 ; 15 Digest 790, *8527*.
(3) *R.* v. *Alison* (1838), 8 C. & P. 418 ; 15 Digest 790, *8528*.
(4) *R.* v. *Jessop* (1887), 16 Cox, C.C. 204 ; 15 Digest 790, *8529*.
(5) *R.* v. *Stormonth* (1897), 61 J.P. 729 ; 15 Digest 791, *8530*.
(6) *R.* v. *Abbott* (1903), 67 J.P. 151 ; 15 Digest 791, *8531*.
*(7) *R.* v. *Symonds*, not reported. See *The Times*, Dec. 19, 1922.

APPEAL by the prisoner from a conviction of murder and sentence of death at a trial before HUMPHREYS, J., at Winchester Assizes. The case is reported on the main contention made on behalf of the prisoner that a person who enters into an agreement with another to commit suicide does not thereby become an accessory before the fact because the mere agreement is not such a counselling or advising or procuring or abetting as would make him an accessory before the fact if in fact he was not present when the suicide was committed.

Humfrey Edmunds for the appellant.

John Maude, K.C., and *J. Scott Henderson* for the Crown.

LAWRENCE, J. [having stated the facts and referred to some minor grounds of appeal] : The next matter with which I will deal is the suggestion that there was misdirection by the judge saying that the prisoner's evidence in the witness box was new. What the judge said was this :

Now we come to the defendant's story which is new to everybody ; not only new to

> you, but new to everybody. I have read to you the statements he made, and you may have noticed that in neither case did he go into details. "I did not murder Joan Lewis; she shot herself," but he has never explained. He has also said he was there at the time, certainly of the first shot , . .

and then he goes on to consider the prisoner's evidence. It is submitted on behalf of the appellant that that is a misdirection on the principle of *R.* v. *Leckey* (1). In our opinion that is a case of a totally different order. There the prisoner when charged and cautioned in the usual way—that is to say he was told that he need not say anything unless he wished to do so, but that if he did do so it would be taken down in writing and given in evidence at his trial—in answer to the charge and caution said: "Well, I have nothing to say until I have seen somebody, a solicitor." But notwithstanding the fact that he had been told in the caution that he need not say anything unless he wanted to do so, the judge on three occasions in his summing-up referred to the fact that he had said nothing, and he said that one would have expected him to say that the place was all right when he left it, and the fact that he had not said so was some indication of his guilt or introduced some evidence of suspicion. In our opinion that is a totally different case from the present. In fact, no one except the prisoner and his advisers did know the story which he told in the witness box, the story that after the first shot had been fired he got through the window and was going for help or was going somewhere and then returned after the second shot had been fired. It is, as I indicated, a comment which would spring to the mind of every reasonable juryman, I should have thought, when he heard this evidence which the prisoner had not alluded to before. There can be, in our opinion, no objection to the summing-up on that ground.

Then it is contended that a person who enters into an agreement with another to commit suicide does not thereby become an accessory before the fact because the mere agreement is not such a counselling or advising or procuring or abetting as would make him an accessory before the fact if in fact he was not present when the suicide was committed. A number of cases were referred to: *R.* v. *Dyson* (2), *R.* v. *Alison* (3), *R.* v. *Jessop* (4), *R.* v. *Stormonth* (5), *R.* v. *Abbott* (6), and, lastly, *R.* v. *Symonds* (7). It is perfectly true that in all those cases the prisoner was present and was charged as an aider and abettor; the distinction between aiders and abettors and accessories before the fact being, of course, that aiders and abettors are present and accessories before the fact are absent. As counsel for the Crown has pointed out to us, it was impossible before 1861 to have a case in which an accessory before the fact could be so treated if it was a case of suicide, because it was necessary before that date that the principal felon should have been convicted first and, as the felon had already died, he could not be convicted. Therefore, all those were cases not of accessories before the fact but of aiders and abettors. In *R.* v. *Symonds* (7)—it was only an *obiter dictum* because there the prisoner had been present at the commission of the offence—Lord Hewart, L.C.J., on behalf of the court consisting of himself, Darling, and Salter, JJ., said that if he was absent he would be an accessory before the fact—he was dealing with a case of suicide. He said that even in a case in which a survivor is not present when an agreement is acted upon, he is none the less an accessory to the crime. In the present case the whole of the judge's summing-up was based upon the evidence that there was an agreement in this case, and he put it to the jury that that was an essential element for them to find, that there was a mutual agreement to commit suicide in this case. Where there is such a mutual agreement to commit suicide, we are of opinion that that amounts to such a counselling, procuring, inducing, advising or abetting as constitutes the person who agrees an accessory before the fact even if he is not there when the other party to the agreement commits suicide. The words of description of an accessory before the fact are very wide, as is shown by Russell on Crime, 9th Edn., Vol. II, p. 1481, *et seq.*, where he cites two authorities, Hawkins' Pleas of the Crown and Hale's Pleas of the Crown.

Lastly, counsel for the appellant complains that the summing-up does not contain any reference to the possibility of the agreement to commit suicide having been determined or countermanded. It is quite true that the judge does not deal expressly with that except in the passage which is not exactly upon that point where he says:

> Even if you accept his statement in the witness box that the vital and second shot was fired when he had gone through that window he would still be guilty of murder if she was then committing suicide as the result of an agreement which they had mutually arrived at that that should be the fate of them and it is no answer for him that he altered his mind after she was dead, and did not commit suicide himself.

That passage, it is true, does not deal with the exact point which counsel for the appellant was raising, but the authorities, such as they are, show in our opinion that where a person has acted as an accessory before the fact, in order that he should not be held guilty as an accessory before the fact, he must give express and actual countermand or revocation of the advising, counselling, procuring or abetting which he had given before. We are of opinion that the circumstances in this case did not amount, and could not have been reasonably held to amount, to such a clear countermand as would discharge the prisoner from the liability to a charge of murder if that which occurred was the result of what he had done before. He had been in the summerhouse all night alone with this girl; he had brought to her his revolver; he had loaded it and he had cocked it; he had loaded it in every chamber and they were in the dark. All he did, according to his evidence, when she shot herself through the breast and cried out in pain and told him to get some help, was to put his hand to her breast and then get out of the window. He never said anything to her which could have removed from her mind the effect of the counsel which he had given her before. He does not say that he said anything to her and he left her wounded, possibly fatally wounded, with this revolver loaded in all chambers except the one which had been fired. In our opinion that conduct cannot be held to be such a countermanding or determination of an agreement to commit suicide as would entitle him to an acquittal.

We are, therefore, of opinion that this conviction cannot be quashed for that reason. As I have already said, the summing-up must be looked at as a whole, and, looked at as a whole, in our opinion it was a fair and full summing-up. It put to the jury every material point which had been made on behalf of the appellant.

For these reasons this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

NICHOLLS *v.* AUSTIN (LEYTON), LTD.

[COURT OF APPEAL (MacKinnon and Lawrence, L.JJ., and Cassels, J.), **October 23, 1944.**]

Factories—Dangerous machinery—Absolute duty—Circular saw—Guard complying with Woodworking Machinery Regulations, 1922, *reg.* 10*—Operator injured—Whether any residual duty under Factories Act,* 1937, *s.* 14*—Factory and Workshop Act,* 1901 (*c.* 22)*—Factories Act,* 1937 (*c.* 67), *ss.* 14, 60, 159*—Woodworking Machinery Regulations,* 1922 (*S.R. & O.*, 1922, *No.* 1196), *reg.* 10.

The respondent sustained personal injury from a sliver of wood which flew out of a woodworking machine which she was operating in the course of her employment by the appellants. The respondent claimed damages from the appellants for, *inter alia*, the alleged breach of their statutory duty under the Factories Act, 1937, s. 14, and the Woodworking Machinery Regulations, 1922, reg. 10. On behalf of the respondent it was admitted that the machine in question completely complied with the requirements of reg. 10, but it was contended that there remained a collateral duty under sect. 14 of the Act:—

HELD: where the requirements of the Woodworking Machinery Regulations, 1922, reg. 10, have been complied with there does not remain any collateral or residual duty under the Factories Act, 1937, s. 14.

[**EDITORIAL NOTE.** It was decided in *Davies* v. *Thomas Owen & Co.* [1919] 2 K.B. 39, and *Dennistoun* v. *Charles E. Greenhill, Ltd.* [1944] 2 All E.R. 434, that the duty to fence under the Factories Act, 1937, s. 14, is an absolute one. The obligation is one which can only be replaced by the making of regulations by the Secretary of State, as exemplified by the Woodworking Machinery Regulations here considered. This case takes the matter one stage further by deciding that when such Regulations have been made, the statutory duty is entirely superseded and no residual duty under sect. 14 remains. The court also hold that compliance with the Regulations is a sufficient answer to an allegation of breach of the common law duty to provide a safe system of working.

As to Absolute Duty to Fence Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130; and for Cases, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76.]

Cases referred to:

*(1) *Miller* v. *William Boothman & Sons, Ltd.*, [1944] 1 K.B. 337; [1944] 1 All E.R. 333.

*(2) *Lewis* v. *Denye*, [1940] A.C. 921; [1940] 3 All E.R. 299; Digest Supp.; 109 L.J.K.B. 817; 163 L.T. 249.

*(3) *Whitten* v. *Army & Navy Stores, Ltd.*, [1943] 1 K.B. 580; [1943] 2 All E.R. 244; 169 L.T. 207.

*(4) *Wilsons & Clyde Coal Co.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

Appeal by the occupier of a factory within the meaning of the Factories Act, 1937, from a decision of Stable, J., dated May 15, 1944. The facts are fully set out in the judgment of MacKinnon, L.J.

F. W. Beney, K.C., and *R. Marven Everett* for the appellants (defendants).

Sir Charles Doughty, K.C., and *S. R. Edgedale* for the respondent (plaintiff).

MacKinnon, L.J.: In this case the plaintiff was employed by the defendants working at a woodworking machine. It was a circular saw and the operator stood in front of the bench of the circular saw and the pieces of wood to be cut were moved towards the circular saw, being assisted in that motion by a belt under the machine. While she was carrying out her work at the machine a very small piece of wood called a sliver in some way flew towards her and hit her on the hand. I gather that in most cases with an injury like that nothing more would have happened than that the injured person would have been detained a short time and would suffer some inconvenience. But, most unhappily she had some nerve trouble, the injury caused a great deal of trouble to the fingers and it caused some of the fingers to be stiff, and, to some extent, she lost the use of them. She would have had a claim for compensation under the Workmen's Compensation Act, but she brought this action against the defendants claiming damages for breach by the defendants of their statutory duty under the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922, made by the Secretary of State under his powers under that Act and, in the alternative, she made a claim at common law alleging negligence against the defendants in not providing a safe method of working and a safe system of working for their employees. So far as the claim with regard to breach of statutory duty goes, she alleges that there was a breach by the defendants of their statutory duty under sect. 14 of the Act of 1937. I need not read all that section; it begins:

> Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.

Perhaps the only other material part of that section worth noticing is right at the end:

> The Secretary of State may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine.

I mention that because the danger here arose not from the movement of dangerous parts of the machine itself but from the ejection by the machine of some of the wood which was put in the machine and was being operated upon. In fact, no regulations under that final paragraph of the section have been made by the Secretary of State.

If that section stood alone, *prima facie* it would have been open, perhaps, to the plaintiff to say that this machine did not have every dangerous part of it securely fenced, but the strict provisions of sect. 14 are modified in this way. By sect. 60 it is provided:

> Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connection therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case.

Then it is provided that such special regulations may, among other things:

> . . . modify or extend with respect to any class or description of factory any provisions of Pt. I, Pt. II, or this Part of this Act, being provisions imposing requirements as to health or safety;

Special regulations were issued by the Secretary of State in this sense, that under the previous Act of 1901 special regulations with regard to woodworking machinery, of which this machine was one, had been issued in Nov., 1922. Although sect. 60 of this Act of 1937 gives the Secretary of State power to make similar regulations under this Act, no doubt it was thought it would be rather an unnecessary waste of paper to reprint the old regulations of 1922 and, therefore, it was provided by sect. 159 of the Act of 1937:

> Subject as hereinafter provided the enactments referred to in the Fourth Schedule to this Act [which includes the 1901 Act] are hereby repealed to the extent specified in the third column of that Schedule.

Provided that any regulations made under the Factory and Workshop Act, 1901, s. 14, shall continue in force and shall have effect as though they had been made or given under this Act. The meaning of that is that one must treat the Act of 1901 in regard to its effect on sect. 14 as providing by sect. 60 of this Act that the Secretary of State may make regulations which shall modify or extend the duty so imposed by sect. 14, and by virtue of sect. 159 the regulations previously made under the 1901 Act in November, 1922, are to be deemed to have been issued by the Secretary of State under sect. 60. The special regulations so given force under sect. 60 of the Act of 1937 provide a self-contained code as to the sort of fences which are to be provided for, amongst other things, a circular saw, which is the machine which we are concerned with in this case. I need not read all of them, but reg. 10 is: "Every circular saw shall be fenced as follows," and then there is quite a long and detailed provision as to how that fencing is to be accomplished.

In this case the fencing of this circular saw was not only sufficient to comply with every detail of reg. 10, but it was more efficient and more complete than the requirements of that regulation. That is found by the judge. He says:

> Turning to reg. 10 (*a*), in my view, the defendants carried out the whole of the requirements of that regulation and they have done a great deal more besides.

So that there does not seem to be any doubt that they carried out their duty under the regulation having regard to the nature of this saw and the elaborate housing under which it performed its operations with fencing all round it. The defendants therefore say: If you allege a breach by us of our statutory duty under sect. 14 you fail, because our duty under sect. 14 is only to comply with reg. 10 of the regulations of 1922 which, under sect. 60 of the Act, the Secretary of State has imposed by way of modification of what, perhaps, would otherwise be an absolute duty so to fence a circular saw that every part of it is absolutely fenced in; but the judge, accepting that as being the result, if you regard the obligation under the regulations as being in substitution for the general obligation to fence under sect. 14, held that, notwithstanding the defendants had complied with the regulations and to that extent had complied with the obligations under sect. 14, there remained a collateral duty under sect. 14 as regards the danger of material which is being operated on by the circular saw flying out and causing injury. With regard to that, there is a regulation of 1922, which deals with the danger of the operator getting his hands in contact with the actual circular saw; we are not dealing with that danger, but with the danger of the possible ejection of material. But the duty to fence dangerous machinery still remained and still existed under sect. 14.

It is said by the defendants, the appellants in this appeal, and I think rightly said, that that finding is in conflict with the decision of this court in *Miller* v. *William Boothman & Sons, Ltd.* (1), and, in particular, it is in conflict with that decision inasmuch as a similar view to that adopted by the judge in this case had previously been adopted and acted upon by Tucker, J., in the case of *Lewis* v. *Denye* (2), and by WROTTESLEY, J., in *Whitten* v. *Army & Navy Stores, Ltd.* (3), and both those cases were expressly mentioned and considered by this court in *Miller* v. *William Boothman & Sons, Ltd.* (1). The facts in that case are rather different from the facts here, but there are, I think, two or three material passages in the judgment of the court delivered by LORD GODDARD, as he now is, which seem to me to be not only material but conclusive on this point. He says, at p. 341 ([1944] 1 All E.R., at p. 335):

> In our opinion, these regulations [those are the regulations of 1922] must be regarded as modifying the provisions of sect. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require. It is difficult, indeed, to see what other object these regulations could have. A

Then he goes on a little lower down:

> To anyone reading them it could not but appear that, provided he [that is, the employer] followed the provisions of the regulations and saw that his saws were constructed and protected in accordance therewith, he was fulfilling his duties under the Act. B

As far as the statutory duty under the Act is concerned, the defendants, it is admitted, complied with the whole of their duty under the regulations of 1922 and are entitled to say: We have carried out our statutory duty under sect. 14 of the Act. Then, after referring to passages in the two previous decisions I have mentioned, LORD GODDARD says, in *Miller* v. *Boothman* (1), at p. 341 ([1944] 1 All E.R., at p. 335): C

> We are of opinion that so much of TUCKER, J.'s, judgment, in *Lewis* v. *Denye* (2) as holds that reg. 10 of the regulations does not affect the absolute obligation otherwise imposed by sect. 10 of the Act of 1901, now sect. 14 of the present Act, must be overruled and so must the judgment of WROTTESLEY, J., in *Whitten* v. *Army & Navy Stores* (3) on this point.

At p. 342 ([1944] 1 All E.R., at p. 335), he answers these questions entirely on the ground that: D

> . . . sect. 60 permits of a modification of the absolute obligation under sect. 14, and that the Woodworking Machinery Regulations, 1922, have modified it.

It seems to me clear, so far as the statement of claim in this case alleges breaches of the statutory duty imposed by the 1937 Act, it being admitted that the defendants fully complied with the requirements of the regulations of 1922, E any attempt to say that there was any surviving or additional duty upon them by sect. 14 is erroneous and is not justified having regard to that decision of this court. I do not know that STABLE, J., refers to it, but the judge does say he has read *Miller* v. *Boothman* (1), and I confess I do not quite understand upon what ground he thought he was able to distinguish it from the present case in so far as he had to consider the statutory duty of the defendants under the Act. Upon that ground I think the decision of the judge was wrong and that this appeal F must succeed.

There is one other matter I must mention. Counsel for the respondent, seeking to support the judgment of STABLE, J., below (and he is entitled to rely upon every possible ground), contended before us that, quite apart from any statutory duty under the Act of 1937, there was a breach by the defendants of the common law duty to take care to provide a safe system of working and the safety of the premises and surroundings of their workmen. We have been G reminded that that sort of common law duty was discussed in the case of *Wilsons & Clyde Coal Co.* v. *English* (4), where, at p. 78, LORD WRIGHT said:

> The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word 'absolutely,' I do not mean that employers warrant the adequacy of plant, or the competence of fellow employees, or the propriety of the system of work. The H obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill.

Here the plaintiff is saying: If there was a reasonable exercise of care and skill you, the defendants, would not have provided this machine without having taken some extra precaution to guard me against danger which as reasonable people you ought to have anticipated. With regard to that, there is no finding by the judge on this common law aspect of the matter, because he deals with the case on the statute, but he does mention some considerations as to the possibility of the employers having to provide some extra guard to prevent this trouble of bits of wood flying out of the machine. The facts are that bits of wood do come out in the direction of the operator who is moving the wood towards the circular saw and there is a system of feeders, which I gather are little movable things, 1·32nd of an inch apart, which prevent pieces of wood coming out, unless they are pieces which are very, very small in size. However, where this particular piece of wood came out which caused this unfortunate and wholly unexpected injury is rather obscure. Some witnesses said it came out in front, others said it came out at the side, and the judge agrees that it probably did come out at the side. There was some evidence by other people that this piece of wood did come out, but there was an entire absence of any evidence that anybody ever saw it at all. If it frequently happened, I can only suppose that they were far away from it, because there was no evidence of any sort that anybody ever knew of it before, and there was evidence by one witness who described this machine as the most perfect machine of this type that he had ever seen, that this was a danger to be guarded against and, therefore, it was necessary to provide a guard of this sort.

Under these circumstances, I do not think it would be right for this court to hold that there was any breach at common law by the defendants in exercising reasonable skill and care in foreseeing and providing against this form of accident. But the alternative attempt by counsel for the respondent to uphold the judgment below is based upon the statutory obligation of the defendants. I do not think it would be right in this case to arrive at that conclusion upon the facts here and, therefore, upon the main ground of appeal certainly I think the appeal ought to be allowed.

Lawrence, L.J. : I am of the same opinion. On the question of common law negligence, it seems to me that in addition to the fact that there was no evidence of any previous accident and no evidence of any previous complaint and no finding by the judge that there was common law negligence, one must also have regard to the fact that the Secretary of State has made, in the regulations to which my Lord has alluded, most specific provisions as to the protection which could be given to this saw and has made no regulations under the last paragraph of sect. 14 requiring the fencing of materials or articles which are dangerous while in motion in the machine. In those circumstances, I cannot think that any reasonable user of such a machine as this could have thought that he was under any further obligation to fence the machine.

For those reasons, I agree with the judgment proposed by my Lord.

Cassels, J. : I agree.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors : *Barlow, Lyde & Gilbert* (for the appellants) ; *Shaen, Roscoe & Co.* (for the respondent).

[*Reported by* R. Boswell, Esq., *Barrister-at-Law.*]

TURLEY *v.* KING.

[King's Bench Division (Humphreys, Asquith and Cassels, JJ.), **January 24, 1944.**]

Landlord and Tenant—Liability of landlord for repairs—Roofs of houses in state of disrepair—Damage to roofs caused by enemy action—Statutory nuisance—Abatement notice served on landlord—Failure to carry out repairs—Whether landlord entitled to relief from obligation in case of war damage—Public Health Act, 1936 (*c.* 49), *ss.* 91-94—*Landlord and Tenant* (*War Damage*) *Act,* 1939 (*c.* 72), *s.* 1.

The respondent landlord was the owner of two houses in Birmingham. In 1940 and 1941 the premises were damaged by enemy action. In pursuance of the powers given by the Public Health Act, 1936, ss. 91-94, the local authority, having found the roofs of the premises in a state of dangerous disrepair, served upon the landlord a notice to abate the nuisance. No repairs were carried out. On a complaint having been made the justices found that on part of the property a nuisance existed, arising from the defective condition of the front and rear main roofs. They found further that the damage was originally caused by enemy action. It was contended that though the respondent was under an obligation to repair, he was entitled to claim relief from the obligation under the Landlord and Tenant (War Damage) Act, 1939, s. 1. The justices accepted the contention and dismissed the complaint :—

Held : the obligation imposed by the Public Health Act, 1936, on a landlord liable for repairs not to commit a statutory nuisance, or to abate a statutory nuisance existing on his property when ordered to do so, was not relieved by the terms of the Landlord and Tenant (War Damage) Act, 1939, s. 1.

[**EDITORIAL NOTE**. The principle upon which this case is decided is that the duty upon every person who is an owner of property to avoid committing a statutory nuisance, and to abate one when ordered to do so, is something quite different from his duty as a landlord towards his tenant. Therefore, the fact that he is in a position to plead statutory relief from liability to repair, as against his tenant, is no answer to proceedings under the Public Health Act for failure to abate a nuisance.

As to Dangerous Property, see HALSBURY, Hailsham Edn., Vol. 24, p. 49, para. 85 ; and for Cases, see DIGEST, Vol. 26, p. 433, Nos. 1517-1519. For the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S STATUTES, Vol. 32, p. 984.]

Appeal by way of case stated from a decision of the justices for the city of Birmingham on the question whether an owner of property, liable for repairs, who had been called upon by the local authority to abate a nuisance on his premises, was entitled to plead relief from the obligation of repair because the nuisance was originally caused by enemy action. The facts are sufficiently set out in the judgment of Humphreys, J.

Gerald Gardiner for the appellant.

Norman A. Carr for the respondent.

Humphreys, J. : This is a case stated by justices for the city of Birmingham and raises a question whether a person, being the owner of property who is liable to have an order made against him to abate a nuisance arising upon that property, is entitled to plead that he is not liable to be ordered to abate the nuisance because the nuisance was caused by enemy action in the course of this war.

The respondent to this case is the owner of property in Birmingham and the case finds that, upon part of that property, a nuisance exists, arising from the defective condition of the front and rear main roofs at the two houses in question. There is, therefore, a statutory nuisance. The case further finds that the damage to the property was originally caused by enemy action.

That being so, the Public Health Act, 1936, s. 91, provides :

> It shall be the duty of every local authority to cause their district to be inspected from time to time for the detection of matters requiring to be dealt with under the provisions of this Part of this Act as being statutory nuisances within the meaning of the next succeeding section.

Sect. 92 provides, *inter alia*, that the statutory nuisance includes :

> . . . any premises in such a state as to be prejudicial to health or a nuisance.

Sect. 93 says :

> Where a local authority are satisfied of the existence of a statutory nuisance, they shall serve a notice (hereafter in this Act referred to as " an abatement notice ") on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose :

There is a proviso, which certainly does not assist the respondent in this case, to the effect that where the nuisance arises from any defect of a structural character, a notice shall be served on the owner of the premises.

Then sect. 94 says :

> (1) If the person upon whom an abatement notice has been served makes default in complying with any of the requirements of the notice, or if the nuisance, although abated since the service of the notice, is, in the opinion of the local authority, likely to recur on the same premises, the authority shall cause a complaint to be made to a justice of the peace, and the justice shall thereupon issue a summons . . .

It was on the hearing of a complaint of that nature that the question in this case arose.

It is not disputed, and was not disputed, that, so far there was a *prima facie* case against the respondent which would justify the making of an order against him. But it was argued that the order ought not, and could not be made in this particular case, because of the terms of the Landlord and Tenant (War Damage) Act, 1939, which, by sect. 1 which is headed: "Relief from obligation to repair in cases of war damage," provides:

> Where, by virtue of the provisions (whether express or implied) of a disposition or of any contract collateral thereto, an obligation (in this Part of this Act referred to as an "obligation to repair") is imposed on any person to do any repairs in relation to the land comprised in the disposition, those provisions shall be construed as not extending to the imposition of any liability on that person to make good any war damage occurring to the land so comprised.

It is argued that the proceedings in this case were not *eo nomine*, but in effect proceedings calling upon the landlord to repair the premises; and the justices came to the conclusion that by reason of that section, the respondent was entitled to claim relief from the obligation to repair in case of war damage.

For my part, I entirely agree with the view of the justices, that by sect. 1 of that Act, the respondent would be entitled to claim relief from the obligation to repair. Where I think the justices have misdirected themselves in matter of law is that, in my opinion, the obligation to repair in this case, whether it is regarded as an obligation arising from the terms of the letting of the premises—which in fact were let on a weekly tenancy, with the duty upon the landlord to keep them in repair—or whether it is regarded as a case in which by virtue of a statute such an obligation is imposed upon the landlord and it seems to me that the relief from that obligation to repair, as between landlord and tenant, has nothing whatever to do with the duty which falls upon every person who is the owner of property and, indeed, upon everybody else, not to commit a statutory nuisance or to be a party to the commission of a statutory nuisance; and where the person proceeded against is the owner of property, not to fail to abate a statutory nuisance upon his property when ordered to do so.

The view which I take of the matter renders it unnecessary to discuss some of the interesting questions which have been debated at the Bar. My opinion is that this case should go back to the justices, with the opinion of the court that the obligation upon the respondent imposed by the Public Health Act, 1936, is not an obligation from which he was relieved by the terms of the Landlord and Tenant (War Damage) Act, 1939. Therefore, in my view, the appeal succeeds.

ASQUITH, J.: I agree.

CASSELS, J.: I agree.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *M. P. Pugh*, Birmingham (for the appellant); *Smiles & Co.*, agents for *William Hadgkiss & Co.*, Smethwick (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JENKINS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 31, 1944.**]

Income Tax—Sur-tax—Settlements—Avoidance of tax—Irrevocable settlements—Trust funds invested in companies controlled by settlor—Winding up by settlor destroying trust fund—"Income payable to settlor in any circumstances whatsoever"—Loan by settlor repaid out of income by trustees—Finance Act, 1936 (c. 34), *s.* 21—*Finance Act,* 1938 (c. 46), *s.* 38.

By an irrevocable settlement made in June, 1934, between the appellant and certain trustees, the appellant settled £500 on each of his three daughters. The trust funds were to be invested in any shares whatsoever with the consent of the settlor. The powers given to the trustees were unusually wide; they could borrow or raise money with the consent of the settlor with or without security and they could make arrangements or enter into any obligation for the repayment of any loan. Income received under the settlement was to be applied by the trustees in certain specified ways, one of the methods of application being the repayment of any moneys which the trustees had borrowed under their borrowing powers. Armed with these powers, the trustees decided to invest the trust funds in the shares of the Woodlands Investment Trust Co., which the appellant had caused to be registered in June, 1934, as a private unlimited company with a share capital of £26,000 divided into 5,000 A shares and 21,000 B shares of £1 each. The appellant was governing director of the company for life. He and his wife were the signatories to the memorandum of association and they each subscribed for one A share. With the consent of the appellant the trustees invested the trust funds by subscribing for the 21,000 B shares, borrowing £19,500 without security and without interest from the appellant in order to do so. The appellant himself subscribed for the remaining A shares ; thus the whole of the share capital of the company was subscribed for and fully paid up. Simultaneously the appellant caused to be registered another company, the Dilnot Investment Trust and Estate Co., with a share capital of £38,000 divided into 12,000 A shares and 26,000 B shares of £1 each. The structure of this company was the same as that of the Woodlands Investment Trust Co. The Woodlands Investment Trust Co. then subscribed for 26,000 B shares of the Dilnot Co., and the appellant subscribed for all but one of the A shares. Subsequently the appellant sold the Dilnot Co. certain property at a price of £48,699 9*s.* 8*d.*, of which £2,699 9*s.* 8*d.* was a loan from the appellant to the Dilnot company. The trustees received dividends of both the Woodlands and the Dilnot companies for the years 1936-1937 and 1937-1938, and they used the income of the latter year to repay the loan or part of it. The appellant was assessed to tax on the income arising from the settlements for both periods. For their contention that income arising from the settlement was assessable for the year 1936-1937, the respondents relied on the Finance Act, 1936, s. 21 (8) claiming that the settlements were not irrevocable although in terms expressed to be so, since the appellant could have got into his hands, at any moment, the whole of the trust funds by means of liquidation of the two companies, which in effect amounted to a power to revoke the settlements. In support of the assessment for the year 1937-1938 the respondents relied on the provisions of the Finance Act, 1938, s. 38 (3) (4) which provided that the settlor was to be deemed to have an interest in income arising under a settlement, if the income became payable to him "in any circumstances whatsoever." The appellant contended that the sum of money applied by the trustees in discharge of the debt could not be properly described as income, in relation to the creditor :—

HELD : (i) if the terms of the settlements did not provide for payment to the settlor, the settlements were irrevocable and, therefore, the provisions of the Finance Act, 1936, s. 21 (8) did not apply. It was irrelevant that the settlor by virtue of extrinsic matters would have been in the position to put an end to the trust funds by liquidation of the companies.

(ii) The repayment of the loan by the trustees from the income received under the settlements established that the money became applicable for the benefit of the settlor within the meaning of the Finance Act, 1938, s. 38 (3).

Decision of MACNAGHTEN, J. ([1944] 2 All E.R. 160) *affirmed.*

[**EDITORIAL NOTE.** The court here affirms the decision of the court below, and rejects the contention of the Crown that a settlement may be regarded as revocable within the Finance Act, 1936, s. 21, if it is possible for the settlor to destroy the whole tax evasion scheme and get the money back into his own pocket. The word " irrevocable " must be given its ordinary technical meaning. On the liability to assessment under the Finance Act, 1938, s. 38, also the court upholds MACNAGHTEN, J., holding that as the trustees had a discretion to use the income in their hands in paying off the loan of the settlor, a discretion which they in fact exercised, the income could properly be said to be payable to or applicable for the benefit of the settlor.

AS TO REVOCABLE AND OTHER DISPOSITIONS OF INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 266-270, paras. 535-539 ; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575b-576g.]

APPEAL by the taxpayer and the Crown from the judgment of MACNAGHTEN, J., dated May 9, 1944, and reported [1944] 2 All E.R. 160, where the facts are fully set out.

F. Heyworth Talbot for the appellant taxpayer.

The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

LORD GREENE, M.R.: We have before us two appeals from a decision of MACNAGHTEN, J., one by the taxpayer and one by the Crown. The assessments in question were additional assessments to surtax for the year ending Apr. 5, 1937 and for the year ending Apr. 5, 1938. With regard to both those years, we have to consider the construction of certain provisions of the Finance Act, 1936, s. 21. With regard to the second year, we have also to consider certain provisions of the Finance Act, 1938, s. 38, which, if applicable to the case, applies to tax for the year 1937-1938 under subsect. (7) of that section.

The transaction in which the settlor thought fit to engage was of a complicated nature and, on the face of it, ingeniously invented for the purpose of enabling him to avoid the burden of taxation. The question on both appeals is whether, having regard to the relevant legislation, his endeavours to achieve that object remain as successful as apparently they were, when he first entered into the transaction. The Crown says that he is caught with regard to both years by the 1936 Act, and that in any event with regard to the second year he is caught by the Act of 1938. MACNAGHTEN, J., held in favour of the taxpayer with regard to the earlier of the two years, ruling that the relevant provisions of the 1936 Act did not cover the case. That decision also defeated the argument of the Crown in relation to the second of the two years in so far as it was based on the 1936 Act; but MACNAGHTEN, J., held that the argument of the Crown was right with regard to the second year in so far as it was based on the 1938 Act.

I do not propose to go into the rather elaborate scheme which is set out in the case stated and sufficiently explained in the judgment of the judge. I can conveniently treat the matter as though only one settlement was involved. There are in fact three, but precisely the same considerations apply to all. I will, therefore, use language appropriate to the case of one single settlement out of the three. Under the settlement the trustees are given the unusual power to borrow or raise money with the consent of the settlor with or without security. They are empowered to make arrangements or enter into any obligation for the repayment thereof out of "capital and/or income" of the trust funds, and they are empowered to mortgage or charge the trust funds. That that power was put in with an eye to the carrying out of the scheme, nobody I venture to think would entertain any doubt; in fact money was borrowed without security and without interest from the settlor himself and the loan apparently was repayable on demand. At any rate, there is nothing in the facts to suggest otherwise.

Under the settlement the trustees, when they receive income, are in terms entitled to deal with it in certain ways. There are three ways specified in the settlement in which the trustees can apply the income. One is at their discretion until the beneficiary attains the age of 25 to apply it or any part of it towards her maintenance or education. That is the first method of application of income. The second method of application of income is investment of the surplus income in augmentation of the capital. The third method of application of income is, in terms, the repayment out of income of any moneys which the trustees have borrowed under their borrowing power. That then is what the settlement provides and nobody could entertain any doubt as to what is meant there by the use of the word "income" or the words used in relation to it.

Having said that much about the language of the settlement, it will, I think be convenient to deal at once with the argument based on the 1938 Act. The trustees, in fact, in the year in question utilised the cash, which was in their possession as the result of the receipt of the income, in or towards satisfaction of the loan which had been made to them by the settlor. I use that roundabout phrase on purpose because, if I had said that the trustees used the income in repayment of the loan, I should have been prejudging the argument of counsel for the appellants which was, as will appear, that what the trustees utilised for repayment was not income, but merely cash.

Now I turn to the language of the Finance Act, 1938, s. 38 (3). It provides for the case where a settlor has an interest in any income arising under or property comprised in a settlement. The settlement in the present case consists of three documents of June 22, 1934, and it is not suggested that the companies in their structure and their articles of association can be treated as part of the settlement for the purpose of the subsection. If and so long as the settlor has such an interest, any income during any year of assessment during his life is to be treated, to the extent to which it is not distributed, as his income for that year. There is an extended and artificial meaning given by the section to the phrase "have an interest in income," and that is to be found in subsect. (4) :

> . . . the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement, if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever :

The question, therefore, is whether on the facts of this case the settlor can be said, during the year 1937-1938, to have had an interest in income arising under the settlement in the extended meaning of that phrase which is found in subsect. (4). The position when the trustees received the income of that year was this : As I have pointed out, they could have applied it in any one of the three ways which I have mentioned so far as the language of the settlement is concerned. The one that they chose was the third, namely, the payment off of the loan, or part of it. At the moment before they had come to the decision to apply the money in that way, it was, I think, true to say that if they so determined, the money would thereupon have become applicable for the benefit of the settlor. It is not disputed that the repayment of a non-interest bearing loan was for the benefit of the settlor within the meaning of this subsection. It is, therefore, not necessary to consider what the position would be if the loan had been of a different description. My words must not be taken as expressing any view on that point.

Here are the trustees, therefore, with a sum of income in their hands. If they decide to use it in paying off the loan, it thereby becomes applicable for the benefit of the settlor, and it seems to me that, looking if one pleases to the time before they have received the income, it would also be true to say that the income when they received it might become payable to, or applicable for, the benefit of the settlor for the simple reason that they had it in their power to decide to divert the money in that direction and, therefore, in the circumstance that they so decided, it would become payable to the settlor. I say that because I do not wish it to be thought that the fact that actual payment, as took place in this case, would be necessary in order to bring the subsection into operation. In point of fact, this is an *a fortiori* case, because the money was in fact paid to the settlor. But the circumstance that the money could always be so paid if the trustees so decided would, in my opinion, have been sufficient to bring the subsection into operation. In my opinion, therefore, the language of subsect. (4) is quite wide enough to cover, and does on its true interpretation cover, the present case and the judgment of the judge was perfectly right in that respect.

The main argument of counsel for the appellants was that the sum of money applied or applicable by the trustees in discharge of the debt could not properly be described as income. He said that although when the trustees received the dividends they could truly be said to be receiving income, by the time they paid off the loan, which might have been in the next five minutes, by some strange alchemy, what had gone into their hands as income, went out of them as mere cash which could not accurately in an accountancy sense be described as income. He illustrated the argument by striking an imaginary balance sheet of the trustees in which he said the sum received as income would have to be reflected in an entry on the liabilities side under some title showing that it was income, otherwise the balance sheet would not balance. It is perfectly true that if the trustees in a given year proceed to use income to pay off a loan, to make the balance sheet balance, there would have to be a balancing item. That, says counsel for the appellants, could only be properly described as an unapplied income account, or something of that sort. He said it is only when a payment is attributed to such a fund that it would be proper to say that that income has been used for the purpose of the payment.

In my opinion the introduction of that rather elaborate accountancy conception into the construction of the subsection is not justified, and I would point out that if one is minded to consider the form of accounts, if you go back to the income and expenditure account of the trustees, that would contain in the year,

and contain only, one entry on each side. One would be the income received. On the other side would be repayment of the loan. The two would exactly balance. I should have thought that even an accountant would have found difficulty in saying in such a case that the income had not been applied in payment of the debt. In truth and in fact, in my opinion, the language of the subsection must be construed in a commonsense way, and if trustees receive a sum of income and pay it into their bank and immediately draw it out in dis-
A charge of a capital liability, it seems to me to be flying in the face of the realities of the case to say that they have not applied income in that way.

In the result, the judgment of MACNAGHTEN, J., on this part of the case was, in my opinion, perfectly right.

Now I turn to the case so far as it is affected by the 1936 Act. The Crown's appeal is based on the proposition that the settlement in this case was not, on Apr. 22, 1936, an irrevocable settlement although in terms it is expressed so
B to be. Quite apart from the artificial and extended meaning of the word "irrevocable" which is to be found in the Act of 1936, s. 21 (8), it is argued in the first place, that the settlement was not irrevocable in the ordinary sense of that word; and, putting it quite shortly, that argument was based on the proposition that the settlor could at any moment, if he so desired, destroy the whole of this edifice and get back into his own pocket whatever money there
C was lying about in the ruins and it was said that the fact that he had power to do that made the settlement a revocable settlement. In my opinion, that is placing much too wide a construction on the word "irrevocable" in subsect. 10, taking it in its ordinary sense. The distinction between a revocable and an irrevocable settlement is the veriest a.b.c. in legal language; and nobody familiar with the language of lawyers and in particular of those concerned with settlements could have the slightest doubt, I should have thought, when finding
D the word "irrevocable" used in relation to a settlement, what that word was intended to mean. It seems to me quite illegitimate to take a word which has a technical and precise meaning in conveyancing and then to argue that it has some extended meaning. If the legislature wished to give to the word "irrevocable" some unusual and extended meaning of this sort I ask myself why in the world did it not do so. The legislature is the master of the draftsmanship of these Acts, and if it intends to use a word which is to have the widest possible
E scope it is little short of carelessness or incompetence in drafting to select for that purpose a perfectly familiar word which to everyone has a quite limited scope. I cannot bring myself to give to the word "irrevocable" in subsect. (10) the meaning which the Crown wishes to place upon it.

But the legislature has in fact shown that it does wish the word "irrevocable" to be used in an extended sense because it has so provided in subsect. (8). That
F subsection provides that:

> . . . a settlement shall not be deemed to be irrevocable, if the terms thereof provide [then picking out the essential words] for the payment to the settlor . . . or for the application for the benefit of the settlor . . . of any income . . . in any circumstances whatsoever during the life of any child of the settlor [who is a beneficiary under the settlement.].

G Those last words are a paraphrase. The question then arises in this case whether it can truly be said that the terms of this settlement provide for the payment to the settlor of any income in any circumstances whatsoever during the life of the child. It is perfectly true that in the way things have worked out the trustees have paid income to the settlor in discharge of the debt. Can it be said that that was done because the terms of the settlement so provided?

MACNAGHTEN, J., refused to accept one of the arguments of the Crown,
H namely, that in applying those words to the circumstances of this case it is legitimate to consider the whole structure of this tax-evasion scheme and to say that as the result of the whole mechanism it would be possible for the settlor to get out of the settlement all the funds which at any given moment it comprised whether they be capital or income. MACNAGHTEN, J., rejected that argument and, in my opinion, rightly so. Such a disintegration of the scheme and recapture of the funds by the settlor, if it were to take place, would not be due to some provision in the terms of the settlement but it would be due to the circumstances that the settlor, by virtue of extrinsic matters, is in fact in a

position to produce that result. It seems to me to be quite wrong to say that the result would be due to some provision in the settlement within the meaning of subsect. (8).

The other argument, which I think was not dealt with by Macnaghten, J., was of a narrower description. It was to this effect, that in the year in question there was in fact a loan in existence which the trustees had obtained from the settlor pursuant to the powers contained in the settlement ; that loan they might or might not choose to repay out of income ; if they did so pay it it would be a payment to the settlor and in fact they did pay it. That situation, it was said, arises because the terms of the settlement so provide. It was said : the loan is raised under a power in the settlement ; the settlement contains power to repay it out of income if the trustees so wish ; it happens that the lender is the settlor ; therefore, reading the settlement in its application to the actual facts, it can truly be said that the terms of the settlement provide for repayment of that loan to the settlor out of income in the hands of the trustees. In my opinion, that is a construction of the words which they will not fairly bear. As was pointed out by Morton, L.J., in the course of the argument, the terms of the settlement are precisely the same the moment after it is executed as they were in the year 1937-38. If you go on to find out what the terms of the settlement are you must look at the settlement and see what it says. Having looked at them, you ask yourself the question : "Do the terms provide for payment to the settlor ?" The answer is, in my opinion, that they do not, on any sensible construction of those words. What they do say and what can be extracted by implication is that if the trustees choose to exercise their power to borrow and if the person from whom they borrow happens to be the settlor then the person to whom they will have to repay the loan will be the settlor. If it was intended to cover that state of facts by this subsection, I say once more, nothing would have been easier than to do it. If that case has got to be squeezed into the language of this section by means of the ingenious argument presented to us, then all I can say is that the legislature has singularly failed in its duty to make its intentions clear. The language, "if the terms thereof provide," seem to me to have a perfectly clear, simple and straightforward meaning, and I find no justification for giving to it a crabbed or artificial or highly intricate meaning such as would be necessary to enable it to cover the state of facts which I have mentioned.

I put to counsel for the respondents in the course of his argument another case. I said : Suppose a settlement contained power to the trustees to purchase a dwelling house and in the result the trustees in fact entered into a contract to buy a dwelling house from the settlor himself. I asked counsel for the respondent whether in the year in which that position arose it would be true to say that the terms of the settlement provided for the payment to the settlor of the purchase price of that house. He, very fairly, said, and I think he was bound on his argument to say, that that would be the case. It seems to me that the language cannot, on any fair construction, lead to any such result. It would not be the terms of the settlement which provided for payment to the settlor ; it would be the circumstance that the trustees, in pursuance of their powers, had happened to enter into a particular legal relationship which involved the payment of money and the person with whom they happened to enter into it was the settlor. I use the word "happened" because I think that for the purpose of construing this section as applying to the present case the fact (as I have no doubt it was) that it was the intention all along that the settlor should be the lender cannot be taken into consideration. It is not a matter which affects the construction of the settlement at all or throws any light upon its terms. Therefore I think it is legitimate to use the word "happened," and the circumstance of the trustees having exercised their discretion and having decided to borrow from the settlor by incurring the obligation to repay seems to me not to be covered by the language of the subsection.

In the result both appeals fail.

Finlay, L.J. : I entirely agree both with the judgment of Lord Greene, M.R., and with the judgment of Macnaghten, J., in the court below ; and as to the appeal of the Crown I have nothing further to add.

As regards the appeal I would only say this. When one looks at the terms of the 1938 Act, s. 3, and when one considers the facts here—those facts being that the settlor had lent money, that the trustees received income and that, acting under powers which they had, they chose to apply that income in repaying part of the loan made by the settlor—on those facts (and those are the facts here) I cannot for myself entertain any doubt that sect. 3 applies and applies directly and that the appeal must fail. One can see, I think, that other cases might arise, and if they do arise they may have to be dealt with. But when the facts here are seen this case seems to me to be absolutely directly within the subsection. I agree entirely with the judgment of LORD GREENE, M.R.

MORTON, L.J.: I agree that both appeals must be dismissed, and I only desire to add this in view of the observations which have just fallen from FINLAY, L.J. In regard to the appeal by the subject, I do not base my judgment solely upon the fact that the income in question was paid to the settlor. I agree with the observations of LORD GREENE, M.R., that the Finance Act, 1938, s. 38 (4), might equally well have applied even if the trustees had not thought fit to pay over the money to the settlor but had retained it in their own hands.

Both appeals dismissed. No order as to costs.

Solicitors: *E. & J. Mote* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CLIFTON *v.* PALUMBO.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **October 24, 1944.**]

Sale of Land—Offer—Letter by proposed vendor—Whether amounting to an offer.

The defendant was negotiating to purchase the plaintiff's estate, which was very large and subject to a number of encumbrances. On June 7, without legal assistance, the plaintiff wrote to R. as follows: "I . . . am prepared to offer you . . . my . . . estate for £600,000 . . . I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion." Subsequently the plaintiff informed the defendant that he considered that the price was too low, and on Aug. 16 the plaintiff's solicitors wrote to the defendant's solicitors postponing a meeting arranged to deal with matters in the preparation of a sale contract "until the pending negotiations for the sale and purchase may have more nearly reached definite agreement." This letter was brought to the defendant's notice. On Aug. 17 the defendant indorsed the letter of June 7 with an authorisation to R. to accept on his behalf, R. indorsed on the letter an acceptance and a confirmation in writing by the plaintiff was obtained. It was contended on behalf of the defendant that the letter of June 7 constituted an offer to sell for £600,000 on the terms of an open contract which had been accepted:—

HELD: in all the circumstances the letter did not amount to an offer to sell, and the words "the Schedule of Completion" referred to a purchase contract by which the parties were, for the first time, to become bound.

[**EDITORIAL NOTE.** The word "offer" when used in relation to price by one of the parties to negotiations for the sale of property is not necessarily used as indicating the intention to make a contract on acceptance by the other party. It may be only one element in protracted discussions and its precise effect will depend on the construction of the particular document in which it appears, together with a consideration of the surrounding circumstances. Here it was used by a layman in reference to a large and complicated deal in real property. The document also contained a reference to the preparation of a "schedule of completion" and this is construed to mean the formal contract upon which the solicitors were actually engaged. The letter containing the word "offer" therefore did not amount to a binding offer to sell.

AS TO WHAT CONSTITUTES AN OFFER, see HALSBURY, Hailsham Edn., Vol. 7, pp. 83-87, paras. 117-120; and FOR CASES, see DIGEST, Vol. 12, pp. 53-63, Nos. 299-365.]

APPEAL by the defendants from a decision of VAISEY, J., dated July 14, 1944. In the action the plaintiff asked for a declaration that there was no valid and binding contract between the parties for the sale of certain land. The defendant counterclaimed for specific performance. The facts are sufficiently set out in the judgment of LORD GREENE, M.R.

N. L. C. Macaskie, K.C., and *Raymond Jennings* for the appellant, defendant below.

Gilbert Paull, K.C., and *J. F. Bowyer* for the respondent, plaintiff below.

LORD GREENE, M.R.: At the trial of this action, which took a number of days, a great deal of ground was covered and the judge, in a most careful and lucid judgment, decided the issues, which appeared to him to be the crucial issues, in favour of the plaintiff.

At the threshold of the case there lies a question which, if decided against the defendant's contention, is, as counsel for the defendant very fairly admitted, conclusive. It is a question of the construction of a short document.

The surrounding circumstances, so far as relevant to the construction of that document, are not, I think, capable of dispute. I do not propose to state them in any detail, although I must refer to one or two of them in the course of what I have to say.

The document in question is the letter of June 7, 1943. I refer to it as the letter, although, in point of fact, there were three letters concerned in the case, but I need not differentiate between the three because, for present purposes, there is no difference of any importance between them. The letter was originally written on June 7, 1943. It was copied by the plaintiff from a draft which Rickett had taken with him for the purpose of obtaining the plaintiff's signature if he should prove to be willing to sign it. The letter is couched in the language of offer. Nothing was done in the matter of what, without prejudice to the question that we have to decide, I may call acceptance of that offer, until Aug. 17. The letter lay dormant. In the meanwhile the situation as between the parties had changed and developed in a number of respects. In particular, the solicitors had been instructed on both sides to prepare a contract. The position, therefore was, on Aug. 17, that the defendant, not having purported to accept this offer, was proceeding with the negotiations on the footing that the solicitors were going to prepare a contract.

On Aug. 17—I think that was the date and not the 18th—the defendant indorsed the letter with an authorisation to Rickett to accept the offer on his behalf, and the document contains an indorsement by Rickett accepting that offer signed by him, and the confirmation in writing by the plaintiff was obtained. I need only say with regard to the obtaining of that confirmation, that, on the facts as related in the judgment of the judge, his statement "that the accounts of the midnight incidents impressed me very unfavourably" may be thought to be distinguished by remarkable moderation of language. But I do not allow myself to be influenced by considerations of that kind, because the question that we have to decide, as I view it, is one of construction.

It follows, therefore, that the original document of June 7 was signed by the plaintiff in relation to the circumstances existing at that time so far as they were relevant to its construction. I am quite prepared, in the first instance, to see what construction ought to be put upon the language of that document as at the date when it first came into existence, and to ask myself what would have been the effect in law, if, on the same day, the defendant had written a letter saying: "I accept your offer." Would there have been a binding contract between the parties, or would there not?

The negotiations, such as they were, between the parties down to June 7, had been conducted with some haste and with no real assistance, so far as the formulation of the terms of a bargain was concerned, from legal advisers. This document is a layman's document, and it was signed by laymen, neither of them having had any expert assistance in drafting it.

The subject matter of the alleged contract was a very large estate spread over a very large area and comprising properties of various types which were subject to various sorts of lease, the whole being subject also to a jointure. There were mortgages outstanding in large sums. The transaction was one which any layman (and I suppose more particularly a layman in the position of the defendant, who was not inexperienced in dealing with real estate) would regard as one of great magnitude, and probably of considerable complication.

When parties are beginning to negotiate a transaction of this magnitude it is common experience—and, indeed, it is only business—to find that the first thing they begin to think about is the price, because it is quite useless making elaborate investigations and conducting complicated negotiations if it is going to turn out in the end that their views as to price do not agree. What would one expect, therefore, in a transaction of this kind? The very first thing that the parties would set themselves to explore is the possibility of their seeing eye to eye in the matter of price. Anyone who has had experience of transactions in relation to the purchase of land can recall letters written by vendors saying that they agree to sell at a named price, or that purchasers agree to purchase at a named price. The use of the word "agree" in such a context may or may not involve a contractual result. On the other hand, if you say that the price has been agreed when the contract is being negotiated, you do not use the word "agree" in the sense that any binding contract has been entered into. All you mean is that that particular element in the contract which you are negotiating has been decided. You are agreeing that that is the figure which will be put into the contract and then you go on to debate the other matters which fall for discussion. Therefore, words like "agree," "offer," "accept," when used in relation to price are not to be read necessarily as indicating an intention to make, then and there, a contract or an offer as the case may be. Whether they do or do not must depend entirely on the construction of the particular document.

The letter of June 7 says:

> Dear Mr. Rickett, I thank you for the memorandum of the meeting held at the Clifton Estate Office, Lytham, on Wednesday, June 2, and, having read same, am prepared to offer you or your nominee my Lytham Estate for £600,000, on condition that it is definitely understood and agreed that the lordship of the manors remains in my possession. I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.

It is said on behalf of the defendant that that document contains an offer to sell the estate referred to for £600,000 on the terms of an "open contract," and that, if that offer were accepted, the parties would immediately be bound. There is nothing in the world to prevent an owner of an estate of this kind contracting to sell it to a purchaser, who is prepared to spend so large a sum of money, on terms, written out on a half sheet of notepaper, of the most informal description, and even, if he likes, on unfavourable conditions; but I think it is legitimate, in approaching the construction of a document of this kind, containing phrases and expressions of doubtful significance, to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description couched in such terms is remote. If they have done it, they have done it, however unwise or however unbusinesslike it may be. The question is: Have they done it?

The argument has turned on the last sentence in that letter. VAISEY, J.—I am quoting his words—came to this conclusion with regard to it:

> I construe that last sentence (if construe it I must) as indicating an intention that the "details" of the deal were to be subjected to further examination and further consideration, and that the "Schedule of Completion" means neither the completion statement as to the apportionments of outgoings and the like, nor the instrument or instruments of conveyance, but some further contractual document in which the ambiguities of the letter were to be cleared up and by which the parties were, for the first time, to become bound. Taking the written matter alone, I hold that it does not constitute a contract between the parties.

I find myself in complete agreement both with the reasoning by which the judge came to that conclusion and with the conclusion itself.

But it would not be right, in view of the argument which has been addressed to us, to leave the matter there, and I must examine shortly what was said about these words. Counsel for the defendant contended that all that they did was to express an intention on the part of the plaintiff not to withdraw his offer until Rickett had had time to go into all the details concerning the estate. It followed from this that the moment the offer was accepted the clause would cease to have any operation, because, according to the argument, its operation was confined to the time between the signing of the letter and the acceptance of the offer. If the sentence had merely run: "I also agree that sufficient time shall be granted for the examination and consideration of all the details," there would, perhaps, have been something to be said for that argument; but, unfortunately for the argument, the sentence does not end there but goes on to refer to the "details necessary for the preparation of the Schedule of Completion."

Counsel for the defendant, finding that those words did not fit in with what he said are the object and true meaning of the sentence, naturally argued: A Well, if they do not fit in, cut them out. They have no meaning. They are superfluous; they are meaningless. We can read this document as if the sentence ended at the word "details." I certainly am not going to subject this sentence to that degree of amputation. If there be one cardinal rule in construing the language of a document, it is that, so far as possible, meaning should be given to every word that is to be found in it. The rejection of words as redundant, and, still more, the rejection of words as meaningless, is something B which must only be resorted to in the very last necessity. I find no need here to reject these words, because it seems to me they have a meaning, and the meaning that they have is not lacking in precision.

Counsel for the defendant then said, if those words are to be given a meaning, they must refer to the completion statement. In my opinion, that is quite inacceptable, and for this reason. A completion statement is one which comes at the very end. It is something drawn up for the sole purpose of enabling the C payment to be adjusted as between the vendor and purchaser when completion takes place, and the purchase money is handed over. It is certainly not a matter for the consideration of which time would be required by the purchaser while making up his mind whether to accept the offer or not.

The idea that time would at that stage be granted for the preparation of a completion statement, and that a provision to that effect should be inserted D in a document of this kind, seems to me so unlikely as to make it impossible to place that construction upon the words "Schedule of Completion." Counsel for the defendant did not approve, although I am not sure that he repudiated it, of the idea that the phrase "the Schedule of Completion" meant the conveyance. I think there is a conclusive answer to any argument of that description, because, so far as the conveyance was concerned, time for conveyance would automatically have to be given, and, in any event, it is not the sort E of thing that people would be thinking about at this stage of the matter.

Junior counsel for the defendant suggested that it might be a comprehensive phrase dealing with all documents coming into existence after the contract is made, namely, the abstract, requisitions, conveyance, and so forth. There again, I do not find that that is a construction which fits in sensibly and reasonably with the words.

For myself, I would like to call attention to one or two matters in this sentence F which seem to me to give a clue to its meaning. First of all, the writer is contemplating that a document is to come into existence. It is a document that is to be prepared. It is not merely a document that may or may not come into existence according to taste; but it is a document described by the definite article "the." It seems to me that the force of that article in this context is that the document referred to is one which, it is taken for granted, is going G to come into existence. It is not going to be something which the purchaser is going to draw up for his own convenience, or not draw up, as he pleases. It is something which is contemplated as coming into existence as a matter of course as between the parties. In order that that document may be prepared, it is contemplated that there are certain details necessary for its preparation; that is to say, before it can be prepared certain details have to be examined and considered. I ask myself, what can be the document, which the writer H of this letter is contemplating as necessarily, and in the ordinary course coming into existence in respect of which "examination and consideration" of the necessary details will be required? The only document which fulfils those requirements appears to me to be a purchase contract.

The fact that these laymen do not know the technical words and have used the very inapt phrase "the Schedule of Completion" does not, I think, justify the court in ignoring, what seems to me, the guiding phrase which indicates the sort of document which the parties were thinking about.

Reading that whole sentence together in the context and in the light of the transaction into which the parties were proposing to enter, I have come to the conclusion that the document which is being referred to by the phrase "the Schedule of Completion" can only be the purchase contract which the parties, if one is entitled to regard them as reasonable persons, would have contemplated, and which, in the ordinary course, no one in their senses would dispense with in a transaction of this magnitude. Reading the letter, therefore, as at the date when it came into existence, that is the conclusion to which I come.

It is not without importance, however, to notice that when, on Aug. 18, the plaintiff signed a confirmation of the letter, matters had moved considerably. The plaintiff had repented of the price which he had named. He had formed the opinion that it was much too low. Matters at one stage reached a point when the defendant was flatly informed of this but that, in order to save him wasting a long journey, the agents for the plaintiff would continue the discussions in the hope that the plaintiff might change his mind and come back to his original figure. At the beginning of August Rickett and the plaintiff had a conversation, in the course of which the plaintiff again said that the price was much too low, and Rickett advised him to get a valuation. On Aug. 12 a valuation was submitted by the valuer employed by the plaintiff, which brought the value out at a figure of £677,500, that is to say £77,500 higher than the £600,000 mentioned in the letter.

Meanwhile, the solicitors for the parties had been corresponding in the preliminary stages of the preparation of a sale contract. A meeting between them had been proposed, but, on Aug. 16, the plaintiff's solicitors wrote saying that the meeting had better be postponed until the price had been determined. "In the meantime," they said, "we are getting the particulars for the contract into shape." On the same day Latham, agent for the plaintiff, wrote to the defendant, saying that he had had a word with Wright, who was the plaintiff's solicitor, and that Wright agreed with him that, as the matters for discussion with the purchaser's solicitors only concerned the legal side of the business:

> . . . it would be better to postpone his visit until the pending negotiations for the sale and purchase may have more nearly reached definite agreement.

That letter of Aug. 16, in which the plaintiff's solicitors say that the meeting had better be postponed until the price had been determined, was brought to the notice of the defendant and Rickett. There is no dispute about that. On Aug. 17 or 18 Rickett went to spend the evening with the plaintiff, taking with him the original letter of June 7, and certain copies, into the details of which I need not go. The position, therefore, on Aug. 18 was this. The plaintiff had, on June 7, stated the price that he was willing to accept. He had since gone back on that and intimated that he was not proposing to proceed on that basis at all. He was still in that frame of mind on Aug. 18, as appears from the letter which I have read, from his solicitors on Aug. 16, and he showed every reluctance to sign a confirmation of his original letter, in which the figure of £600,000 was mentioned.

I refer to these matters because junior counsel for the defendant quite properly pointed out that the alleged contractual documents must be construed in the light of the fact that the plaintiff had, in terms, confirmed what he had written on June 7. That argument is a perfectly legitimate argument, because it may be said the fact of that confirmation introduced into the final transaction a clear element of contract or a clear intimation of an intention to contract, which otherwise would have been absent.

That is a perfectly legitimate argument, but I call attention to the fact (and I think it is a conclusive answer to it) that it was essential, from the point of view of the defendant, if the matter was to proceed, that he should get the plaintiff to decide finally on the figure of £600,000, from which, in the meanwhile, the latter had resiled. Therefore, it was perfectly natural that his confirmation of that figure should be obtained. If I am right, therefore, in placing upon the document, as at the date when it originally came into existence, June 7, the construction which I do place upon it, the circumstances which had happened in between, calling, as they did, for a confirmation of the figure of price by the plaintiff do not justify me in placing any different construction upon it on Aug. 18, when the alleged contract came into existence.

I think that I have dealt sufficiently with all the matters bearing upon the only question argued before us. There were other matters involved in the case, principally the question whether the subject matter of the alleged contract was ever properly defined. The judge decided that it was not. I do not go into that question because it has not been fully argued before us. Accordingly I must not be taken as in any way expressing an opinion upon that issue. Nor must it be taken that, in saying that, I am casting any shadow of doubt on the correctness of the judge's decision on that point. I only say that it is not a A
point that I have to decide because, in my view, the defendant's case breaks down *in limine*, owing to the fact that the document relied on as being a contract is not a contractual document at all.

In the result, the appeal must be dismissed.

Finlay, L.J.: I entirely agree with Lord Greene, M.R., and there is hardly anything that I wish to add. I should, however, like to join with him B
in paying tribute to the very careful and elaborate judgment of Vaisey, J. In the course of that judgment he says:

> The course of the negotiations was excessively tortuous and confusing, and the onus which, in my judgment, rests upon the defendant, is that of establishing to my satisfaction the emergence from them of a complete and final and concluded and irrevocable contract, bearing in mind that this is said to have occurred on Aug. 19, 1943, and not on any other day. C

Lord Greene, M.R., has pointed out that, of course, it is quite possible for persons on a half sheet of notepaper, in the most informal and unorthodox language, to contract to sell the most extensive and most complicated estate that can be imagined. That is quite possible, but, having regard to the habits of people in this country, it is very unlikely.

If the date be looked at, Aug. 18 or 19—it matters not which—the position, D
as he has pointed out, was this. The solicitors of the parties were negotiating with regard to the agreement, and the solicitor for the plaintiff had written to say that he thought the question of contract had better stand over until the question of price was adjusted. When, in those circumstances, a document is not, indeed, brought into existence, but is confirmed on that day, the probability seems to me to be almost overwhelming that what they would be endeavouring to settle would be the question (a question which had been E
doubtful and outstanding) of price, and the making of the final contract as the matter which had been put in the hands of the solicitors. That is what I think one would expect.

Looking at it purely as a matter of construction, Vaisey, J., concluded his examination of the matter by saying this: "Taking the written matter alone, I hold that it does not constitute a contract between the parties." The judge was there applying himself to the question, to which we also have applied F
ourselves, of the construction of the document. For the reasons which he gave (and also, I would add, for the reasons which have just been fully given by Lord Greene, M.R.), I entirely agree with the result at which he arrived.

Morton, L.J.: I also am entirely in agreement with the judgment which has been delivered by Lord Greene, M.R., and I should like to add that I G
also entirely agree with the comments which have been made by both the other members of the court on the judgment of Vaisey, J., and with the comments which have been made by Lord Greene, M.R., in regard to the events which took place on Aug. 18 and 19.

Appeal dismissed with costs.

Solicitors: *Lee & Pemberton* (for the appellant); *E. P. Rugg & Co.* (for the H
respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

CARRIMORE SIX WHEELERS, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 6th, 1944.**]

Income Tax—Returns—Income from hereditament taxable under Sched. A included in return under Sched. D, Case I—Application for relief—Case stated by Commissioners for the opinion of the court—Whether "*point of law arising in connection with the computation of profits or income*"*—Limitation of jurisdiction of court—Income Tax Act,* 1918 (c. 40), *s.* 149*—Finance Act,* 1923 (*c.* 14), *s.* 24 (5).

The appellants, who owned a factory with land, erected upon it an advertisement hoarding which they let out to a firm of bill-posting contractors at a rent of £90 a year. In making their returns for the years 1936-1939, the appellants had included the rent received as a trading receipt under Sched. D in the computation of their profits for those years, although the bill-posting station was taxable as a hereditament under Sched. A and should have been assessed and taxed under that Schedule. That course was taken deliberately by the appellants for their own convenience and had been consented to by the Inspector of Taxes. The appellants now claimed relief under the Finance Act, 1923, s. 24, on the ground that whether the rent was included under Sched. D, willingly or not, it was by law assessable under Sched. A, and, therefore, its inclusion in the Sched. D computation was an " error " within the meaning of the section. The Crown took the preliminary point that the Special Commissioners were not entitled to state a case for the opinion of the court since there was no point of law arising in connection with the computation of profits or income. It was contended for the appellants that the point of law in reference to the " error " did so arise, and, alternatively, that, if the stated case happened to raise matters which went beyond the permitted limitation, it was open to them to argue those questions of law before the court in the same way as they could under the general provisions of the Income Tax Act, 1918, s. 149 :—

HELD : (i) since the profits under Sched. D as computed for income tax purposes were not in dispute, no point of law arose in connection with the computation of profits or income.

(ii) the power of the High Court was limited to dealing only with such questions as the party was entitled to require the Commissioners to insert in the case, and the court had, therefore, no jurisdiction to entertain the appeal.

Rose Smith & Co., Ltd. v. *Inland Revenue Comrs.* (1) *applied.*

Decision of MACNAGHTEN, J. ([1944] 2 All E.R. 158) *affirmed on other grounds.*

[**EDITORIAL NOTE.** This appeal fails on a preliminary point relating to the jurisdiction of the court. The right to require a case to be stated on a point of law under the Finance Act, 1923, s. 24, is limited to points of law arising in connection with the computation of profits or income, and the court holds that the question of whether a wrong entry deliberately made in a return is an error or mistake does not arise in connection with the computation of profits or income. The insertion of the point in the case stated cannot give jurisdiction, because the power of the High Court is limited to such questions as the party was entitled to require the Commissioners to insert. LORD GREENE, M.R., stresses the desirability of Commissioners stating the point of law under sect. 24 upon which the opinion of the court is sought, and indicates at the end of his judgment the form of a suitable preface to the statement of the point.

AS TO THE RIGHT TO APPEAL TO THE HIGH COURT ON A POINT OF LAW ARISING IN CONNECTION WITH THE COMPUTATION OF PROFITS OR INCOME, see HALSBURY, Hailsham Edn., Vol. 17, pp. 386, 387, para. 795 ; and FOR CASES, see DIGEST, Vol. 28, pp. 100, 101, Nos. 605-618.]

Case referred to :

*(1) *Rose Smith & Co., Ltd.* v. *Inland Revenue Comrs.* (1933), 17 Tax Cas. 586 ; Digest Supp.

APPEAL by the taxpayer from a decision of MACNAGHTEN, J., reported [1944] 2 All E.R. 158. A preliminary point as to the jurisdiction of the court to entertain the appeal was raised by the Crown. The relevant facts are fully set out in the judgment of LORD GREENE, M.R.

Roland Burrows, K.C., and *G. G. Honeyman* for the appellants.

The Solicitor-General (*Sir David Maxwell Fyfe, K.C.*), and *Reginald P. Hills* for the respondents.

Lord Greene, M.R.: The matter which falls for our decision is in the nature of a preliminary point going to the jurisdiction of the court. The point was not considered by Macnaghten, J., because counsel for the Crown was not called upon, and did not accordingly present any argument with regard to it. It was taken in this court, and it is a point of some importance. The section in question is sect. 24 of the Finance Act, 1923. That was a section which granted an indulgence to a taxpayer in the way of return of tax which had lawfully been demanded from him and had been paid, but which in justice the legislature thought should be repaid in whole or in part. The circumstances in which such repayment may be made are briefly these: The taxpayer is entitled to make a claim on the ground that an assessment upon him was excessive by reason of some error or mistake in the return or statement made by him for the purposes of the assessment. By the Finance Act, 1926, he has now six years in which to make the application. The application is made to the Inland Revenue Commissioners, who are to inquire into the matter. The section is rather specially framed. One might perhaps have expected that an indulgence of this kind might have been made effective by means of purely executive action on the part of the Commissioners, but the legislature did not deal with the matter in that way. The Inland Revenue Commissioners are to inquire and they are directed to give by way of repayment, if they are satisfied, such relief in respect of the error or mistake as is reasonable and just, and they are to have regard to all the relevant circumstances of the case. In those respects the power of the Commissioners has a certain discretionary element, but the matter is not left with them as the final resort because the taxpayer is given a right to appeal to the Special Commissioners, and they, in dealing with the application, are to deal with it on the same principles, and subject to the same statutory provisions as the Inland Revenue Commissioners themselves. Even there, however, the legislature did not stop, because it gave a right of appeal from the Special Commissioners by way of stated case on a point of law; but here comes the important matter for our purposes: The right to require a case to be stated on a point of law is not the same right as is given under the ordinary provisions of the income tax legislation under which any point of law can be raised; it is strictly circumscribed. That is to be found in the proviso to subsect. (5), which says this:

> Provided that neither the appellant nor the Inland Revenue Commissioners shall be entitled to require a case to be stated for the opinion of the High Court otherwise than on a point of law arising in connection with the computation of profits or income.

The question which we have to decide is twofold. First, whether the points of law which the appellants seek to raise are points of law arising in connection with the computation of profits or income; and, secondly, if they are not, whether it is competent to them to argue those points of law, notwithstanding the language of the proviso. I do not propose to go into the various points of law which the appellants wish to discuss, with the exception of the first which stands at the threshold of the case. If the appellants are wrong with regard to that matter, it is manifest that there is no jurisdiction to hear the appeal at all.

The first matter arises in this way: The appellants who own a factory with land, erected upon it an advertisement hoarding which they let out to a firm of bill-posting contractors at a rent of £90 a year. In making their returns for the years in respect of which they now seek for relief, they included the rent of £90 as a receipt in their return for the purposes of Sched. D. They now say that that was an error or mistake, and that they ought to be refunded the amount of tax which they have so paid. Now the way in which they came to insert that item in their Sched. D return was this: Their accountants, for convenience, included it in that return. There were, apparently, various matters of some complication in regard to which adjustments might have been necessary; but year by year deliberately they included this sum in the Sched. D return to the knowledge of, and with the consent of, the inspector of taxes; in fact, it was for the convenience of calculation and assessment that that course was taken. The result, therefore, is this: Here was an entry in their return which admittedly was wrong. The proper schedule which governs the rent of that advertisement hoarding was, of course, Sched. A, and the tax ought to have been exacted under that schedule in respect of the ownership of the hoarding in the usual way by assessment on the tenant. That, as I say, was not done; but the appellants took this course deliberately with their eyes open, knowing that it was not the correct course to take. That arrangement they now seek to tear up. The question, therefore, immediately presents itself: Can that deliberate wrong entry, made with full knowledge that it was a wrong entry, be described A as an "error or mistake" within the meaning of sect. 24 (1)? The Special Commissioners held that it was not an error or mistake, and that is the first matter which the appellants seek to dispute before us.

The question is undoubtedly a question of law. It is a question of the true construction of subsect. (1) and may be formulated in this way: Whether or not, on the true construction of the words "error or mistake" in that subsection, the appellants are entitled to maintain a claim; but the fact that it is a question B of construction, and, therefore, a question of law, did not entitle the appellants to ask for a case unless the question of law arose in connection with the computation of profits or income. It was argued by counsel for the appellants that the question did so arise, but, in my opinion, that argument will not bear examination. The question has nothing to do with the computation of profits or income. There was no dispute as to the proper method of computation of C profits or income with regard to this item at all. The profits under Sched. D, as computed for income tax purposes, were not in dispute. The inclusion of this particular item was wrong, and I cannot see how any point of law in connection with the computation of profits or income can be said to arise. It is a pure question of construction of the subsection in relation to the admitted fact that a wrong entry was made with full knowledge that it was wrong, and deliberately.

That really disposes of the case, subject to the next argument, with which D I will now deal. It is said that accepting, for the sake of argument, that the point of law in reference to error or mistake was not a point of law arising in connection with the computation of profits or income, nevertheless it is open to the appellants to argue it before the court because it appears on the face of the stated case. It is said that the only limitation imposed by the proviso is a limitation on the appellants or the Inland Revenue Commissioners in respect of what they may require in the way of a stated case. If the stated case happens E to raise on its face matters which go beyond the limits of that permitted limitation it is open to them to argue those questions of law in the same way as they could under a stated case under the general provisions of the Act.

In my opinion, that argument again will not bear examination. The proviso must be read in connection with the Income Tax Act, 1918, s. 149, which deals with the statement of a case for the opinion of the High Court. The first sub-F section gives power to the parties, if dissatisfied with the determination as being erroneous in point of law, to declare that dissatisfaction and to require the Commissioners to state and sign a case for the opinion of the High Court thereon. Now, reading into that the words of the proviso, it has this effect, that the party having declared his dissatisfaction may require the Commissioners to state and sign a case on a point of law arising in connection with the computation of profits or income. That is the only power which the party, be it the taxpayer G or the Crown, is entitled to call upon the Commissioners to exercise. Then, under para. (*d*), the case shall set forth the facts and the determination of the Commissioners. That, quite clearly, means the determination in respect of which a case is being required, because that is the only matter of determination which is referred to, and, accordingly, the Commissioners, in setting forth the determination, are limited to setting forth the determination on a point of law arising in connection with the computation of profits or income. The matter H appears even more clearly, if that be required, when para. (*e*) is looked at. Under that, the party transmitting the case to the High Court, the party who has required the case, is to send notice in writing of the fact that the case has been stated on his application. The only application that he can make is an application for a statement of a case on a limited point of law, and, therefore, in giving the notice under that paragraph, he is clearly giving a notice that a case has been stated in accordance with his application, and in accordance with the only application which he, lawfully, could make. Then the power of the High Court is to hear and determine any question or questions of law arising on the case. It is quite clear, when that is read in relation to the rest of the section as re-written so as to incorporate the proviso, that the power of the High Court is limited to dealing with such questions as the party was entitled to require the Commissioners to insert in the case. The result, therefore, is that, although the case, as stated, had it been stated under the ordinary jurisdiction of the court, is sufficient to raise several points of law, it is only on points of law which arise in connection with the computation of profits or income that the court is entitled to deal with it.

The conclusion to which I have quite clearly come is, I think, in entire accordance with the decision of Finlay, L.J., when sitting as revenue judge in the case of *Rose Smith & Co., Ltd.* (1). In connection with that case there were two different methods of making the necessary calculations in the case of hire purchase companies. The calculation had, for a time, been made on one basis and afterwards they changed that basis ; that change was agreed to by the Commissioners, and the company then sought recovery of tax on the ground that in the earlier period the basis that had been adopted was not the correct one. There is a proviso in sect. 24 (2) prohibiting the giving of relief when the error or mistake was in accordance with a practice generally prevailing at the time when the return or submission was made. That proviso was relied upon by the Crown, and the question which was submitted in the stated case was whether or not the evidence justified the Commissioners in holding that the returns in the period in question were made in accordance with the practice generally prevailing at the time when such returns or statements were made. That, quite clearly, was a question of law ; but it was held that it was not competent to the court to entertain that question of law because it was not a point of law arising in connection with the computation of profits or income ; it related to a totally different matter and was merely of this nature : Whether, on the evidence, the Commissioners were entitled to come to a conclusion of fact, namely, as to the prevalence of the practice at the relevant time. That decision, as I say, is entirely in accordance with the view that I am taking. I do not propose to refer to any other questions of law which the appellants desire to discuss. Questions might arise upon them as to whether they, in their turn, arose in connection with the computation of profits or income. It is quite unnecessary to consider those matters, or to give an answer to that question, for the single reason that the first thing that the person asking relief under the section must establish is error or mistake, and, if he fails to establish that, the whole basis of his claim goes. If he is prevented from raising a point of law in connection with the meaning of the words " error or mistake," the jurisdiction of the court does not arise. In my opinion, therefore, the court has no jurisdiction to entertain this appeal, and it must be dismissed with costs.

In conclusion, I would like to say this : the Commissioners, in the present case, merely set out the contentions of the parties and concluded in this way, in para. 13 :

> We, the Commissioners who heard the appeal, held : (1) That no error or mistake in the company's returns or statements was made within the meaning of the Finance Act, 1923, s. 24 ; (2) That if there was made by the company an error or mistake, within the meaning of the section, the damage to the company was nil.

Now that, it seems to me, however convenient it may be in the ordinary case of a case stated to put the decision of the Commissioners in that way, is under the very special provisions of this section highly inconvenient, for this reason : The power of the Commissioners to state a case under this section is limited to points of law of a particular description, and it is, therefore, in my view, highly desirable that, when Commissioners are asked to state a case under this section, they should be careful to state what the point of law is upon which the opinion of the court is being sought. A proper preface to the statement of the point would be this : The point of law arising in connection with the computation of profits or income in respect of which the court is required to state a case is as follows : That would bring quite clearly within their minds the limits of their jurisdiction in the matter of stating a case, and would show the court precisely what the point is upon which its opinion is going to be asked. I hope that, in future, cases stated under this section will follow those lines.

Finlay, L.J. : I agree.

Morton, L.J. : Counsel for the appellants had completed his argument in this case before the question of jurisdiction arose. In those circumstances, I feel some regret that want of jurisdiction prevents this court from dealing with the appeal on its merits, or lack of merits. I agree, however, that the appeal must be dismissed upon the grounds stated by Lord Greene, M.R.

Appeal dismissed with costs.

Solicitors: *De Meza & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD.

[Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.), **November 3, 1944.**]

Sewers and Drains—Land drainage—Drainage rates—Annual value of premises for purposes of drainage rates determined by drainage board—Whether board required to make fresh valuation in each year—Land Drainage Act, 1930 (*c.* 44), *ss.* 24, 26, 29.

By virtue of the Land Drainage Act, 1930, drainage rates were payable by the respondents to the appellants in respect of certain properties, the annual value of which, since there was no Sched. A assessment of them was to be determined, for the purposes of drainage rates, by the appellants. It was contended on behalf of the respondents that, by virtue of sect. 24 (4) of the Act, the appellants were under an antecedent duty on every occasion when they were about to make a rate to make a fresh valuation of all lands not assessed to Sched. A, and that unless each such rate was founded on a fresh determination of the annual value of the premises in question it was a nullity:—

Held: upon the true construction of the Act, in the absence of circumstances showing that a case had arisen on the merits for a fresh consideration of the annual value, there was no express direction to the board to make a fresh determination in each year of the annual value of land not assessed under Sched. A, and that it would be wrong to imply such a direction.

Decision of Divisional Court ([1944] 1 All E.R. 727) *reversed.*

[**EDITORIAL NOTE.** The court here reverses the court below on the question of whether a drainage board is required to make an annual valuation of lands not assessed to Schedule A, in order to "determine" the value within the Land Drainage Act, 1930, s. 24 (2). The court holds that the Act gives no indication of the time for determination. There is a general duty of supervision given by sect. 1 (3) and this should include a consideration from time to time of the standing assessments. Furthermore annual re-assessments would both throw an unreasonable burden on the board and would be contrary to the principle underlying the quinquennial valuation for Schedule A and rating, namely, that annual fluctuations do not necessarily represent a change in value justifying an alteration in the assessment.

As to Drainage Rates, see HALSBURY, Hailsham Edn., Vol. 30, pp. 90-92, para. 170; and for Cases, see DIGEST, Supp., Vol. 41, p. 6, Nos. 423-469c.]

Case referred to:

(1) *Consett Iron Co., Ltd.* v. *Durham County Assessment, etc.*, [1931] A.C. 396; Digest Supp.; 100 L.J.K.B. 242; 144 L.T. 649.

Appeal by the drainage board from a decision of a Divisional Court, reported [1944] 1 All E.R., at p. 727, where the facts are fully set out.

A. S. Comyns Carr, K.C., and *Harold B. Williams* for the appellants.

F. A. Sellers, K.C., and *F. Wishart* for the respondents.

Scott, L.J. [delivering the judgment of the court]: This is an appeal from the Divisional Court consisting of Humphreys, Oliver and Stable, JJ., on a special case stated upon an appeal to quarter sessions by agreement under Baines' Act, 1849, s. 11. The facts are, therefore, undisputed. The appeal below was by the present respondents, the Port of London Authority, against a rate made by the present appellants, the Essex Rivers Catchment Board in respect of the year commencing Apr. 1, 1943, upon the respondent authority as the owner and occupier of the Tilbury Docks, being land within the district of the Rainham Internal Drainage Board, whose powers and duties for the time being had passed to the Catchment Board. Whether that passing was under the Land Drainage Act, 1930, ss. 10 or 11, does not appear in the case, but that relationship is implicitly recognised in the facts stated.

The dispute between the parties is as to the legality of the rate, and the question arose in this way. The Tilbury Docks are within the drainage board's district, and the drainage board's expenses had, under sect. 24 of the Act, to be met by two uniform rates, one on owners for "new works" and "improvements" and the other on occupiers for "other expenses or charges." The rates were fixed for the year in question at 10*d.* and 3*d.*, respectively, on the annual value of all the hereditaments in the drainage district. The relevant provisions are contained in sect. 24 (1), (2), (3) and (4). By sect. 26 the two rates may be made for a period either of twelve months or of six months, and both are to be assessed upon the occupiers. By sect. 29 (1) the annual value of lands, which are assessed under Sched. A of the Income Tax Acts, is to be that value: by subsect. (2) the annual value of lands not so assessed is to be "such value as may be determined by the drainage board." Where a hereditament is partly one and partly the other, the board are by that subsection directed to apportion the land and rate accordingly. Subsect. (3) provides that where the board either determine the annual values, or make an apportionment, they shall serve notice and the owner or occupier may appeal within twenty-eight days to a court of summary jurisdiction. Subsect. (4) confers on the board the right from time to time to require information from the surveyor of taxes of his annual values for Sched. A. Where proceedings cannot be taken under sect. 29 (3), sect. 30 (1) gives a general right of appeal against a rate to quarter sessions. It is under this last provision that the Port of London Authority purported to appeal to quarter sessions in the present case.

The questions put by the case were:

> (i) Whether the respondent was bound in law to make a fresh determination of the annual value of the said premises and to serve notice of their decision upon the appellant before making the said drainage rates for the year commencing Apr. 1, 1943: (ii) whether the said rates are bad in law.

The second part of the first question, *viz.*, as to serving notice, is merely consequential on the first part; if there was a duty to determine, sect. 24 (3) imposed the duty of notice. The Divisional Court answered the first question in the affirmative, and, therefore, held that the two rates assessed upon the Port of London Authority (as both owner and occupier) were bad. Their reason was that in their opinion the Act of 1930 imposes upon the drainage board, on every occasion when they are about to make a rate, an antecedent duty to make a valuation of all lands not assessed to Sched. A; with the consequence, that unless each such rate is so founded upon a fresh determination of annual value, it is a nullity. This interpretation of the Act was founded upon the Divisional Court's view that sect. 24 (4) so provides in express terms. Counsel for the respondent board before us contends that that construction is erroneous, although he frankly concedes that his construction is open to the criticism that the language of the Act is not perfectly free from ambiguity; but he contends that the construction adopted by the Divisional Court cannot be got out of the express words of the subsection; and further that it is contrary to the true interpretation of the Act as a whole. In spite of the unanimous view of the Divisional Court we find ourselves unable to agree with them. These are our reasons.

Sect. 24 (4) provides:

> Every rate made by a drainage board shall be an annual value rate, that is to say, a rate assessed on the basis of annual value as regards all hereditaments . . .

Sect. 29 (1) says:

> . . . the expression "annual value" in relation to any land means the gross annual value of that land as determined for the purposes of income tax under Sched. A of the Income Tax Act, 1918, as amended by any subsequent enactment.

Subsect. (2) says in the case of other land that "the annual value shall be such value as may be determined by the drainage board." The Finance Act, 1930, which received the Royal Assent on the same day as the Land Drainage Act, 1930, provides that there shall be revaluation of properties with Sched. A only in every fifth year. We do not read the provisions of either of those two sections of the Land Drainage Act, 1930, where the legislature explains the words "annual value" as having any bearing upon the question of the time when the board is to make its determination. That phrase is there used in the same sense as it is used in Sched. A of the Income Tax Act, or as it is understood in the general law of rating, whether gross or net. In each it is used in what may be called an "income" sense as opposed to a "capital" sense, and its use justifies no implication about the time when the act of ascertaining it is to be performed by the taxing or rating authority. It by no means follows that the drainage authority has no duty in the matter; indeed, an express duty is imposed by sect. 1 (3):

> Subject to the provisions of this Act, a drainage board shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties as are conferred or imposed on drainage boards by this Act.

The function of supervision cannot be properly performed without due consideration being given from time to time to the question of the standing assessments. If at any time the Board has reason to think there may have been any substantial change of annual value, either generally or in regard to some particular hereditament, it is its duty to give consideration to the matter; and if satisfied that there has been such a change, then to estimate its extent, and if it finds it to be substantial, it ought then to make a new determination. On the other hand, if having considered the matter, it does not think the change sufficient to require a new valuation, it is free to leave matters as they are. And in this context it is important to bear in mind that a present diminution of profits due to a depression in trade does not necessarily mean that the annual value of the hereditament has fallen for purposes of rating or taxation. That principle was the *ratio decidendi* of the House of Lords in *Consett Iron Co., Ltd.* v. *The Assessment Committee of the City of Durham* (1). Expectation of an improvement of trade in future years may well balance a present diminution of trade, and justify a refusal to make a present reduction in the assessment of the annual value. Such a principle is implicitly recognised in the view of Parliament that quinquennial assessments for either Sched. A or rating are fair.

That in the absence from the Act of any express direction to the drainage board to make a new determination every year of every annual value, it would be wrong to imply it, also follows from another characteristic of these drainage boards, which are all treated alike in the Act. They are mostly small and the rates are mostly small. Annual values do not change rapidly, and to revalue every hereditament not assessed to Sched. A every year and to send out notices and carry out all the detailed work so involved, would put on each board a burden of staff and expense wholly unreasonable in relation to the small degree of advantage the ratepayers would get, and we cannot think they would be grateful to Parliament for so unnecessarily adding to the expenditure of the board, and, therefore, to the rates to be paid.

It should be emphasised that the special case does not state that the circumstances were such that a case had arisen on the merits for a fresh consideration by the board of the annual value proper to be attributed to the hereditaments of the Port of London Authority, or of any other hereditament lying within the board's area, the annual value of which was not assessed under Sched. A, and there is nothing in the special case to show whether or not the board did or did not consider the merits of the request for a revaluation of Tilbury Docks which was preferred by the Port of London Authority. The only matter before us is, therefore, the abstract question of the construction of the Act. If a ratepayer at any time becomes aggrieved by his existing valuation, it is open to him to lay the facts before the board and ask for their consideration, but the statute confers on a ratepayer no right to demand a determination. If the board does not consider the position in regard to a particular valuation when facts have been or are brought before it, its duty of supervision imports a duty to consider; and if the duty is not discharged, it is open to the aggrieved ratepayer to ask the King's Bench Division for an order of *mandamus* requiring the board to consider. No procedure is laid down by the Land Drainage Act, 1930, for that purpose, and the law of ordinary rating for the old poor rate or for local government rates under the Act of 1925 has no application. The first sentence of Ryde on Rating states that position quite clearly.

For the above reasons we think both questions should be answered in the negative, and the appeal allowed with costs here and below.

Appeal allowed with costs. Leave to appeal to the House of Lords granted.

Solicitors : *Kennedy, Ponsonby & Co.*, agents for *W. Hilliard & Ward*, Chelmsford (for the appellants) ; *Hubert de Mesurier* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

OXLEY *v.* REGIONAL PROPERTIES, LTD.

[Court of Appeal (Lord Greene, M.R., MacKinnon and Luxmoore, L.JJ.), **July 6, 1944.**]

Landlord and Tenant—Rent restriction—Tenancy agreement allowing bonus on punctual payment of rent—Agreement terminated by notice—Statutory tenancy —Whether proviso for bonus imported into statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 15 (1).

The standard rent of certain premises subject to the Rent Restriction Acts was fixed by a tenancy in 1938. In 1941 the respondent became the tenant of the premises under a tenancy agreement for three months, the rent being payable by equal monthly instalments in advance. The agreement contained a proviso that in the event of the tenancy continuing after the three months it was to continue as a monthly tenancy terminable by one month's notice. It also contained a proviso for a bonus to the tenant in the event of the rent being paid punctually. In 1943 the appellant landlord served a valid notice to quit and the respondent became the statutory tenant of the premises. The question for the decision of the court was whether the proviso relating to the punctual payment of rent was imported into the statutory tenancy under sect. 15 (1) of the 1920 Act. On behalf of the appellant it was contended that the "original contract of tenancy" in sect. 15 (1) referred to the tenancy of 1938 by which the standard rent of the premises was fixed and not the tenancy of 1941 under which the respondent was holding before he became a statutory tenant in 1943 :—

Held : (i) the provision for punctual payment of rent was imported into the statutory tenancy.

(ii) the words in sect. 15 (1) of the 1920 Act "the original contract of tenancy" refer to the tenancy under which a tenant was holding before he became a statutory tenant.

Bryanston Properties Co., Ltd. v. *Edwards* (1) *followed. Capital & Counties Properties Co., Ltd.* v. *Butler* (2) *distinguished.*

[**EDITORIAL NOTE.** The court here decides that a provision for a bonus on punctual payment of rent is a term or condition of the tenancy, and as such is imported into the statutory tenancy by the Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15, following the *Bryanston* case (1). It is not a matter of importing the actual reddendum out of the contractual tenancy into the statutory tenancy, and is thereby distinguished from *Capital & Counties Properties Co.* v. *Butler* (2). It is further argued that the "original tenancy" in sect. 15 refers to the tenancy by which the standard rent first fell to be ascertained. This is rejected on the ground that the tenant might otherwise find himself bound by the terms of an earlier tenancy of which he was completely ignorant.

As to Statutory Tenants, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, para. 400 ; and for Cases, see DIGEST, Supp.]

Cases referred to :

*(1) *Bryanston Properties Co., Ltd.* v. *Edwards*, [1944] 1 K.B. 32 ; [1943] 2 All E.R. 646 ; 113 L.J.K.B. 161.

*(2) *Capital & Counties Properties Co., Ltd.* v. *Butler*, [1944] 2 All E.R. 223.

(3) *Phillips* v. *Copping*, [1935] 1 K.B. 15 ; Digest Supp. ; 104 L.J.K.B. 78 ; 152 L.T. 175.

Appeal by the landlord from a decision of His Honour Judge Drucquer, dated Apr. 19, 1944, on a question of the construction of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1). The facts are fully set out in the judgment of LORD GREENE, M.R.

G. J. Lynskey, K.C., and *S. Seuffert* for the appellants.

Graham Brooks for the respondent.

LORD GREENE, M.R.: In this case the standard rent fell to be fixed by reference to the tenancy of Pickles under an agreement of Aug. 9, 1938. It is unquestionably £90. The present respondent became tenant on Jan. 30, 1941, A under a tenancy agreement for three months from Oct. 28, 1940. The rent was expressed to be £90 payable by equal monthly payments of £7 10*s.* in advance. It contained a proviso that in case the tenancy should continue after the three months it should continue as a tenancy from month to month determinable by one month's notice in writing. It also contained this proviso:

> Provided further that the landlord shall credit the tenant's account with an additional sum of 16*s.* 8*d.* upon the tenant paying to the landlord the sum of £6 13*s.* 4*d.* within B fourteen days of the day on which any monthly payment of rent ought to be made to the landlord in accordance with the provisions herein contained.

Putting that in popular language, it is a bonus on punctual payment and does not in any way alter the fact that the standard rent is £90, nor does it alter the fact that the rent payable under the tenancy is £90. It is merely a piece of machinery put in to encourage the tenant to pay his rent punctually.

On Feb. 27, 1943, the appellants served the tenant with a notice saying that C the rent of the premises would, as from Mar. 28, be £92 1*s.* 6*d.*, made up as to £90 of the standard rent, and as to £2 1*s.* 6*d.* of an addition in respect of an increase of rates. With regard to that addition no question arises.

The sole question that arises is whether, when the statutory tenancy came into existence on the expiration of that notice which operated as a notice to quit, the provision relating to punctual payment of rent is to be imported into D the statutory tenancy so that the tenant, if he pays punctually, will get his credit of 16*s.* 8*d.* a month. The county court judge held that the tenant was in the right.

We have had recently to consider questions of that kind arising under sect. 15 of the Act of 1920, which provides, putting it shortly, that a statutory tenant, so long as he retains possession, is to:

> . . . observe and be entitled to the benefit of all the terms and conditions of the E original contract of tenancy, so far as the same are consistent with the provisions of this Act, . . .

The question is: is that provision as to punctual payment a term and condition of the tenancy, or is it not? We have had recently two cases; one fell on one side of the line and one on the other. In *Bryanston Property Co., Ltd.* v. *Edwards* (1), there was a particular provision in the lease under which the tenant could satisfy his obligation by paying a smaller sum during the continuance of the war. F In that case we held that that was a term of the contract, that it was no part of the *reddendum* which remained at the higher figure, and that that term was imported into the statutory tenancy. In a subsequent case, heard only a few days ago, of the *Capital & Counties Properties Co., Ltd.* v. *Butler* (2) (again a county court appeal), the *reddendum* itself provided for the payment of a lower rent, and we held that that was distinguishable from the *Bryanston* case (1) G for that reason. We have not before us any record of our judgment in that last case. The words of the most unimportant and garrulous witness in an action in the King's Bench Division are taken down in shorthand at the public expense, but decisions of this court which, until reversed by the House of Lords, contain the law of England, are not recorded officially. Accordingly, to the great inconvenience of counsel and the court, when it is necessary to refer to a decision of this court which has not found its way into the reports, we are not H able to have before us the language in which that decision was expressed. So it has appeared right to those who have authority in these matters. But, from my recollection of the case, it was distinguished from the *Bryanston* case (1) for the reason which I have mentioned, that there it was a case of importing the actual *reddendum* out of the contractual tenancy into the statutory tenancy; in the *Bryanston* case (1) it was not so.

I do not propose to state in different language what I said in the judgment in that case in relation to the *Bryanston* case (1) and the earlier case in this court of *Phillips* v. *Copping* (3); it would be dangerous to do so because I have not my actual language in front of me at the moment for the reason I have stated. Suffice it to say that, in my opinion, the present case falls within the *Bryanston* case (1). It is not a question of importing the *reddendum* into the statutory tenancy; it is a separate and independent term of the tenancy by which, in certain circumstances, the tenant can get a bonus on punctual payment. It may be thought that the distinction between the two classes of case is rather a fine one and depends on technicalities of language: but it must always be remembered that, although one must construe the Rent Restriction Act in as popular a way as one can, when an Act of that description, which is really of a rather make-shift nature, comes to be applied to the highly technical and highly variegated relationship of landlord and tenant and the various different forms which are to be found in different types of lease, it is almost inevitable that fine distinctions will be found to prevail. It may be thought, as I have said, that the distinction is a fine one. Having had occasion to reconsider the *Bryanston* case (1) both in the recent case which I have mentioned and in this case, I see no reason to feel any doubt about the view I formed in the *Bryanston* case (1), with which the other members of the court agreed.

There was one further argument of counsel for the appellants. He said, referring to the language of sect. 15 (1) of the Act of 1920, that the terms and conditions which the subsection says are to be imported into the statutory tenancy are the terms and conditions of the original contract of tenancy. On the facts of this case, he says that the original contract of tenancy there referred to was not the tenancy under which the present respondent was holding before he became a statutory tenant, but the tenancy of Pickles by reference to which the standard rent fell to be ascertained. That, he says, is the meaning of "original" in the subsection. That interpretation has all the merits of startling originality, because I think it must have been implied in numerous decisions under this subsection that the terms which are to be imported into the statutory tenancy are the terms of the relevant contractual tenancy, namely, the one under which the tenant was holding when he ceased to be a contractual tenant and became a statutory tenant. That is obviously the justice and sense of such a provision, because otherwise a tenant would find himself bound by terms in an earlier tenancy which might be fifty years ago, quite inappropriate to his case, and the mere existence of which he was completely ignorant. If the *Bryanston* case (1) is looked at I think it is a good example of that. In this connection there is a further point, that a statutory tenant is only to be entitled to give up possession on giving such notice as would have been required under the original contract of tenancy. There is the same phrase "original contract of tenancy." If that means not the contract under which the statutory tenant was holding, but some earlier contract under which somebody else had held possibly years ago, it would mean that the notice which he has to give would have to be a notice of the length required under the earlier tenancy, which might have been a totally different type of tenancy; it might have been a tenancy from year to year as against a monthly tenancy, and so on. Further, how the unfortunate statutory tenant is to know what notice the earlier tenancy provided for is not explained. In my opinion, it is perfectly clear that the reference in this subsection to the original contract of tenancy is to the contract of tenancy under which the statutory tenant was holding before he became a statutory tenant.

In the result, the appeal must be dismissed with costs.

MACKINNON, L.J.: I agree that this case is indistinguishable in principle from the *Bryanston* case (1) and that, as that binds us, this appeal must fail.

LUXMOORE, L.J.: I also agree.

Appeal dismissed with costs. Leave to appeal to the House of Lords on terms.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the appellant); *F. E. Clifford* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

LOOKER *v.* R.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), **October 9, 1944.**]

Emergency Legislation—Compensation—House requisitioned by military authorities —Agreement with tenant—Compensation payable in respect of house and in respect of storage of furniture—Disclaimer of lease by tenant—Whether tenant still entitled to compensation in respect of storage of furniture—Construction of agreement—Compensation (Defence) Act, 1939 (*c.* 75), *s.* 2*—Landlord and Tenant (Requisitioned Land) Act,* 1942 (*c.* 13), *ss.* 1, 2.

The suppliant was the tenant in occupation of a house which was requisitioned by the Secretary of State for War. Under an agreement made between the parties the tenant was paid compensation for the house at the rate of £304 per annum. He further received a separate sum of £96 per annum as compensation for storage of furniture, such storage expenses being considered necessary expenses in connection with the requisitioning of the house. Subsequently the tenant availed himself of the powers given by the Landlord and Tenant (Requisitioned Land) Act, 1942, and disclaimed his lease. The tenant claimed that the disclaimer of the lease, though terminating his right to receive compensation for the house, did not disentitle him to receive compensation in respect of the storage of furniture:—

HELD: by disclaiming his lease, the suppliant ceased to have any right to compensation. Since the suppliant was no longer the tenant of the requisitioned house, he could not be considered to incur any expenses in connection with it.

[**EDITORIAL NOTE.** It is to be noted that this case is not concerned with the construction of the statutory provisions for compensation on requisition but with the construction of an agreement between a lessee and the Secretary of State for War in which compensation for requisition was quantified at a sum equal to rent plus a sum in respect of storage of furniture. It is held that on disclaimer of the lease the agreement is terminated and all right to compensation ceases.

FOR THE COMPENSATION (DEFENCE) ACT, 1939, see HALSBURY'S STATUTES, Vol. 32, pp. 1013-1030; and FOR THE LANDLORD AND TENANT (REQUISITIONED LAND) ACT, 1942, see HALSBURY'S STATUTES, Vol. 35, pp. 105-119.]

Case referred to:

(1) *Luxor (Eastbourne), Ltd. (in Liquidation) and Others* v. *Cooper*, [1941] A.C. 108; [1941] 1 All E.R. 33; 164 L.T. 313.

PETITION OF RIGHT to determine whether the tenant who received compensation in respect of a requisitioned house under the Compensation (Defence) Act, 1939, s. 2 (1) (*a*) and in respect of the storage of furniture under sect. 2 (1) (*d*) of the Act, was still entitled after disclaimer of his lease under the Landlord and Tenant (Requisitioned Land) Act, 1942, to receive compensation in respect of the storage of furniture only. The facts and arguments are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Comyns Carr, K.C., and *G. D. Squibb* for the suppliant.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*), and *Valentine Holmes* for the respondent.

VISCOUNT CALDECOTE, L.C.J.: The question arising in this case is one of construction of a contract. The suppliant was the tenant of a house. The tenancy was under a lease for 14 years. While the tenancy existed the house was requisitioned by the Secretary of State for War under the Defence (General) Regulations, and in those circumstances Parliament had provided by the Compensation (Defence) Act, of 1939, that compensation should be payable upon certain conditions stated in the Act. I have not to apply the measure of compensation provided by the Act to the circumstances of this case; my task is much simpler than that; I have to construe an agreement.

The agreement which I have to construe was made on Apr. 10, 1941, between the Secretary of State for War and the suppliant and it contains a recital in these terms:

> Whereas the Department has taken possession of "Woodgate" Dane Hill pursuant to the powers conferred on it by the Defence Regulations 1939 by reason of which compensation is or will be payable to the said Herbert William Looker under the provisions of the Compensation (Defence) Act 1939.

Then the compensation is quantified :

> It is hereby agreed between the parties hereto that the Department shall pay and the said Herbert William Looker shall accept payment at the rate of £304 per annum payable quarterly.
>
> In addition the Department will pay at the rate of £96 per annum in respect of storage of furniture under sect. 2 (1) (*d*) of the said Act.

Sect. 2 of the Act is in these terms :

> The compensation payable under this Act in respect of the taking possession of any A land shall be the aggregate of the following sums . . .

Sect. 2 (*a*) includes in the calculation of the compensation payable the sum equal to the rent which might reasonably be expected to be payable by a tenant in occupation, and so on, and (*d*) is :

> A sum equal to the amount of any expenses reasonably incurred, otherwise than on behalf of His Majesty, for the purpose of compliance with any directions given on behalf B of His Majesty in connection with the taking possession of the land :

After the house had been requisitioned for some time the suppliant availed himself of the powers which were given by the Landlord and Tenant (Requisitioned Land) Act, 1942, and he disclaimed the lease of this house in respect of which he had agreed to take compensation payable by the Secretary of State for War. In those circumstances the dispute arises between the parties. On C the one hand the suppliant says : My disclaimer puts me in the position of not being able any longer to receive payment at the rate of £304 per annum payable quarterly, but it does not disentitle me to receive that other part of the aggregate of the compensation to which I am entitled under the Act of 1939, which is the payment of £96 in respect of storage of furniture.

Counsel for the suppliant has suggested that the Crown can only avoid payment of that sum of £96 by inserting some clause called an implied clause, some- D thing, that is to say, read into the agreement, and so obvious that it was not thought necessary to put it into writing because it would, to use LORD WRIGHT's expression in the *Luxor* case (1), go without saying. The Attorney-General, on the other hand, says that the suppliant can only succeed in this case by inserting some implied term.

Let me say at once that I do not think this agreement is to be construed by considering the implication of any new term which required to be inserted E for the purpose of giving effect to the agreement. As LORD WRIGHT said in the passage to which counsel for the suppliant has referred me, it is not for the courts to rewrite agreements ; agreements are to be construed. In so far as it is necessary to imply a clause or a term so as to give effect to the agreement between the parties the court will imply the proper term, but in this particular case I think that it is not possible to suggest any term which is so clear or F necessary as has been suggested on the one side or the other. I think that this agreement is reasonably plain and can be construed in the proper way without implying or adding any new clause to it at all.

The compensation to which the suppliant is entitled seems to me quite simple when it is considered. The compensation to which the suppliant is entitled is the aggregate of certain items. This agreement refers specifically to two of those items, that which is payable pursuant to sect. 2 (1) (*a*), which is a sum G equal to the rent and a sum paid under sect. 2 (1) (*d*) which is a sum equal to the amount of the expenses reasonably incurred for the purpose of compliance with any terms given on behalf of His Majesty in connection with the taking possession of the land.

It is conceded by counsel for the suppliant that when the suppliant ceased to have any right to possession of these premises, in other words when he disclaimed the lease, he ceased to be entitled to receive payment of a sum of £304 pursuant H to sect. 2 (1) (*a*). I think that in precisely the same way when he had disclaimed his lease he ceased to have any right to compensation ; not a part of the compensation, but the whole of the compensation ceased to be payable by the Crown. It was the act of the suppliant which disentitled him to receive compensation, and whether he received it under one part of the Act, which states the aggregate compensation payable or under another seems to me to make no difference to the time for which the agreement lasted. If the suppliant having disclaimed the lease became disentitled to receive any further compensation it could not be said that under 2 (1) (*d*) there were any directions given on behalf of His Majesty in connection with the taking possession of the land in complying with which the suppliant had to incur expense. He has ceased to be the tenant; he no longer incurs any expense in order to comply with the directions in connection with the taking possession of the land, and I think that the answer made by the Crown to the petition is the right one and that judgment should be given accordingly.

A *Petition dismissed with costs.*

Solicitors: *Gibson & Weldon* (for the suppliant); *The Treasury Solicitor* (for the respondent).

[*Reported by* R. BOSWELL, ESQ., *Barrister-at-Law.*]

B

MOORE *v.* I. BRESLER, LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **October 24, 1944.**]

Emergency Legislation—Purchase tax—False returns with intent to deceive made by servant of company in fraud of company—Liability of company.

C *Criminal Law—Criminal liability—Corporations—Intention of servants to defraud company.*

The secretary of the respondent company, who was also the general manager and the sales manager of the company's Nottingham branch, sold, with the object of defrauding the company, certain of the company's goods intended for sale. The secretary, who alone kept the accounts, and the general manager made certain returns in respect of purchase D tax on the sales which were false in material particulars and made with intent to deceive contrary to the Finance (No. 2) Act, 1940, s. 35. The company and the two officers of the company were charged with the appropriate offences under the Act. The company was convicted but on appeal to Quarter Sessions the convictions were discharged on the ground that the sales were not made by the officers of the company as the agents of or with the authority of the company but in fraud of the E company:—

HELD: the officers were acting within the scope of their employment in making the sales and the returns, and the fact that these were made with intent to defraud the company did not render the officers any the less the agents of the company acting with authority.

[**EDITORIAL NOTE.** It was held in *R.* v. *I.C.R. Haulage, Ltd.* ([1944] 1 All E.R. F 691), that a company can be indicted for the criminal act of its agent, the liability depending upon the nature of the charge, the relative position of the agent and other relevant facts. Here the agent was clearly acting within the scope of his authority in making the fraudulent returns, and the sales to which they related, and the fact that the sales were intended to benefit the agent and not the principal is held on general principle not to affect the guilt of the company.

AS TO CRIMINAL LIABILITY OF CORPORATIONS, see HALSBURY, Hailsham Edn., Vol. 8, pp. 111-113, paras. 178, 179; and FOR CASES, see DIGEST, Vol. 13, pp. 408-411, G Nos. 1286-1308.]

Case referred to:

*(1) *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ltd.*, [1944] 1 K.B. 146; [1944] 1 All E.R. 119; 113 L.J.K.B. 88; 170 L.T. 41.

APPEAL by way of case stated from a decision of the Nottingham Quarter Sessions. The facts are fully stated in the judgment of VISCOUNT CALDE-H COTE, L.C.J.

Valentine Holmes and *Gordon Lowe* for the appellant.

The respondent company were not represented.

VISCOUNT CALDECOTE, L.C.J.: This case on the facts as stated, both as to the charges and as to the evidence which supported them, appears to be a little complicated, but in truth I think it is a simple case. There were four informations that were preferred against different persons in each case, but in each of the four informations the present respondent, I. Bresler, Ltd., was included in the charge. The first was that the man who was secretary of the respondent company and the general manager of the Nottingham branch of the respondent company did, in breach of the Finance (No. 2) Act, 1940, with intent to deceive, publish a document which was false in a material particular. It was said to be false because it certified less than the true amount of transactions which had been entered into so as to make the company liable to pay purchase tax. The second information was against a man named Phillips. Phillips was the sales manager of the Nottingham branch and, with Phillips, the respondents were charged under the same provision of the Finance Act with producing an account which was false in a material particular with intent to deceive. The account in that case was said to be a complete record of all transactions charged with purchase tax. A similar information was charged against Bresler and the respondents, and the fourth information was against Bresler and the respondents, the offence there being the making of a statement that they had no knowledge of the sale of goods made to three persons who it was proved had made purchases of handbags from them.

The facts led—and there is no appeal about this decision—to the conviction of Phillips and Sidney Bresler. On appeal to the Court of Quarter Sessions the respondents, who had been convicted, escaped by the appeal being allowed. The facts as to the falseness and the intent to deceive are really not in dispute, but the contention which was made for the respondents was that the handbags the sales of which were concealed were not the goods of the respondents; and, secondly, that the handbags were the goods of Phillips and were sold by him for his personal gain and without the knowledge of Bresler or of the respondents; and then it was contended that a company like the respondent could not be charged with an offence involving an intent to deceive or guilty knowledge. When I look at the opinion expressed by the Recorder, it seems to be clear that he did not accept the last contention—he says nothing about it—but, even if he had accepted it, I think it would have been wrong and no doubt that was his opinion, wrong on the authorities which have been cited to us. But whether or not he intended to accept the first two contentions, I am not quite clear. There are findings which are not quite consistent with each other in the case as to whose goods the handbags were which were sold, but the Recorder's opinion was this:

> . . . that the respondents were not guilty of the alleged offences or any of them because the sales referred to in para. (*e*) hereof made by the said Phillips in collusion with the said Bresler were not made by them as the agents or with the authority of the respondents but in fraud of the respondents.

That seems to me an impossible view upon the facts of this case. Sidney Bresler was the secretary of the respondent company and the general manager of this Nottingham branch. It seems to me that, if either of them, or both of them together, sold goods which were the property of the respondents and intended for sale, they were acting within the scope of their authority; the sales which were effected were made by them as agents and with the authority of the respondents.

Then the Recorder goes on to say that these sales were made by Phillips and Bresler solely for their own benefit. That, in one sense is true; at any rate the part is true that the sales were made in fraud of the respondent company. The Recorder continues:

> While the said Phillips and the said Bresler were guilty of the offences alleged against them in the said information of making the alleged false statements with intent to deceive, such statements were made by them for the sole purpose of concealing the said fraudulent sales made by them of the company's property and without the authority of the company.

That, I think, repeats the fallacy which I have already tried to point out. The sales undoubtedly were fraudulent, but they were sales made with the authority of the respondent company by these two men as agents for the respondent company. I think the opinion was, therefore, wrong, but, even if it was right, I should have had great difficulty in seeing how it could be said to be a ground upon which the offences could be held not proved. These two men were important officials of the company, and when they made statements and rendered returns which were proved in this case, they were clearly making those statements and giving those returns as the officers of the company, the proper officers to make the returns. Their acts, therefore, as, indeed, the Recorder seems to have been prepared to agree, were the acts of the company. It is only because, for some reason which I am not able to fathom, he thinks that they have converted the goods of the company and made them their own and so acted without authority, that the Recorder came to the conclusion that the appeal ought to be allowed. How he came to base his decision upon the fallacious reasoning contained in his opinion, if I may say so with great respect to him, I do not know. It is sufficient for us, I think, to say that he went wrong on a point of law and on the facts stated in this case these two people acting as officers of the company made the company liable for the offence which was committed.

The case, therefore, ought to go back to the Recorder with a direction to find the offences proved.

HUMPHREYS, J.: I am of the same opinion. I confess that I regard this as a clear case. The Recorder came to the conclusion, and there was no other conclusion at which he could arrive, that Sidney Bresler, the secretary of the respondent company and general manager of their Nottingham branch, where he alone kept the books, and Phillips, the sales manager of the Nottingham branch, had between them and in collusion with one another made, or caused to be made, false documents. Some were returns, some were letters and some were accounts, all documents which came within the language of the Finance (No. 2) Act, 1940, s. 35, which makes it an offence for any person with intent to deceive, for the purposes of this Act, to make or make use of such documents for the purposes of the Act. Having done that, and having convicted these persons, the Recorder found some reason or some argument which induced him to hold that the company which was responsible for purchase tax was not guilty of that offence. Being a limited company, that company could only act by means of human agents. It is difficult to imagine two persons whose acts would more effectively bind the company or who could be said on the terms of their employment to be more obviously agents for the purpose of the company than the secretary and general manager of that branch and the sales manager of that branch. Why, then, is it said that the limited company, which was also prosecuted, was not guilty? As my Lord has pointed out, the opinion of the Recorder is stated in this way: he was of opinion that because the sales referred to, which were sales of goods of the company, made by those two persons were not made by them as the agent of or with the authority of the respondent, therefore the company was not responsible. The answer, I think, is that it is perfectly obvious that in fact and in law those sales of the company's goods were made by those persons as agents of and with the authority of the respondents, and the sale is not less made with the authority of the master because the employee means to put into his own pocket the proceeds of the sale when he receives them. That is what the Recorder goes on to say, that those sales were made—not that the returns were made—in fraud of the respondents. That is perfectly true, but there is no authority that I am aware of, and there is a very great deal of authority to the contrary, for the proposition that because a servant does something in fraud of his master, although it is something which he is actually paid to do, such as a sales manager making a sale, that, therefore, the master is not responsible for the sale. I think it is a very elementary proposition of law which the Recorder, with all due deference to him, has forgotten, perhaps as the result of having quoted to him some authorities, and perhaps the complicated provisions of this Act of Parliament. The Recorder goes on to say that while the two men were obviously guilty, and he properly convicted them of the offence, that the limited company was not guilty of the offence because those fraudulent sales—a mere repetition of what he had said above—although made by them as sales of the company's property, were without the authority of the company. In my opinion, it is perfectly clear on the facts of this case that they were made with the authority of the company. Therefore, I agree with the judgment of my Lord that the Recorder was wrong in his view of the law and that the question which he asks us in para. 14 of the case, the question being "Whether upon the facts stated above the Recorder came to a correct conclusion and determination in point of law," should be answered in the negative and the case should go back in order that that wrong view should be put right.

Birkett, J.: I agree. The only thing I would add would be to adopt as my own a sentence of Macnaghten, J., in the case of *The Director of Public Prosecutions* v. *Kent & Sussex Contractors, Ltd.* (1). He there said, at p. 124:

> If the responsible agent of a company acting within the scope of his authority puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that according to the authorities which my Lord has cited his knowledge and intention must be imputed to the company.

It seems to me that that sentence applies quite fully to the facts of this case. The transactions which were concealed and omitted from the documents which were put forward were transactions where the respondents' goods were sold on the respondents' premises by the respondents' servants to the respondents' customers, and it was conceded that it was the duty of these two men, Bresler and Phillips, to make the returns in question. I cannot think that the Recorder was right in the course that he took and for the reasons given by my Lord and Humphreys, J., I agree that the appeal should be allowed.

Appeal allowed with costs. Conviction restored.

Solicitor: *Solicitor for H.M. Customs and Excise* (for the appellant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

HOUNDSDITCH WAREHOUSE CO., LTD. *v.* WALTEX, LTD.

[King's Bench Division (Stable, J.), **May 5, 1944.**]

Sale of Goods—Contract—Sale by sample—Breach of condition as to quality—Offer by defendants to accept return of undisposed stock—Offer rejected—Damages—Mitigation—Duty of plaintiffs to ascertain precise meaning of offer—Sale of Goods Act, 1893 (c. 71), *ss.* 35, 56.

Under agreements made in September, 1942, the defendants sold by sample and delivered to the plaintiffs 306 dozen men's braces of which the plaintiffs resold 83½ dozen to various retailers. Complaints having been received in January, 1943, from some retailers about the quality of the braces, the plaintiffs after investigation of the matter commenced proceedings against the defendants for damages for breach of contract, alleging that the braces did not correspond with the sample. After the issue of the writ the defendants offered to accept the return of the undisposed stock and to refund the purchase price, provided the braces were in the same condition as at delivery. In the course of the ensuing correspondence between the parties the defendants pointed out that the offer was not made for the purpose of disposing of the action. The offer was rejected by the plaintiffs on the ground that the production of the braces in court was essential to their case. It was found as a fact that the bulk of the braces did not correspond with the sample and that the offer of the defendants to accept the return of the goods was genuine and put forward for sound commercial reasons:—

Held: (i) if the offer of the defendants was meant as an offer to compromise part of the claim, the plaintiffs were under no obligation to accept it. If it was an offer outside the action altogether and without prejudice to any legal rights of the parties, the plaintiffs ought to have accepted it in discharge of their obligation to mitigate the damages. Since it was not clear in which sense the offer was meant, the plaintiffs had acted unreasonably in refusing it without first ascertaining its precise meaning.

(ii) the amount of damages to which the plaintiffs would otherwise have been entitled, had, therefore, to be reduced.

[**EDITORIAL NOTE.** The plaintiffs here are held to fail in their duty to mitigate their loss arising from faulty goods delivered by the defendants. The offer of the defendants to buy back the goods was mistaken as an offer to compromise, and as the ambiguity was never cleared up by the plaintiffs' solicitors the damages recoverable are accordingly reduced.

As to the Duty of Plaintiff to Mitigate Loss, see HALSBURY, Hailsham Edn., Vol. 10, pp. 113-115, paras. 143-144; and for Cases, see DIGEST, Vol. 17, pp. 125-128, Nos. 324-360.]

Case referred to :

(1) *Payzu, Ltd.* v. *Saunders*, [1919] 2 K.B. 581 ; 39 Digest 571, *1765* ; 89 L.J.K.B. 17 ; 121 L.T. 563.

ACTION for damages for breach of condition as to quality of goods sold by sample. The facts are fully set out in the judgment.

R. F. Levy, K.C., and *Marcus Grantham* for the plaintiffs.

D. A. Scott Cairns for the defendants.

STABLE, J. : This is a claim by the plaintiffs, arising out of two contracts made respectively on Sept. 22 and 23, 1942. On Sept. 22, 1942, an agent of the defendants called upon the plaintiffs, who are carrying on business as wholesale and general warehousemen, and he showed to the plaintiffs a sample of some leather braces and indicated that there were some 100 dozen of those braces immediately available. He further indicated that they probably had material for a larger order and there and then an order was given for 100 dozen of those braces, deliveries to be in accordance with the sample. On the next day he again communicated with the plaintiffs, and informed them that there would be available some 200 dozen more of those braces, and on Sept. 23 the second order was given, for 200 dozen. In point of fact 306 dozen were delivered, for the net price of £434 8*s*. 3*d*. The deliveries were made under the contracts in comparatively small instalments spread over a period of something slightly in excess of one month. The entire deliveries were completed by Nov. 6, 1942. The plaintiffs paid the contract price as against each lot delivered.

To state the history of the matter quite shortly, the plaintiffs retained in stock some 212 dozen, and they resold to various retailers 83½ dozen of the braces. Nothing more was heard of the matter until about Jan. 8, when the Cardiff Co-operative Retail Society wrote to the plaintiffs and made very serious complaints about the braces. This was followed by yet another complaint from another retailer, and the plaintiffs, who were careful of the goodwill and high standing of their company, investigated the matter, and as between them and the retailers to whom they had sold they decided that there was nothing else for them to do but to give a credit note for the sales, and for the goods to be returned. They, not unnaturally, passed on the complaints to the defendants, from whom they had bought. There was a certain amount of negotiation, and by way of compromise (which of course the plaintiffs were perfectly entitled to accept or refuse as they thought fit) the defendants offered to take back the stock which had not been disposed of at a price of about 24*s*. per dozen. That offer, which in my view has nothing whatever to do with the mitigation of damages, but was put forward as an offer to compromise a disputed claim, was rejected by the plaintiffs, as they were perfectly entitled to do. Counsel for the plaintiffs submitted to me that apart from the 83½ dozen which were in fact resold, the plaintiffs are now entitled to reject everything that they have got left on their hands. The first question I have to decide is whether or not the deliveries under these two contracts were in accordance with the contracts.

In my view, these sales were not sales by description. There was no description attached to the articles, except that they were called "braces." This was a sale by sample, and under the Sale of Goods Act there was an obligation upon the defendants to deliver commodities which corresponded with the sample. There is a condition that the buyer should have a reasonable opportunity of comparing the bulk with the sample, and there is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample. That last condition means that if there is a defect in the sample which renders the goods unmerchantable, and the buyer, notwithstanding and with knowledge of that defect in the sample, is content to take a delivery which corresponds with the sample, and gets such a delivery, he has no ground for complaint. On the other hand, if, although the delivery is in accordance with the sample, there is in the sample some latent defect, undetected and not apparent on reasonable examination, then if the contract deliveries contain the same latent defect which renders them unmerchantable, the contract has not been performed.

In this case I have had the opportunity of seeing the actual sample, and I am satisfied that in the sample there is no latent defect which renders goods identical with the sample unmerchantable. The sample is not a very finished product, but it seems to me to represent a good solid working pair of braces. The next question that I have to decide is whether the deliveries were in accordance with the sample, and in my opinion they were not. The substantial ground of complaint is that the leather in the sample is a much stronger leather, which carries the stitching better than the bulk braces which were delivered. In the result I am quite satisfied here that there never was a delivery that was corresponding with the sample in quality. I think the plaintiffs would have been perfectly justified in rejecting the whole delivery.

Counsel for the plaintiff has contended that his clients have not lost that right in relation to any of the braces except the 83½ dozen which they in fact sold, and as regards the balance they can still exercise their right of rejection. That throws one back on to the Sale of Goods Act, ss. 35, 56. Sect. 35 provides:

> The buyer is deemed to have accepted the goods if he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

In my judgment the plaintiffs here have lost their right of rejection. I agree with counsel for the plaintiffs that in one sense the deliveries were separable, that is to say, if the first five or six deliveries had been in accordance with the sample and had been accepted and disposed of, that would not have precluded the plaintiffs, if the later deliveries were not in accordance with sample, from rejecting them. But in fact the plaintiffs kept these goods throughout the months of November, December, and the early part of January, before any complaint was made to the defendants. Counsel for the plaintiffs is unable to prove whether the 83½ dozen sold came from the contract of Sept. 22, or Sept. 23, or whether they were taken from this delivery or that delivery; but he says that he is entitled to appropriate the whole to the first contract, which he says gives him the right to reject all the deliveries under the second contract. In my view he has no such right of appropriation. Whether those goods which were so sold come from the first delivery, or the second delivery, or the last delivery we simply do not know. The plaintiffs have kept the goods for a matter of two months, and they have, in fact, sold 83½ dozen. In my view they have done an act in relation to the goods which is inconsistent with the ownership of the seller. But even if that view is wrong, having had the opportunity of seeing a vast number of these braces, I think that far more than a reasonable time had elapsed by the middle of January, when in point of fact the first complaint was made. I have no doubt that the plaintiffs made the most cursory examination of these goods, and that if even the most unskilled examination had been made it would have been immediately apparent to anybody, whether skilled in the matter of skins or not, that a very considerable portion of these braces were not in conformity, as regards quality, with the sample.

That being the case, the plaintiffs lost their right to reject, and they are thrown back on their claim for damages. They put their claim for damages in this way:

> We have sold some of these things, and a good deal of time has elapsed, and we have not had them thrown back on us. We have in stock braces which at cost price have cost us £360 2*s*. 6*d*.

They have satisfied me, in view of the shortage of supply and the considerable demand existing, that had they had delivery in accordance with the sample they would have made a profit, over and above the profit that they in fact made on the braces which were sold, of £99 9*s*. 4*d*., which gives them a total claim of £459 11*s*. 10*d*., less the value of the braces left on their hands.

I have come to the conclusion that although perhaps in the hands of the manufacturer some of the braces could, by some amount of reinforcement and strengthening, be turned into a perfectly merchantable commodity, as far as the plaintiffs are concerned, who are not manufacturers and have no facilities for that, the game simply would not be worth the candle; and I accept the plaintiffs' evidence that, to them, the braces that they have on their hands are absolutely worthless.

If the matter rested there the plaintiffs would have been entitled to the sum of £459 11*s.* 10*d.*, as damages, but the matter does not rest there; after the writ was issued there was some correspondence between the parties. On Mar. 13, the defendant company's solicitors wrote to the plaintiffs' solicitors saying that the defendants were prepared to accept the return of all the braces, in the same condition as at delivery, and to refund the amount paid for those braces. The offer was made on the footing that the defendants were to examine the braces and to refuse any that were not in their opinion in the same state as when they were delivered. That offer was misconstrued. It appears that the plaintiffs read the letter as being an offer of compromise. They thought they were being invited to give up their rights in the action, and they replied accordingly. On Mar. 16 the defendants' solicitors wrote again, pointing out that the plaintiffs had misunderstood the first offer, which was not made for the purpose of disposing of the action, but was intended to deal only with the braces in the possession of the plaintiffs, of which the defendants were willing to accept the return on the conditions stated. On Mar. 17 the plaintiffs' solicitors replied:

> Under the circumstances we cannot advise our clients to agree with your suggestion until the action is disposed of. The production of the goods in court will be essential for our clients' case.

It is not quite clear to me whether the defendants' offer was really an offer outside the action and the legal rights of the parties altogether, an offer to buy braces which in their opinion were in their original state at the contract price, or whether it was an offer to compromise the claim for damages in relation to that proportion of the braces, leaving the question of liability for damages open in relation to the rest of the braces. If the plaintiffs' solicitors had kept the negotiations alive and cleared up any ambiguity it is uncertain what the outcome of the matter would have been, but I have come to the conclusion that in turning the offer down, lock, stock, and barrel, as they did by their letter of Mar. 17, the plaintiffs were not acting reasonably. I think that they, if in any doubt, should at least have obtained a clear definition of what the offer meant, and if it was an offer to buy part of the braces without prejudice to the rights in the action, then quite irrespective of the fact that the writ had been issued, they were under a duty to the defendants to accept that offer and thereby to mitigate the damages which the plaintiffs themselves had sustained. I think it was a perfectly genuine offer, put forward for sound commercial reasons.

If the offer was an offer of a compromise, even of only part of the claim, then in my view the plaintiffs were under no obligation to accept it, and I must take into consideration the possibility that it was such an offer of compromise. If on the other hand it was not, then in my view the plaintiffs ought to have accepted it, a view supported by the case of *Payzu, Ltd.* v. *Saunders* (1). That being so, in my judgment I am compelled, making the allowances that I have indicated, to write down the plaintiffs' damages from the sum of £459 12*s.* 0*d.* If it had been an out-and-out offer to buy the whole of the braces in stock, the damages would have been mitigated to the extent of £300, and the plaintiffs' damages would have been reduced to the sum of £159.

On the whole I have come to the conclusion that it was unreasonable on the part of the plaintiffs to have brought that negotiation to an abrupt conclusion by the letter of Mar. 17, and, making the best allowances I can for the various possibilities, I award the plaintiffs the sum of £309 damages for breach of contract. The braces, such as they are, of course, will remain the property of the plaintiffs, and they can dispose of them as they think fit.

Judgment for plaintiffs with costs.

Solicitors: *Robert Clayton & Co.* (for the plaintiffs); *Albert M. Oppenheimer* (for the defendants).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

ARNELL *v.* HARRIS.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **October 25, 1944.**]

Magistrates—Jurisdiction—"Person charged"—Money taken from person without any charge preferred—Subsequent charge of theft of articles in postal packets not including money—Direction by magistrates at trial for return of money—Summary Jurisdiction Act, 1879 (c. 49), *s.* 44.

On Feb. 1, 1944, Harris, a junior employee of the Post Office, was charged under the Post Office Act, 1908, s. 55, with stealing postal packets in the course of transmission by post. Except for a few articles, the postal packets did not contain any money. On Jan. 13, 1944, Arnell, an officer of the Post Office engaged on investigation work, took charge of £110 found on Harris. No accusation of any sort was made against Harris at the time. On the application of Harris at the trial, the magistrates made an order under the Summary Jurisdiction Act, 1879, s. 44, directing the money to be returned to him. It was contended on behalf of the Post Office that on a proper construction of the section the money could be returned only if, when it was taken away, he was charged with some offence:—

Held: the Summary Jurisdiction Act, 1879, s. 44, was confined to cases where property was taken from a person who was at the time charged with some offence or other before a court of summary jurisdiction. Therefore, the magistrates had no power to make the order.

[**EDITORIAL NOTE.** There is apparently no direct authority on the meaning of "the person charged" in the Summary Jurisdiction Act, 1879, s. 44. The court holds that the powers of restitution given to the court of summary jurisdiction cannot be exercised in relation to property taken before the owner is at least accused, and in that sense charged. The only decision bearing on this was under the Metropolitan Police Courts Act, 1839, s. 29, now replaced by the Police (Property) Act, 1897, where the phrase is "where any property has come into the possession of the police in connection with any criminal charge."

As to the Summary Jurisdiction Act, 1879, s. 44, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 347.]

Case referred to:

*(1) *R.* v. *D'Eyncourt* (1888), 21 Q.B.D. 109; 33 Digest 315, *321*; 57 L.J.M.C. 64.

Appeal by way of case stated from an order made by the Shropshire justices under the Summary Jurisdiction Act, 1879, s. 44. The facts are fully set out in the judgment of Humphreys, J.

Valentine Holmes for the appellant.

Humphreys, J.: In this case, my Lord has asked me to express my opinion first.

This is a case stated by justices of Shropshire, and raises this very short point: There is a section of an Act of Parliament which enables a court in certain circumstances to make an order that money or property taken from an accused person who is before the court may be returned to that person. The question is whether, upon the facts of this case, the magistrates were right in making an order, as they did, that a sum of £110 which had been taken from an accused person, one John Campbell Harris, should be returned to him. The application in this case was made in these circumstances: Harris, the respondent, was charged with the offence of stealing the property of his employer, His Majesty's Postmaster General, being letters in the course of transmission by post, and it was alleged that the property in question, being postal packets, contained various articles which did not include any sum of money. That charge was before the magistrates, and in the course of the investigation evidence was given that before any charge or any accusation of any nature had been made against the respondent that the appellant, had taken from the respondent a sum of £110. We are not informed of the circumstances under which that money was taken or of the reason why it was taken; it was in fact taken by the appellant in his capacity as an officer of the Post Office from a junior employee of the Post Office, who was the respondent. That happened about a fortnight before any accusation of any sort was made against the respondent Harris. Then at the expiration of that time, proceedings were taken against the respondent

Harris, of the nature which I have indicated; he was charged with stealing certain postal packets which obviously had nothing to do with the £110 which had been found upon him a fortnight before for the reason, as I have already stated, that those postal packets did not contain any money at all, but other things.

Counsel appearing for the accused person made an application, and purported to make his application under the Summary Jurisdiction Act, 1879, s. 44, and he said he was entitled to have an order from the magistrates if the magistrates thought it right to make it, for the return of that £110 because that section provides:

> Where any property has been taken from a person charged before a court of summary jurisdiction with any offence punishable either on indictment or on summary conviction, a report shall be made by the police to such court of summary jurisdiction of the fact of such property having been taken from the person charged and of the particulars of such property, and the court shall, if of opinion that the property or any portion thereof can be returned consistently with the interests of justice and with the safe custody of the person charged, direct such property, or any portion thereof, to be returned to the person charged or to such other person as he may direct.

Therefore it is a section which, by its terms, gives power to the magistrates to order the return to the accused person in certain circumstances of property taken from him, and gives no power to order the handing over of that property to any other human being. Unless that order is made, then the property in question will remain in the possession of the court, as is shown by the fact that the police are required if they have it, and they normally would as officers of the court, to retain it as being in the custody of the court.

Objection was made to the handing over of that property, but the magistrates thought fit to make the order, and they made the order in question, ordering that the whole of the money be returned to the respondent.

The argument which has been addressed to this court, and in consequence of which this case was stated, is that there was no power in the court to make any such order, for this reason, that the section is confined to a case where property has been taken from a person charged before a court of summary jurisdiction, and the argument is that that involves that it should have been taken from a person who was, when it was taken from him, charged in some form or other with some offence. It is not said that it is confined to the case where the person is actually before the court of summary jurisdiction and the property is then taken from him, for the practical reason that such a case is extremely unlikely to arise. But it is argued that the meaning of those opening words of that section must be that the section only applies to a case where the property has been taken from the person who is at the time accused in some form or other of an offence for which he is brought before a court of summary jurisdiction either for committal, for trial or for adjudication upon the charge.

It may be that the language of the section is open to two different readings. It is unfortunate that the case has not been argued in this court on the other side, but counsel for the appellant has, of course, put before us with perfect fairness everything which in his view could be and would be argued by his opponent, if he had one, and the conclusion at which I have arrived is that the meaning which counsel for the appellant asks us to put upon this section must be the meaning which it is right to put upon it, and that the section only applies to the case of a person from whom property has been taken on or after an accusation of a charge of some nature in respect of which he subsequently comes before a court of summary jurisdiction, when it is proper that he should make the application. "The person charged" is an expression which has various different meanings, and in my opinion it may include the case of a person who has been arrested upon a charge, as he might be if it is a case of felony, or a person who has been arrested upon a warrant granted by a magistrate, or even the case of a person who has been summoned, that being another form of bringing a person before a court to appear and answer a charge. But I think that the section must be confined to cases where the person is at least accused, and in that sense charged, with some felony or misdemeanour.

If that be right, that is an end of this matter, because it is clear that at the time when this £110 was taken from the respondent no accusation was made against him of any sort or kind by any person, and, therefore, it would not be right to say that this is a case where property has been taken from a person who can rightly be described as at the time charged with anything at all, and for that reason I think the magistrates came to a wrong conclusion and that they were wrong in thinking that they had any power to deal with this matter at all.

It is to be observed and, I think, emphasised, that that does not mean that the money was not his property. It may well be that it was his property. It may possibly be the fact that nobody else would lay claim to it at all, in which case, of course, eventually he would get his property back. But this is a power which, if it exists, enables the magistrates to deal with money or other property, it may be a large sum of money found upon a person who has in fact at the time when they order it to be returned to him been charged with a serious criminal offence.

In the case of *R.* v. *D'Eyncourt and Ryan* (1), the court had to consider the language of two statutes, and Field, J., in giving the judgment of the court, having dealt with the Metropolitan Police Courts Act, 1839, s. 29, continued, at p. 119:

> It was also contended that the order in question could be supported under the Summary Jurisdiction Act, 1879, s. 44. That section carries still further the care and caution displayed in the Metropolitan Police Courts Act, 1839, s. 29. A person charged before a magistrate, who is going to commit him for trial, is up to that time presumably innocent. It is quite uncertain up to that time whether the money found upon him has been obtained by fraud or not. Under those circumstances it was thought a hardship that he should have all his money taken away from him, and be left without the means of providing for his defence.

If counsel had been here to argue on behalf of the respondent, he would no doubt have observed that the decision which I have said is my view of the law in this case might be very hard, because it might prevent a magistrate from making an order to pay over a small sum of money to enable a man who has a quantity of money upon him, which may be his own money, to defend himself from the charge which is made against him. If that were a conceivable position, I for my own part should agree that it would be very unfortunate, but it is perfectly notorious that as a matter of practice prosecutors who, I suppose, in 99 cases out of 100 are the police, do not object to some small portion of a large sum of money being handed over to an accused person for that purpose. We have been told by counsel for the appellant that the Postmaster General, who was the prosecutor in this case, raises no such objection. That is, of course, a very different thing from saying that the magistrates had any power to hand over £110 to this person, that being a sum which he clearly did not require for the purpose of his defence against this charge, and I accept for my part that the principal object of this section was probably that which was suggested by Field, J.

The result, in my opinion, is that the magistrates here had no power to make this order at all, and, therefore, the question which is asked in the case, whether they came to a right conclusion in point of law, must be answered in the negative, and that the case should go back to the magistrates with that expression of the opinion of the court.

Viscount Caldecote, L.C.J.: I entirely agree. The opening words of the section are capable on their strict reading of two possible interpretations, but I am satisfied that the narrower view which has been taken of the words in the judgment which has just been delivered is the right one. That view, I may add, is confirmed, I think, by the requirement in the section that the police should make a report upon the matter before the court of summary jurisdiction makes the order which is provided for by the section.

Birkett, J.: I am of the same opinion and for the reasons which have been so fully stated.

Appeal allowed. Case remitted to the magistrates.

Solicitors: *The Solicitor's Department, General Post Office* (for the appellant).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re DEBTORS (NOS. 2 AND 3 OF 1944), *Ex parte* THE PETITIONING CREDITORS *v.* THE DEBTOR.

[CHANCERY DIVISION (Cohen and Evershed, JJ.), **July 17, 1944.**]

Emergency Legislation—Bankruptcy—Petition—Stay of proceedings—Inability to pay arising from "circumstances . . . attributable to war"—Material transactions entered into after outbreak of war—Conditions of stay varied—Courts (Emergency Powers) Acts, 1943 (*c.* 19), *s.* 1 (5).

The debtors were husband and wife. In Apr., 1942, the husband formed three companies, Wharf Hill Properties, Ltd., Wharf Mills, Ltd., and R. H. Shrimpton & Sons, Ltd. To finance these companies he obtained from the petitioning creditors a loan of £10,000 which was secured by a debenture on Wharf Hill Properties, Ltd., and by monthly bills given by Wharf Mills, Ltd., and guaranteed by the debtors. Wharf Hill Properties, Ltd., defaulted on some of the bills and the petitioning creditors brought four actions for which they obtained judgments against the debtors. The debtors were then served with bankruptcy notices with which they failed to comply. On Mar. 10, 1944, the petitioning creditors filed bankruptcy petitions against each debtor. Application to stay proceedings under the petitions was made by the debtors. At the hearing on Apr. 21, 1944, the county court registrar, having been satisfied that the debts were due to circumstances attributable to the war, made an order, under the Courts (Emergency Powers) Act, 1943, s. 1 (5), staying proceedings so long as the debtors should pay to the petitioning creditors the amount of their debts by four equal monthly instalments and such costs as directed in the order. For the petitioning creditors it was contended that (i) the order was wrong as the material transactions were entered into after the outbreak of war and the debtors had not shown clearly that their inability to pay their debts was due to circumstances attributable to the war; (ii) the condition that the debts be paid by four instalments amounted to a preference of the petitioning creditors and, therefore, could not stand:—

HELD: (i) the question being one of fact, the court was satisfied that the registrar was justified in making the order under the Courts (Emergency Powers) Act, 1943, s. 1 (5).

(ii) the conditions under which the debts were to be paid to the petitioning creditors would amount to a preference and, therefore, could not be sustained. A special account should be opened into which the debtors should pay a fixed sum per month and also any moneys they might receive from a realisation of any of their assets; the question of the application of the balance would be for the registrar when the matter came before him on an application to remove the stay.

[**EDITORIAL NOTE.** The main point of interest here is the contention that as an applicant for a stay under the Courts (Emergency Powers) Acts cannot rely on circumstances attributable to the war which were or should have been present to his mind when incurring liability, the Act cannot apply to obligations entered into during the war, since the inevitable risks of war must be necessarily kept in mind. This contention the court rejects.

AS TO COURTS (EMERGENCY POWERS) ACT, 1943, s. 1 (5), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 36, p. 469.

Cases referred to:

(1) *A.* v. *B.*, [1940] 1 K.B. 217; [1939] 4 All E.R. 169; Digest Supp.; 109 L.J.K.B. 43; 161 L.T. 325.

(2) *Re A Debtor* (*No.* 2 *of* 1943), unreported.

APPEAL against an order dated Apr. 21, 1944, of the registrar, Winchester County Court, staying proceedings under the Courts (Emergency Powers) Act, 1943, s. 1 (5). The facts are fully set out in the judgment.

G. F. Kingham for the petitioning creditors.

COHEN, J. [delivering the judgment of the court]: The debtors are husband and wife. The petitioning creditors' debt against each of them arose out of the same transactions. The applications were heard together in the court below and a similar procedure was adopted at the hearing before this court. The transactions took place in Apr., 1942, when the husband acquired certain assets from the liquidator of a company called Provender Mills (Winchester), Ltd., and formed a series of companies to acquire and operate these assets. The companies in question were Wharf Hill Properties, Ltd., Wharf Mills, Ltd., and R. H. Shrimpton & Sons, Ltd. The acquisition of the properties was financed by the petitioning creditors who advanced over £10,000, partly to enable Wharf Hill Properties to complete the purchase of the mills, and as to the remainder to finance the acquisition of machinery by a hire purchase arrangement. The advances were secured by a debenture by Wharf Hill Properties, Ltd., and by monthly bills given by Wharf Mills, Ltd. The debtors guaranteed the bills.

Wharf Mills, Ltd., defaulted on certain of the bills, and the petitioning creditors commenced four actions, two against Wharf Hill Properties, Ltd., and two against Wharf Mills, Ltd. The debtors were defendants to all four actions and judgments were obtained in all four actions. On Feb. 14, 1944, the petitioning creditors served a bankruptcy notice on the husband in respect of one such judgment and on the same date they served a similar notice on the wife in respect of another such judgment. The debtors failed to comply with the bankruptcy notices and on Mar. 10, 1944, bankruptcy petitions were filed against each debtor. On Mar. 18, the wife gave notice of her intention to apply for a stay of proceedings under the Courts (Emergency Powers) Act, 1943, s. 1 (5), and a similar notice was given by the husband on Mar. 28. These applications were supported by affidavits sworn by the debtors and filed on Mar. 29. The wife in substance merely relied on her husband's affidavit. This affidavit was obviously deficient in information, and on the same day the registrar adjourned the hearing of the applications to enable the debtors to file a further affidavit. On Apr. 12, the husband gave notice of his intention at the hearing to support the application by further information which he specified in the notice and he also filed an affidavit exhibiting accounts of the three companies and offering to pay the petitioning creditors' debts by monthly instalments. The petition came on for hearing again on Apr. 14 and Apr. 21, and on the latter date the registrar made an order in each case staying the proceedings under the petition so long as the debtor should pay to the petitioning creditors the amount of the petitioning creditors' debt by four equal monthly instalments commencing on May 21, 1944, together with the costs thereinafter ordered to be paid, such costs to be paid within seven days after taxation thereof. It is from this order that the present appeal is made.

Before turning to the facts on which the debtors relied, it will be convenient to refer to the Courts (Emergency Powers) Act, 1943, s. 1 (5). That subsection is in the following terms :

> Where a bankruptcy petition has been presented against any debtor, or a winding-up petition has been presented against any company on the ground that it is unable to pay its debts, and the debtor or company proves to the satisfaction of the court having jurisdiction in the bankruptcy or winding-up that his or its inability to pay his or its debts is due to circumstances directly or indirectly attributable to any war in which His Majesty is engaged, the court may at any time stay the proceedings under the petition for such time and subject to such conditions as the court thinks fit.

To avail themselves of this section, therefore, the debtors must establish that their inability to pay is due to circumstances directly or indirectly attributable to the war. As the liability was only incurred in 1942, the debtors must show that the circumstances on which they rely arose after the date of the contract, since they clearly cannot rely on circumstances attributable to the war which were or should have been present to their minds at the time when they incurred the liability.

Counsel for the petitioning creditors argued that since the material transaction occurred, and the obligations in question were entered into in 1942, the events which subsequently occurred to defeat the debtors' expectations should be treated as arising from the inevitable risks of war and as such should have been present to the debtors' minds ; and that, accordingly, the debtors ought not to be able to pray those events in aid, or, on the basis of those events, to invoke the protection of the Courts (Emergency Powers) Act, 1943. We do not think that argument can be accepted. If accepted the argument would lead in effect to the conclusion that the Act can have no application to the cases of obligations entered into during the war, a conclusion indeed from which counsel did not shrink. But this would be to add to the section of the Act words of qualification which are not there. In our judgment, there is no ground for saying that the section does not apply to cases of obligations incurred during the war, provided that the relevant circumstances are satisfactorily established by evidence.

On what then do the debtors rely ? Reading the husband's affidavit, with the notice of Apr. 12, 1944, to the accuracy of which he swore on oath when himself before the registrar, the substance of his evidence is as follows : (1) the companies were formed to the knowledge of the petitioning creditors for the purpose of operating two contracts (*a*) a cocoa grinding contract with E. Biggins & Co., Ltd. ; (*b*) a contract with Messrs. Brand & Co., Ltd., for manufacturing certain products according to proprietary formulae. (2) The first contract was worked satisfactorily for four months but was then frustrated by a series of government restrictions at first restricting and finally forbidding the use of cocoa in the bakery trade. (3) The second contract was rendered impossible of performance at the anticipated profit by a government order forbidding the use of proprietary formulae and was finally brought to an end as the result of further government orders applying a zoning scheme and directing trained girl workers to other works. (4) In the result the company was compelled to undertake government work at a much lower rate of profit than that obtainable under the original contracts. (5) As an inevitable consequence the company has only been able to make a small profit and was unable to meet its liabilities on the bills. Now these allegations which were, we think, accepted as proved by the registrar, would be relevant to an application by the company under the Courts (Emergency Powers) Act, 1943 ; but would *prima facie* be irrelevant to an application by a guarantor of the company's debts. But in the present case the wife has sworn in her affidavit that the whole of her income is derived from the three companies while the husband has exhibited a statement of their joint assets from which it would appear that nearly the whole of his money is invested in shares in and loans to the companies, the only other assets disclosed being (*a*) household furniture and effects valued at £1,508 ; (*b*) a freehold property, 41, Wharf Hill, Winchester, charged to its full value ; and (*c*) his residence at Southampton, the equity of redemption in which he values at £2,300.

Counsel for the petitioning creditors points out that the husband admitted in the box that his banking account was not included in the statement and that the liability to the petitioning creditors was also not shown in the statement. Counsel, relying on the decision of the Court of Appeal in *A.* v. *B.* (1), says that the debtors must be meticulous in their disclosure and that as they have not been so the application should have been dismissed. We agree that it was unfortunate that the statement was not fuller and that it did not distinguish the assets of the husband from those of the wife ; but we see no reason to doubt that the substance of the matter was before the registrar. No objection appears to have been taken to his dealing with the two cases together and we can find in the registrar's note no sign of any suggestion on behalf of the petitioning creditors that the statement put in was defective except as to the omission of the banking account. Since the balance of that account appears to have been only £3, we do not think that we should attach importance to that omission. The full measure of the liability of the debtors to the petitioning creditors must we think, have been present to the mind of the registrar, for, if their only liability had been that covered by the judgments, we do not think he would necessarily have found that they were unable to pay their debts, but, if their liability on bills not yet due is taken into account it is clear that they were insolvent. In all the circumstances we do not think we should reverse the registrar's order on the ground of inadequate disclosure of assets and liabilities. We have further come to the conclusion that we ought not to disturb the registrar's findings that the debtors had established that their liability to pay was due to circumstances arising out of the war. The freehold house is situate in a much bombed area and may not be readily realisable, and apart from furniture their only assets were debts due from and shares in the companies. We think that there was evidence on which the registrar could properly come to the conclusion that these assets had been so depreciated by circumstances arising out of the war as to render the debtors unable to discharge their liability to the petitioning creditors. That being so and the question being one of fact, this court ought not to interfere with the registrar's conclusion and it is immaterial whether we should have come to the same conclusion had we been adjudicating on the matter.

We turn, therefore, to the question whether the conditions on which the registrar granted a stay can be sustained. In our opinion, they cannot, since the provision in the registrar's order for the payment of the petitioning creditors' debt by four instalments would amount to a preference of the petitioning creditors over the heads of the other creditors. This view is in accordance with an unreported decision of this court on July 12, 1943, in the case of *Re A Debtor* (*No.* 2 *of* 1943) (2). In a later hearing in this court of the same case, the court had to consider what conditions ought to be required if a stay were granted. It imposed conditions directed to preventing the debtor from dissipating his assets during the continuance of the stay. We think we should impose similar conditions in the present case. The details are a matter for discussion with counsel and the debtors who appear in person, but what we visualise is that a special account should be opened, preferably in the name of a responsible person, such as the petitioning creditors' solicitor into which the debtors should pay a sum of £*x* per month and also any moneys they may receive from the realisation of any of their assets. The question of the application of the balance to the credit of that account will be a matter for the registrar when the matter comes before him on an application to remove the stay, whether the purpose of such an application be a receiving order or the dismissal of the petition.

Appeal allowed.

Solicitor: *Sidney Pearlman* (for the petitioning creditors).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

Re JOHN POWELL (*deceased*), NEALE *v.* ROBERTS.

[CHANCERY DIVISION (Vaisey, J), **November 1, 1944.**]

Wills—Construction—Annuity—"Clear yearly sum"—Computation of capital sum—Statutory variation of tax burden—Finance Act, 1941 (c. 30), *s.* 25 (1).

By his will, dated Apr. 29, 1938, the testator left to the vicar and churchwardens of All Saints, Sidley, "such a sum as will produce after payment of tax and all other deductions, the clear yearly sum of £60." This sum was to be applied by the vicar towards the stipend of an assistant priest. The question was whether, in computing or quantifying the amount of the capital sum, the Finance Act, 1941, s. 25 (1) applied:—

HELD: the expression "clear yearly sum" indicated the payment of a clear net sum after payment of tax and, therefore, the provision came within the meaning of sect. 25 (1).

[**EDITORIAL NOTE.** This is a somewhat curious application of the Finance Act, 1941, s. 25. That section refers to "payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £." Here the gift is of "such a sum as will produce" a clear yearly sum. The question is whether future fluctuations are to be disregarded, so that the sum now set aside to satisfy the bequest, in a year in which income tax is 10*s*., is to be quantified by applying the terms of sect. 25. The court decides in the affirmative.

AS TO TAX FREE PAYMENTS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-217, paras. 386-391; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.]

SUMMONS to determine *inter alia* whether an annuity given tax-free in a will dated Apr. 29, 1938, is subject to the Finance Act, 1941, s. 25 (1). The facts are set out in the judgment.

C. E. Shebbeare for the trustees.

H. E. Salt for the children of the testator.

S. P. Hayward for the churchwardens of All Saints, Sidley.

Wilfrid M. Hunt for the Society of St. John the Evangelist and the Universities' Mission to Central Africa.

H. O. Danckwerts for the Attorney-General.

VAISEY, J.: The question which arises in this case is as to the proper construction of a gift to "the vicar and churchwardens for the time being of the church of All Saints, Sidley," that being the church of which the testator himself was the vicar at the time when he made his will and also, I think, at the time of his death. The gift is somewhat curiously phrased. It is a gift to those persons of "such a sum as will produce, after payment of tax and all other deductions, the clear yearly sum of £60 to be applied by the said vicar"—not by the vicar and churchwardens—"towards the stipend of an assistant priest appointed as hereinafter mentioned for the parish of All Saints, Sidley." The testator then directs "that the vicar and churchwardens shall, with all convenient speed after the receipt by them of the said sum, take all proper legal steps for vesting the same in a competent authority," having power to pay the income of the said sum, "in accordance with the terms of the will." Pausing there for the moment, I think it is obvious that the testator was thinking of the Diocesan Fund or the Diocesan Board of Finance; that is to say, of the incorporated body which, in every diocese, exists for the purpose of holding permanent endowments. The testator then directed that the appointment of the assistant priest "shall be subject in the matter of doctrinal opinions only to the written approval of the Council General of the Confraternity of the Blessed Sacrament," that being an association to which he had, in the earlier part of his will, given a pecuniary legacy. Then there is a direction that all legacies bequeathed by the will should be free of all duties.

Three possible answers may be given, I think, to the main question, which concerns the method of computing or quantifying the amount of the capital sum which is the subject of the legacy to the vicar and churchwardens of All Saints, Sidley. The first view advanced by counsel appearing for the vicar and churchwardens is that the gift of a sum sufficient to produce, I suppose at the time when it is handed over, a sum which, after deducting tax at the current standard rate, disregarding all other considerations, will produce £60 a year; that is to say, a sum which will, as matters now stand, produce an amount of £120 a year, that being, if I may say so, the maximum amount, and that the Finance Act, 1941, ss. 25 and 27, have no application to the matter, so that the £120 per annum, which is the measure of this capital sum, is not, in this case, to be reduced to 20-29ths in accordance with the provisions of that section which apply in the ordinary case to a pre-war annuity given free of tax.

At the other end of the scale, submissions are made by those interested in residue that, inasmuch as this is a gift to the legatees upon a charitable trust in respect of which no income tax will be payable, the amount which must be set aside is merely a sum which will produce £60 a year disregarding income tax altogether, because they say none will be payable.

The intermediate view is that this is a case of a pre-war annuity given tax free and the provisions of the Finance Act, 1941, to which I have referred, do apply to it.

I will take the minimum sum first; that is to say, I will take, first, the submissions which have been addressed to me on behalf of the residuary legatees. The difficulty which I feel about accepting that view of the case is the reference to the payment of tax. I thought at one time that payment of tax might be an incorrect reference to payment of death duties, but when one looks at the framework of the sentence, I do not think that can be right, but that the "clear yearly sum" is intended to be a sum which is clear in the sense that tax and other deductions normally to be made from income as such have been provided for. If the submissions made on behalf of the residuary legatees are accurate, I do not see what sense can be given to the reference to tax. It is quite obvious that the ultimate object which the testator had in view concerned the money to be put into the pocket of the assistant curate as part of his stipend, which money, with the rest of the income of that assistant curate, would be subject to tax in the usual way. Therefore, I must reject the argument that no more than £60 a year, both gross and net, regarding the two as identical, is all that is to be provided for.

The question then arises whether this is a gift of (*a*) an annuity which may be notionally regarded at the moment as £120 a year, or (*b*) an annuity of 20-29ths of that amount, which would be a sum of £82 15*s*. 2*d*. Counsel for the vicar and churchwardens asks me to say that the 1941 Act, s. 25, does not apply to the case. I will look at the section. What sect. 25 says, leaving out inapplicable words, is this:

> . . . any provision, however worded, for the payment, whether periodically or other-

> wise, of a stated amount free of income tax . . . being a provision which is contained . . . in any will . . . made before Sept. 3, 1939 . . . shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s*. in the £, have effect as if for the stated amount there were substituted an amount equal to 20-29ths thereof.

Of course, that provision applies only to years in which the tax is 10*s*. in the £. But exactly the same remark applies to every provision for income tax. Income tax is essentially an annual tax. Whatever the rate, the rate which obtains at the moment is only the rate for the current year. Notionally, there might be no income tax next year, or income tax might be greatly increased or greatly reduced—nobody knows. Therefore, in all these cases, as I understand it, where a sum has to be set apart to meet an annual payment of the kind that we have indicated here, that is to say, a clear net sum after payment of tax of so much, you are compelled to fix your figure at the only rate of tax which you know at the moment. Therefore, one starts with this, that, in order to ascertain this capital sum, you have to find out what is the sum which will leave a clear net amount of £60 in the hands of an ordinary recipient. Referring, again, to the words of the section, it does seem to me it is a provision, I must say a somewhat strangely worded provision, for the payment periodically of an amount free of tax, and it seems to me, during this year, when the rate of income tax is 10s. in the £, 20-29ths of that amount is the proper amount to which regard must be had. The effect of this curious fraction of 20-29ths, as I understand the matter, is to treat the position as it would have been if the tax, instead of being raised to the wartime rate of 10*s*., had remained at the pre-war rate of 5*s*. 6*d*.

The only measure which I can fix as regards the calculation of this capital sum is to fix it at such a sum as will produce, after the payment of tax at the current rate, regard being had to the provisions of the 1941 Act, a clear yearly sum of £60 in the hands of the vicar and churchwardens. That amounts to this, that a sum has to be set aside to produce, subject to tax, a sum of £82 15*s*. 2*d*. What happens in the future is a matter to which we are not to have regard.

I entirely agree with the submission of counsel for the vicar and churchwardens, when he says that this is not the ordinary case which the Act contemplates, but it seems to me that a very curious result would arise from saying that the Act did not apply to such as this case at all. Therefore, I think that it is quite right, apart from the fact that it is the middle sum, to fix the sum at £82 15*s*. 2*d*. as the annual sum which this capital amount has to provide.

Direction for a sum to be paid to the vicar and churchwardens to produce £82 15s. 2d. gross.

Solicitors : *Carter & Barber*, agents for *Frape & Gauntlett, Brighton* (for the trustees) ; *Official Solicitor* (for the children of the testator) ; *Griffinhoofe & Brewster* (for the churchwardens of All Saints, Sidley) ; *Raymond-Barker, Nix & Co.* (for the Society of St. John the Evangelist and the Universities' Mission to Central Africa) ; *Treasury Solicitor* (for the Attorney-General).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

R. *v.* KEEPER OF THE PEACE AND DURHAM JUSTICES, *Ex parte* LAURENT.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and and Birkett, JJ.), **October 26, 1944.**]

Magistrates—Practice—Jurisdiction—Appeal—Court of summary jurisdiction—Recognisance forfeited—Whether order of forfeiture a conviction in respect of an offence—Right of appeal to quarter sessions—No appeal open—Summary Jurisdiction Act, 1879 (c. 49), *ss.* 9 (1), (2), 19—*Criminal Justice Administration Act*, 1914 (c. 58), *s.* 37—*Criminal Justice Act*, 1925 (c. 86), *s.* 26 (1).

In March, 1942, on a charge of libel, the applicant was bound over in his own recognisance with sureties in £100 to be of good behaviour. In August, 1943, on a summons for using abusive language towards a police officer, the applicant entered into a second recognisance, the condition being that he should keep the peace for a term of 12 months. Subsequently the applicant was summoned to show cause why his first recognisance should not be adjudged to be forfeited and it was ordered that the applicant should forfeit the sum of £100. Notice of appeal against the adjudication having been given by the applicant, the court of Quarter Sessions declined to hear the case on the ground that they had no power to do so. The applicant contended that the forfeiture of the recognisance was a conviction in respect of an offence within the meaning of the Criminal Justice Administration Act, 1914, s. 37 (1), and claimed the benefit of the right of appeal given by that section. The respondents contended that, as the conduct which had been adjudged to be a breach of his recognisance could not be made the subject of a criminal charge, there had been no conviction against which sect. 37 (1) gave the applicant a right of appeal :—

HELD : (i) the wording of the Summary Jurisdiction Act, 1879, s. 9 (2) " may by conviction adjudge such recognisance to be forfeited " was wide enough to cover anything in the nature of a formal order.

(ii) the right of appeal given by the Criminal Justice Administration Act, 1914, s. 37 (1) required, however, that a conviction should be in respect of an offence in the sense that it could be made the subject of a criminal charge, and a breach of a formal undertaking was, therefore, not within the terms of the section.

[**EDITORIAL NOTE.** The point considered here is whether an order of justices estreating a recognisance is subject to a right of appeal, which involves the question of whether such an order is a " conviction " in respect of an " offence " within the Criminal Justice Administration Act, 1914, s. 37. The Summary Jurisdiction Act, 1879, s. 9, dealing with forfeiture of recognisance, contains the expression " may by conviction adjudge such recognisance to be forfeited," and the court holds that conviction is here meant to cover anything in the nature of a formal order. However, in order to give a right of appeal, there must be a conviction in respect of an " offence," and the court holds that " offence " involves something which could be made the subject of a criminal charge. No right of appeal, therefore, existed. The case may be contrasted with *Cockhill* v. *Davies*, [1943] 1 All E.R. 638, where the appellant was held entitled to appeal, but the decision there turned upon the construction of the Metropolitan Police Courts Act, 1839, s. 50. The illogical position is thus reached, that a right of appeal in such circumstances exists in the metropolis but not elsewhere.

AS TO APPEALS FROM COURTS OF SUMMARY JURISDICTION TO QUARTER SESSIONS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 705-722, paras. 1225-1250 ; and FOR CASES, see DIGEST, Vol. 33, pp. 390-406, Nos. 1011-1168.]

MOTION for an order of *mandamus* directed to quarter sessions requiring them to hear and determine the applicant's appeal from a decision of the Durham justices sitting at the Petty Sessional Division of Consett, Lanchester and Stanley on Nov. 15, 1943, and adjudging the applicant's recognisance in the sum of £100 to keep the peace to be forfeited. The facts and the arguments are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

H. J. Astell Burt and *C. L. Hauser* for the applicant.

H. G. Garland for the respondents.

VISCOUNT CALDECOTE, L.C.J. : A nice point of construction arises upon this motion for an order of *mandamus*. The applicant, Dr. Laurent, asks for an order of *mandamus* directed to quarter sessions to hear and determine an appeal against his conviction (as he says) by the justices for the Petty Sessional Division of Consett, Lanchester and Stanley in the county of Durham. It was adjudged on the occasion of that conviction that the recognisance entered into by Dr. Laurent should be forfeited. The court of quarter sessions has declined to hear the appeal on the ground that there was no appeal open to the applicant from the order in question.

Laurent had an order made against him on a summons issued on Feb. 25, 1942, and he was by that summons said to have unlawfully and maliciously written and published to the chairman of the justices of the peace an abusive and defamatory libel. On appearing to answer the complaint he and some sureties were required to enter into a recognisance, the condition of the recognisance being that the principal, Laurent, should be of good behaviour towards His Majesty and the King's subjects. That was on Mar. 23. Subsequently, on July 26, 1943, he was summoned to answer a complaint that had been made that on a day in July he had been guilty of misconduct towards a police sergeant by using abusive language, whereupon another recognisance was entered into by him on Aug. 9, the condition of the recognisance being that he should keep the peace for the term of 12 months from Aug. 9, 1943. Thereupon, on Oct. 18, 1943, he was summoned to appear before the court of summary jurisdiction at Consett to show cause why the recognisance entered into on Mar. 23, 1942—that was the first of the two recognisances I have mentioned—whereby he was bound to pay the sum of £100 should not be adjudged to be forfeited. He appeared at the court of summary jurisdiction sitting at Consett on Nov. 15, 1943; and the adjudication states:

> And it is now proved that the defendant was on Aug. 9, 1943, found guilty of a breach of the said condition in that he was found guilty of certain misbehaviour towards Police Sergeant Robert Chatt in the execution of his duty: it is therefore adjudged that the said recognisance be forfeited and that the said defendant pay to the clerk of the said court the sum of £100 on or before Dec. 13, 1943.

It is against that adjudication that the applicant, Laurent, desires to appeal.

The right of appeal depends upon statute. By the Summary Jurisdiction Act, 1879, s. 19, a right of appeal was given to any person who was adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine. That was a limited right dependent upon whether or not the conviction was followed by an order or sentence of imprisonment. By the Criminal Justice Administration Act, 1914, s. 37 (1) that right of appeal from a decision of a court of summary jurisdiction was enlarged by providing as follows:

> Any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal from the conviction in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions.

The argument of counsel for the applicant is that, in this case, there was a conviction in respect of an offence. The matter turns to some extent upon the Summary Jurisdiction Act, 1879, s. 9, the same Act as that in which the right of appeal from a summary conviction which resulted in imprisonment appears. The applicant, as I have pointed out, has to show that there has been a conviction of a court of summary jurisdiction in respect of any offence if his claim to appeal is to be granted.

The case for the applicant must be considered in two parts: first of all, whether there was a conviction, and, secondly, whether it was a conviction "in respect of any offence." The first question depends upon sect. 9 (2), which in its original form was in these words:

> Where a recognisance conditioned to keep the peace or to be of good behaviour, or not to do or commit some act or thing, has been entered into by any person as principal or surety before a court of summary jurisdiction, that court or any other court of summary jurisdiction [and I call attention to those latter words "or any other court of summary jurisdiction"] acting for the same county, borough, or place, upon proof of the conviction of the person bound as principal by such recognisance of any offence which is in law a breach of the condition of the same, may by conviction adjudge such recognisance to be forfeited . . . and adjudge the persons bound thereby, whether as principal or sureties, or any of such persons, to pay the sums for which they are respectively bound.

The word "conviction" appears in that subsection twice. In the first place in which it is used it refers to a conviction which has taken place either in the same court or in another court: it speaks of:

> . . . proof of the conviction of the person bound as principal by such recognisance of any offence which is in law a breach of the condition of the same . . .

Then the subsection goes on to say:

> . . . may by conviction adjudge such recognisance to be forfeited and adjudge the persons bound thereby, whether as principal or sureties, or any of such persons, to pay the sums for which they are respectively bound.

What is said by counsel for the applicant is that that shows that, in this particular case, at any rate, there was a conviction because this section gives the power to the court by conviction to adjudge such recognisance to be forfeited: therefore, the argument is that that satisfies, at any rate, the first part of the 1914 Act, s. 37; there has been a conviction. Ordinarily speaking, one would not describe the order which is made for the forfeiture of a recognisance as a conviction, but in the place in which these words appear in this section, I think the proper meaning of the word is that it covers anything which is in the nature of a formal order. As I say, the words are not very apt to describe what takes place, but the words "may by conviction adjudge such recognisance to be forfeited" I think are enough to show that the first requirement as appears from the 1914 Act, s. 37, is satisfied. I call attention to the words which have been inserted after the words "a breach of the condition of the same" in the section as a result of the Criminal Justice Act, 1925, s. 26 (1):

> . . . [or in the case of a recognisance conditioned to be of good behaviour, upon proof that the person bound as principal has since the date of the recognisance been guilty of conduct which is a breach of the condition] . . .

That seems to have been intended to cover cases in which there had been no conviction of the person bound as principal by such recognisance. I pass now to consider the question whether this is a conviction "in respect of any offence": and I feel bound to say that the question has caused me some doubt. The word "offence" is said to be satisfied by showing that there has been a conviction for conduct which, although not capable of being made the subject of a criminal charge, was an offence, and that it is sufficient for the applicant to show that he has been convicted in respect of conduct which was a breach of his recognisance to be of good behaviour. That argument has some attractions. It is not easy to see why in the case of a conviction for a criminal offence a person should have a right of appeal notwithstanding the fact that his fine may be only a few pounds but that he should not have a right of appeal where he has been fined, as in this case, £100 as the result of the breach of his recognisance to be of good behaviour.

As I say, I have been troubled by the argument to see on which side of the line the case should be decided; and I have come to the conclusion (as I have said, with some doubt) that the word "offence" in the Criminal Justice Administration Act, 1914, s. 37, means what at first sight it would seem to mean, a conviction in respect of an offence in the sense that it could be made the subject of a criminal charge. That has this effect: I think the court of quarter sessions were right in saying that they were not empowered to hear an appeal against the adjudication of the magistrates for the petty sessional division in question. I think, therefore, the application should be dismissed.

HUMPHREYS, J.: I agree with the decision of my Lord. The matter is not by any means clear and at times, in the course of discussion, I have been disposed to come to the conclusion that in the case of a person who has been ordered to forfeit a recognisance, which in effect and for some purposes in law is the same as a fine of the amount of the recognisance, there ought to be a right of appeal to quarter sessions from such an order. It is, however, sound and established law that there is no appeal to quarter sessions unless such appeal is given in plain terms by statute. There is no such thing as a common law right of appeal.

Therefore, I think it is useful just to look at the history of appeals to quarter sessions from a court of summary jurisdiction, at least from the year 1879. In 1879, by the Summary Jurisdiction Act, s. 19, the right of appeal to quarter sessions was given in the widest possible terms—in any case where a person had been ordered or adjudged by a conviction or order to be imprisoned without the option of a fine. That is the test—where the order of the court has been that a person be imprisoned without the option of a fine. The words are so wide that they may be said to cover any order of any description which could be made by a court of summary jurisdiction so long as they include the power, which has been exercised, to send a person to prison without the option of a fine. Sect. 19 provides:

> Where . . . any person is adjudged by a conviction or order of a court of summary jurisdiction . . . either as a punishment for an offence, or . . . for failing to do or to abstain from doing any act or thing required to be done or left undone . . .

always subject to two things; he must not have admitted the truth of the allegation or pleaded guilty, and he must have been sent to prison without the option of paying a fine. That makes it clear that at the date of that Act there was no appeal from the sort of order which has been made by the magistrates in this case, i.e., forfeiture of a recognisance. While it is true that sect. 9 (2) contains the words "by conviction" it is quite plain from the language of the section that there is no power to send the person to prison at all. All that can be done is to order that his recognisance be forfeited.

If the applicant is to have an appeal to quarter sessions he must show some subsequent act which gives him that right—and I think in plain terms. He has to rely, and does rely, upon the Criminal Justice Administration Act, 1914, s. 37. It is to be observed that Parliament there increased the right of appeal—because it gave a right of appeal from any conviction for an offence although an order of imprisonment did not follow. At the same time that section does not follow the language of sect. 19 of the earlier Act in giving the right of appeal on anything except the one specific matter which is mentioned: there is no longer any right of appeal, as there was in 1879, from any order of a court of summary jurisdiction for failing to do or to abstain from doing any act required to be done or left undone, but the right of appeal is expressly limited to the case of a person who has been convicted by a court of summary jurisdiction "in respect of any offence."

I ask myself: Has the applicant, then, been convicted by a court of summary jurisdiction of any offence? Of what offence has he been convicted? I cannot think it is right to say, where a person has voluntarily submitted to the giving of a formal undertaking to a court of justice and has subsequently broken that undertaking, that that is an offence against the law as distinct from something which gives jurisdiction to the court to order that he pay that amount of money. I think, on the facts of this case, it would be wrong to say that the applicant has been convicted of an offence. The words "by conviction" in sect. 9 of the Act, which have troubled my Lord, have troubled me, too, and I am not at all sure that I have now any clear idea of why they were inserted. I would only suggest that the explanation may be this. Sect. 9 deals with two quite separate matters. Sect. 9 (1) provides:

> Where a recognisance is conditioned for the appearance of a person before a court of summary jurisdiction, or for his doing some other matter or thing to be done in, to, or before a court of summary jurisdiction, or in a proceeding in a court of summary jurisdiction, such court, if the said recognisance appears to the court to be forfeited, may declare the recognisance to be forfeited, and enforce payment of the sum due under such recognisance . . .

There is no question of conviction at all: the word "conviction" does not appear. The procedure seems to be quite simple and to be quite different from the procedure in the case of a person convicted of some offence.

Subsect. (2) deals with rather a different matter. Where a person has entered into a recognisance on condition to keep the peace or to be of good behaviour or not to do or commit some act or thing, and where it is proved to that court or any other court of summary jurisdiction (he may be brought up before that or before some other court altogether) that he has been since convicted of some offence which of itself, upon proof of the conviction, is proof of the breach of the recognisance, or (in the words inserted by the Criminal Justice Act, 1925, s. 26 (1), which are now to be read as part of this section) where there is proof that the person bound as principal has been guilty of conduct which is a breach of the condition, then the court must do something more than declare that the recognisance is forfeited; it must make an order, which seems to me to be not inappropriately stated in the words "by conviction." But that power to convict is not followed by any power of adjudging any penalty beyond the penalty which might be adjudged by the original court before whom the recognisance was entered into without any conviction at all.

For that reason I agree with my Lord that the words "by conviction" in this section must be read as being equivalent to a formal judgment of some sort, a formal order made by the court in the nature of a conviction, so that the matter will be on record. That may or may not be the explanation of these curious words "by conviction." On the facts of this case I agree with my Lord the applicant has not brought himself within the terms of sect. 37 inasmuch as he has not proved that he had been convicted by a court of summary jurisdiction in respect of any offence. It is only in those circumstances that he acquires any right of appeal at all.

Birkett, J.: I am of the same opinion.

I feel compelled just to add that I associate myself with the observations which have fallen from the other members of the court as to the difficulties which arise in the consideration of this appeal. Having given the whole matter the fullest and the best consideration I can, I agree with the judgments of the court which have already been delivered.

Application dismissed with costs.

Solicitors: *Doyle, Devonshire & Co.*, agents for *Molineux, McKeag & Cooper*, Newcastle-on-Tyne (for the applicant); *Wrinch & Fisher*, agents for *Lazenby & Snowball*, Consett (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re FITZHARDINGE'S LEASE. MACKENZIE *v.* SAMUEL ESTATES, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Finlay and Morton, L.JJ.), **November 9, 1944.**]

Emergency legislation—Landlord and tenant—Multiple lease—War Damage—Disclaimer and retention of lease—Lease comprising two separate buildings—One building rendered unfit for occupation—Whether tenant entitled to disclaim as to one building and retain as to other—Jurisdiction of the court—Landlord and Tenant (War Damage) Act, 1939 (c. 72), *s.* 15 (3) (4)—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (c. 41), *Sched.*

The respondent tenant was the lessee of certain premises which comprised a main building and a separate smaller building under a ground lease for a term of $43\frac{1}{2}$ years of which $10\frac{1}{2}$ years was unexpired on May 10, 1941, when the main building suffered war damage which rendered it unfit for occupation. On May 10, 1943, the appellant landlord served on the tenant a notice to elect under the Landlord and Tenant (War Damage) Acts, 1939-41. On May 20, 1943, the tenant served on the appellant a notice of disclaimer of the lease, accompanied by a letter stating that the tenant was about to apply under sect. 15 of the Act for an order declaring it equitable that the tenant should be allowed to disclaim as to the main building only and that the notice should be of no effect as regards the smaller building. The application was duly made and the court allowed the partial disclaimer, making also certain ancillary orders. On the appeal which was confined to questions of principle only, it was contended for the landlord that the tenant, having served a notice of disclaimer which the appellant was willing to accept, was precluded from asking the court to grant the right of partial disclaimer, and that, accordingly, the court had no jurisdiction to entertain the application. It was further contended that even if the court had jurisdiction, it had no power to weigh the comparative merits, from the point of view of equitableness, of total disclaimer under sub-sect. (3) and partial disclaimer under subsect. (4); it had only to consider whether total disclaimer as such would be equitable in all the circumstances and if satisfied as to that, the sole order the court had power to make was one allowing total disclaimer. The provisions of subsect. (4) were confined to the case where the court failed to be satisfied that it would be equitable to allow the tenant to disclaim as to the whole:—

HELD: (i) a tenant who has served a notice of disclaimer was, nevertheless, entitled under the Act to apply to the court for leave to make a partial disclaimer, and it did not make any difference whether the notice of disclaimer was made after the landlord had served a notice to elect.

(ii) it was the duty of the court to take into consideration the extent of the war damage and the other circumstances of the case as directed by sect. 15 of the Act and then to decide which of the two claims was to be preferred from the point of view of equitableness.

Decision of UTHWATT, J. ([1944] 2 All E.R. 145) *confirmed on the questions of principle raised.*

[**EDITORIAL NOTE.** The Court of Appeal here reviews the principles underlying the exercise of jurisdiction under the Landlord and Tenant (War Damage) Act, 1939, s. 15, in regard to multiple leases. These principles may be summarised as follows: (*a*) the object is to protect impartially both landlord and tenant; (*b*) in the case of multiple as in ordinary leases only notice of "*total* retention" or "*total* disclaimer" can be served; (*c*) notwithstanding service of notice of total disclaimer a tenant may apply for leave to make partial disclaimer; (*d*) the tenant may make such an application without waiting for the landlord to serve notice to elect; (*e*) the court must consider the various courses open to it under sect. 15 and decide what is the more equitable course to follow in view of the war damage and other relevant circumstances. Any other construction of the section requiring the court to deal with the equitableness of whole or partial disclaimer in watertight compartments would involve an impossible mental process, and is based upon a misunderstanding of the problem of draftmanship with which the legislature was confronted.

For the Landlord and Tenant (War Damage) Act, 1939, s. 15, and the Landlord and Tenant (War Damage) (Amendment) Act, 1941, Sched., see HALSBURY'S STATUTES, Vol. 32, pp. 996, 997, Vol. 34, p. 173.]

Appeal by the landlord from a decision of Uthwatt, J., reported [1944] 2 All E.R., at p. 145, limited to the question of the jurisdiction of the court to entertain the application of the tenant to be allowed to disclaim in part and the claim of the landlord that the tenant should only be allowed to disclaim the whole. The relevant facts are set out in the judgment of Uthwatt, J.

R. F. Roxburgh, K.C., and *H. Heathcote-Williams* for the appellant landlord.

H. Wynn-Parry, K.C., and *G. D. Squibb* for the respondent tenant.

Finlay, L.J. [delivering the judgment of the court]: The first questions which arise upon this appeal are whether or not on the true construction of the relevant statutory provisions, and in the light of the relevant facts Uthwatt, J., had jurisdiction to make the order now under appeal, and, if so, what are the principles upon which he should have acted. These questions turn primarily upon the language of the Landlord and Tenant (War Damage) Act, 1939, s. 15, which, as modified by the Landlord and Tenant (War Damage) (Amendment) Act, 1941, s. 2 (5), is set out in the schedule to the latter Act. That section is found in a *fasciculus* of sections grouped under the heading " Special provisions as to certain leases," and it deals with a type of lease in regard to which the main provisions of the Act by themselves were clearly unsuitable and inadequate. Leases of the type in question are those which fall under the definition of a multiple lease contained in the 1939 Act, s. 24. That definition is as follows:

> " multiple lease " means a lease comprising buildings which are used or adapted for use as two or more separate tenements;

The reasons for making special provision for leases of this type are sufficiently obvious. Many buildings, industrial, commercial or residential, are used or adapted for use as two or more separate tenements. A factory comprising several buildings or shops, a building containing a number of flats or offices are simple examples. In the case of buildings of this type war damage may affect part only, e.g., one of several factory buildings or some out of a number of flats or offices. Under the general provisions of the legislation the only right given to a tenant is to serve a notice—either of disclaimer or retention, in respect of the whole lease. Similarly, a notice to elect served by the landlord only relates to the whole lease in that it calls upon the tenant to serve either a notice of disclaimer or a notice of retention each of which, *ex hypothesi*, can only relate to the whole lease. In the event of a question arising as to the validity of a notice, the court has no power under the general provisions to treat the lease otherwise than as a single whole.

These provisions, if they had been left to govern the case of multiple leases, would in many instances have led to injustice or inconvenience. A tenant might quite properly desire to keep the undamaged part of the property. If he could only have done this on the terms that he should retain the whole lease serious hardship would have been involved. Similarly, from the landlord's point of view, to allow a tenant to disclaim the whole lease when a substantial part of the property was undamaged might have resulted in penalising the landlord for the benefit of a tenant anxious to rid himself of the burden of the lease. It was to meet this state of affairs that sect. 15 was inserted in the Act. It is important to observe at the outset that its object is quite clearly to protect impartially both parties to the lease and it is in our opinion quite wrong to interpret it on the assumption that its primary object is to protect the landlord against the tenant or the tenant against the landlord.

The machinery adopted by the legislature in order to secure the desired result is worth examination. It did not, as perhaps it might have done, create a new type of notice which a tenant could serve covering part only of the demised premises. The form of notice remains the same as in the case of leases which are not multiple leases. Subject to the provisions of sect. 15 (4) (*c*) the only notices that can be served in the case as well of multiple leases as of ordinary leases are still what have conveniently been called notices of "total disclaimer" and "total retention"; there is no such thing as a notice of "partial disclaimer" or "partial retention." Similarly, no change is made in the notice to elect; it remains a notice to elect between total disclaimer and total retention.

The next matter to notice is that the jurisdiction of the court under the section only arises when a notice, whether by the tenant or by the landlord, has been served. These notices, as we have pointed out, can only be "total" notices and it follows that whenever a tenant who has served a notice is contending before the court that the proper solution is to give him the right of partial disclaimer or partial retention, he is necessarily asking for relief inconsistent with the terms of his notice. This is important in view of the argument addressed to us on the question of jurisdiction, which was as follows: It was said that the tenant in the present case, having served a notice of disclaimer which the landlord was willing to accept, was precluded from asking the court to give her a right of partial disclaimer, and that the court accordingly had no jurisdiction to entertain her application. The proper course, it was said, for a tenant to take who is desirous of disclaiming in respect of part only of the demised premises is to wait until the landlord serves upon him a notice to elect and then make his application under the section. There are, in our opinion, three convincing reasons for rejecting this view. First, the section itself in terms provides that an application may be made by a tenant who has served a notice of disclaimer which, as has already been pointed out, can only be a total notice; and under subsect. (4) (*d*) where the court decides in favour of partial disclaimer it must order that a notice of disclaimer already served (which can only be a "total" notice) shall be of no effect. Secondly, the argument, if valid against the tenant, must also be valid against the landlord who has served a notice to elect. The election demanded by such a notice is, as we have pointed out, a "total" election. If, therefore, a landlord who wishes to limit his tenant to partial disclaimer serves a notice to elect and the tenant complies with it by serving a notice of disclaimer the landlord, according to the argument, could not apply to the court to limit the tenant to partial disclaimer since the tenant, by serving his notice of disclaimer, would have been taking one of the very two alternatives between which the landlord by his notice was calling upon the tenant to choose. The third reason is that to compel the tenant to wait until the landlord serves a notice to elect might involve the tenant in the gravest hardship. A tenant in the case of a multiple lease will normally want to know what his position is at the earliest possible moment. Can he (if he so desires) disclaim the lease as regards the whole of the demised premises? Can he (if he so desires) retain it as regards part? Must he (perhaps against his will) retain the whole? According to the interpretation which, in our opinion, is the correct one, he can at his own instance give the court jurisdiction to decide these questions by himself serving one of the only two types of notice which are open to him. If he has to wait for the landlord to serve a notice to elect before the court can entertain an application (as, upon the argument, he would be bound to do) he may be left in a state of uncertainty as to his position for an indefinite period since there is no time limit for service of a notice to elect; and the right to obtain a decision from the court will be dependent upon the action of his landlord who may, for reasons of his own, prefer to leave matters as they are. Indeed, the landlord would in many cases (according to the argument) be in a position to force the tenant to serve a notice which, if accepted by the landlord, would deprive the tenant of any right thereafter to ask for any relief under the section.

We come, therefore, to the clear conclusion that a tenant who has served a notice of disclaimer is nevertheless entitled under the Act to apply to the court for leave to make a partial disclaimer. The fact that in the present case the notice of disclaimer was served after the landlord had served a notice to elect does not appear to us to make the slightest difference.

Having, correctly as we hope, disposed of this argument on jurisdiction, we can now turn to the main contention advanced on behalf of the appellant which relates to the principles upon which the court should act. We find it a little difficult to grasp but it is, as we understand, to the following effect. It is said that the court must proceed to deal with any application that comes before it by steps. By this it is meant that the court must first, under subsect. (3) consider whether it is equitable to allow the tenant to exercise the right of disclaimer or retention (as the case may be) in respect of the lease as a whole. Consideration to this question must, it is said, be given without reference to the question whether or not it would be equitable to allow the tenant to disclaim in part. This latter question, it is said, can only be examined by the court under subsect. (4) when it has failed to be satisfied that it is equitable to allow the tenant to disclaim as to the whole. It is conceded that according to this argument the court might be compelled, e.g., to limit the tenant to total disclaimer as being " equitable " notwithstanding that the allowance of partial disclaimer would on the facts be more " equitable." When the matter is being considered under subsect. (3), it is said, the court has no power to examine the comparative merits, from the point of view of equitableness, of total disclaimer on the one hand and partial disclaimer on the other ; it can only consider the equitableness of total disclaimer and if satisfied as to that the only order that the court has power to make is an order allowing total disclaimer under subsect. (3).

Applying these propositions to the facts of the present case, counsel for the appellant argued that they necessarily led to a decision in his favour. Here, he said, is a tenant who, as his notice of disclaimer shows, wishes to be able to disclaim the lease as a whole ; his landlord is willing to agree ; it cannot, therefore, be otherwise than equitable to allow total disclaimer and that is an end of the matter since judicial investigation never reaches the stage of considering the equitableness of allowing partial disclaimer under subsect. (4).

Accepting for a moment (contrary to our own view) the propositions upon which this branch of the argument is based, we would point out that it assumes that the court is bound to treat the notice of disclaimer as expressing in a binding manner the real wishes of the tenant since, if that is not the case, the agreement of the landlord to the notice clearly cannot establish the equitableness of limiting the tenant to total disclaimer. The argument would only prevail if the parties both agreed on total disclaimer which, *ex hypothesi*, is not the case. Once it is made clear that a tenant can ask for partial disclaimer notwithstanding that he has served a notice of total disclaimer, it cannot be said that the landlord's concurrence in total disclaimer establishes the equitableness of that course. It may also be pointed out that the argument involves placing a curious construction on the word " allow " since if it is to be accepted the court would be " allowing " the tenant to do something that he does not want to do.

But the wider ground upon which, in our opinion, the whole argument fails is that the propositions submitted by counsel for the appellant as to the procedure to be followed under the section cannot be supported. They are in any event unattractive in themselves since they impute to the legislature an intention to require on the part of the court a highly artificial and unsatisfactory mental process. According to the argument the court would be bound to confine the tenant's right to that of total disclaimer once it found that this course was equitable notwithstanding that it could see perfectly well that on the facts partial disclaimer would be more equitable. The court would be bound to shut its eyes. Of course, if the language of the section leads to this result, effect must be given to it. But, in our opinion, it does not as an examination of its structure and language will show.

The first thing to notice about the draftsmanship of the section is that it is very tightly compressed. The draftsman had to deal with a large number of possible permutations and combinations, so to speak, and his task was to find language which would cover all of them. Thus the landlord might be claiming that the premises were not unfit ; the tenant might be asking for total disclaimer or alternatively partial disclaimer. Again, the tenant might be asking for total retention ; the landlord might be saying that it was a case for partial retention only. To meet this situation either party is empowered to apply to the court and his application may clearly be for whatever form of relief he prefers among the various alternatives open to him. This appears to us to be the effect of the governing words in subsect. (2) under which the party serving or the party served (or, as it may be, both of them) may apply to the court :

> . . . to determine the question whether the tenant should be allowed to exercise the right of disclaimer or retention, either as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, or should not be allowed to exercise that right at all.

The application or applications according to its or their nature may raise all or some or one only of these alternatives for determination. Subsects. (3) and (4) contain directions to the court as to the form of order to be made in each A of the alternative cases there mentioned, viz.: under subsect. (3) total disclaimer, total retention: under subsect. (4) partial disclaimer, partial retention. The language used in these subsections is clearly intended by the draftsman to be sufficiently comprehensive in its terms to cover all the various permutations and combinations above mentioned. In a compressed piece of drafting of this description it is almost inevitable that the language will prove to be in some respects unsatisfactory. Under the section the court may have before it either B an application by one party or cross-applications by both. It may also have before it an application by an interested party under subsect. (2) (*b*), but for the sake of simplicity we will ignore that case. As an example of what would happen if the argument for the respondent were accepted we will take the case where the tenant is applying for leave to make a partial disclaimer and the landlord is asserting that the only right which the tenant ought to be allowed C to exercise is that of total retention. In such a case it would manifestly be impossible to make an order under subsect. (3) on the tenant's application since the only order possible under that section in respect of disclaimer is one permitting total disclaimer. On the landlord's application there would presumably be jurisdiction to make an order "allowing" the tenant to exercise the "right" (a word which includes both disclaimer and retention) of total retention. Such an order would according to the argument by implication D exclude any right on the part of the tenant to disclaim in part and could only mean that the right of total retention is to be the only right which he is to be allowed to exercise. In making such an order the court would, according to the argument, never have taken into consideration the question which the tenant desired to raise under subsect. (4), viz., the equitableness of partial disclaimer. Once the court had taken the view on the landlord's application that it was equitable to confine the tenant to total retention the question whether E partial disclaimer would in the circumstances be the more equitable course would not arise. The tenant's application would never be heard and any evidence tendered by him on the landlord's application with a view to showing that partial disclaimer would, in the circumstances, be the more equitable course would of necessity be excluded as irrelevant.

A construction which can lead to such a result (and many other examples F could be given) appears to us to be singularly unattractive and speaking for ourselves, we should find difficulty in going through the mental processes which it would impose upon the court. The argument is, in our opinion, founded upon a misinterpretation of the language of the section and a failure to realise the nature of the problem of draftsmanship involved when a large variety of possible cases is dealt with by compressed and all-inclusive language. The mistake, in our opinion, lies in treating the various examinations which the court is G directed to undertake by subsects. (3) and (4) as being successive in point of time and divided, so to speak, into water-tight compartments. The true view, in our opinion, is that the court must consider together the various courses open to it having regard to the nature of the application or applications before it and the circumstances established by the evidence. It must then decide what is the equitable course to take and order accordingly. The different possible orders are (as it appears to us) dealt with in separate subsections for H convenience in order to set out the form of order which the court is to make according as it takes the one view or the other. This construction leads to a fair and sensible result, and enables the court to decide which of the various orders open to it to make will satisfy the justice of the case. It avoids the necessity of imposing on the court the duty of making an order which is in itself equitable without considering whether a different order would in the circumstances be more equitable. The conception of degrees of equitableness is one which we have difficulty in understanding. We should have thought that it would be impossible for an order allowing only total retention (in the example given) to be equitable if the more equitable course would be to allow the tenant to disclaim in part. If it is equitable to give the tenant this right we cannot see how it can be at the same time equitable to confine him (as in the example given) to total retention. The one excludes the other.

The controversy in the present case lay between the claim of the tenant to be allowed to disclaim in part and the claim of the landlord that the tenant should only be allowed to disclaim the whole. In our opinion, applying the principles which appear to us to be correct, the duty of the court is to take into consideration the extent of the war damage and the other circumstances of the case as directed by the section and then to decide which of the two claims is to be preferred from the point of view of equitableness.

Uthwatt, J., held that he had jurisdiction to entertain the application of the tenant and decided in her favour on the merits. The next question which arises on the appeal is whether in so deciding he applied the correct principles as above laid down. At the request of the parties we did not hear argument upon this question since they wished to have an opportunity of considering their position in the light of our decision on the questions of principle.

Appeal dismissed. The merits of the case were not considered.

Solicitors : *Waltons & Co.* (for the appellant landlord) ; *Mead, Sons & Bingham* (for the respondent tenant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

GYTON *v.* PALMOUR.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **November 13, 1944.**]

Rates and rating—Rateable occupation—Possession—Blocks of flats owned by companies—Tenants paying rent inclusive of rates—Rates in arrears—Order appointing receiver and manager—Receiver entered in rate-book of borough council as new rateable occupier—No appeal against entry—Whether change of occupation of premises—Liability to be rated—Poor Rate Assessment and Collection Act, 1869 (*c.* 41), *s.* 16.

Two companies were the rateable occupiers of certain premises owned by them. The premises were let out as flats and the rents charged to the tenants were inclusive of rates. The rates were considerably in arrears. On Feb. 26, 1940, the respondent was appointed receiver and manager under powers contained in a trust deed, securing an issue of first debentures, and the respondent was, without his knowledge, entered by the borough council as the rated occupier of the premises in question. No appeal was made by the respondent against the entry. On Mar. 7, 1940, by an order of the court the respondent was appointed receiver and manager of all the property and assets except uncalled capital of the two companies concerned. The appellant, a collector of rates, preferred a complaint against the respondent that he, being the person duly rated and assessed, had failed to pay the rates outstanding as from the date of his appointment. The magistrate, following a previous decision of the Court of Appeal in a case where the material facts were similar, dismissed the complaint on the ground that the respondent was not, and never had been, in rateable occupation :—

Held : the mere order of the court appointing the respondent to receive and manage the assets of the companies did not create a beneficial occupation of the premises. There was, therefore, no justification for entering the respondent as the rateable occupier.

In re Marriage Neave & Co., North of England Trustee, Debenture and Assets Corpn. v. *Marriage Neave & Co.* (1) *followed.*

Moss Steamship Co., Ltd. v. *Whinney* (2) *distinguished.*

[**EDITORIAL NOTE.** This decision illustrates the distinction between the " possession " of a receiver and manager, and the " occupation " necessary in order to constitute rateability. A receiver may perform all his duties without even seeing the property, as Rigby, L.J., pointed out in *Re Marriage Neave & Co.* (1), but rateable occupation requires actual possession and some degree of permanence. An order of court appointing a receiver and manager is, therefore, not alone sufficient to create beneficial occupation. It follows also that a mere entry of the receiver in the rate book, without beneficial occupation in fact, though not appealed against, is also insufficient to give rise to liability to rates.

As TO THE EFFECT OF APPOINTMENT OF A RECEIVER, see HALSBURY, Hailsham Edn., Vol. 28, pp. 108, 109, paras. 225-227; and FOR CASES, see DIGEST, Vol. 39, pp. 55-56, Nos. 670-677.]

Cases referred to:

*(1) *In re Marriage Neave & Co., North of England Trustee, Debenture and Assets Corpn.* v. *Marriage Neave & Co.*, [1896] 2 Ch. 663; 39 Digest 55, *672*; 65 L.J.Ch. 839; 75 L.T. 169.

*(2) *Moss Steamship Co., Ltd.* v. *Whinney*, [1912] A.C. 254; 39 Digest 56, *677*; 81 L.J.K.B. 674; 105 L.T. 305.

*(3) *Westminster City Council* v. *Southern Ry. Co. and Others*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33.

*(4) *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.*, [1895] A.C. 117; 38 Digest 424, *7*; 64 L.J.M.C. 113; 71 L.T. 818.

*(5) *Dent* v. *Commondale Overseers*, (1891) 56 J.P. 519; 18 Digest 399, *1401*.

APPEAL by way of case stated from a decision of the Metropolitan Police Magistrate, sitting at Marylebone Police Court, dated May 1, 1944, dismissing a complaint preferred against the respondent under the Poor Rate Assessment and Collection Act, 1869, by the collector of rates for the Marylebone Borough Council. The respondent was appointed by the Court of Chancery receiver and manager of the property of the Mayfair and General Property Trust, Ltd., and the Duchess Property Co., Ltd., and the Marylebone Borough Council, thereupon, treated the respondent as the rateable occupier of the premises of the two companies. The facts and the arguments are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

A. S. Comyns Carr, K.C., and *Percy Lamb* for the appellant.

G. D. Squibb for the respondent.

VISCOUNT CALDECOTE, L.C.J.: By an order of the High Court of Justice, dated Mar. 7, 1940, the respondent was appointed receiver and manager of all the property and assets except uncalled capital of the Mayfair and General Property Trust, Ltd., and the Duchess Property Co., Ltd. The order did not contain any order of direction on the companies to deliver possession of any of the companies' property and assets of which the appellant was appointed receiver and manager. At the date of this order each of the two companies was carrying on the trade or business of owning, managing, maintaining and letting offices, flats and chambers, either furnished or unfurnished. The two companies owned and occupied certain premises which were let out as flats. Rents were charged to tenants of the flats, which included a sum to cover certain services and amenities. The rents were inclusive of rates. The two companies were entered in the council's rate books as the rated occupiers respectively of their premises until Feb. 26, 1940. On Feb. 26, 1940, there was outstanding in respect of the general rate upon the premises of the companies the sum of £1,228 12*s.* 2*d.* The respondent, who, on Feb. 26, was appointed receiver and manager under powers contained in a trust deed, securing an issue of first debentures, was, on the same day, entered in the rate books as the rated occupier of the premises in question. No appeal was entered by the respondent against this entry. It appears that the liquidator had no knowledge of the entry of his name in the rate book. The amount owed for rates was reduced by payment of certain sums leaving ultimately the sum of £924 14*s.* 7*d.*

The appellant who is a collector of rates, duly appointed by the Marylebone Borough Council, preferred a complaint against the respondent that he, being the person duly rated and assessed, had not paid the sum of £924 14*s.* 7*d.*, which had been lawfully demanded. The complaint was heard by the magistrate sitting in a court of summary jurisdiction at Marlyebone police court, when it was contended by the appellant that there had been a change of occupation and that the respondent must be deemed to have been actually and properly rated as occupier from Feb. 26, 1940. The magistrate dismissed the complaint on the ground that the respondent was not, and never had been, in rateable occupation of the properties. He further held that he was bound by the decision of the Court of Appeal in *In re Marriage Neave & Co.* (1). The appellant duly applied to the magistrate to state a case and the facts which I have stated are set out in the case. Counsel for the appellant invited us to say either that the decision of the Court of Appeal in *In re Marriage Neave & Co.* (1) did not correctly state the law or that the judgments were not in point and were *obiter dicta*. He relied also on the decision of the House of Lords in the *Moss Steamship Co.* v. *Whinney* (2), as being inconsistent with *In re Marriage Neave & Co.* (1).

We were invited to examine with some care the facts as well as the decision in the case of *In re Marriage Neave & Co.* (1). It appears that one Paterson had been appointed by the trustees under a second debenture trust deed receiver A and manager on behalf of the second mortgage debenture holders. A few days later Paterson and one Stephens were appointed receivers and managers on behalf of the first mortgage debenture holders by order of the court in a debenture holders' action. The order did not direct the company to give up possession to the receivers and managers, but on the day they were appointed they entered the company's premises for the purpose of managing and carrying on the business. A sum of money was due at that time in respect of rates and the company B were served with a summons for the amount thus due by the churchwardens and overseers. On the hearing of the summons the usual distress warrant was issued for the full amount due. The churchwardens and overseers thereupon took out a summons asking that, notwithstanding the appointment of the receivers and managers in the action, the applicants might be at liberty to distrain upon the goods and chattels of the company for the amount due. When the summons came on for hearing KEKEWICH, J., held that a change of occupation C within the meaning of the Poor Rates Collection and Assessment Act had taken place when the receivers and managers were appointed and entered on the company's premises and that as from that date receivers and managers should be regarded as "new occupiers." It was held accordingly that the goods and chattels upon the premises were not liable to distress for the rates in question. The sum due was subsequently apportioned under the Act and the receivers D and managers on a formal demand by the churchwardens and overseers paid the proportion due in respect of the period from the date of their appointment to the end of the half year for which the rate was made. The order of KEKEWICH, J., was then appealed from and the appeal succeeded. LINDLEY, L.J., said, at p. 671:

> The first question we have to consider is whether there has been such a change of occupation as brings into operation the Poor Rate Assessment and Collection Act, 1869, s. 16. E

After pointing out the important fact that the order did not contain a direction for delivery up of possession of the land to the receivers and managers, LINDLEY, L.J., continued as follows, at p. 671:

> They have gone on to the property for the purpose of receiving and managing the income and business of the company, but they have not done anything to change the F ostensible possession of the property in any way whatever; and, upon the facts, it appears to me that the possession and occupation have not been changed at all.

The Lord Justice later said, at. p. 672:

> The real truth is that the company were and are still, in point of law, in occupation of the property, and the receivers are there as managers of the company's business.

LOPES, L.J., dealt with the same point. He said, at p. 674:

> What the receivers have to do is to go there and manage the property. The occupation, G in my judgment, remained in the company in precisely the same way as it did before. The company continued to occupy notwithstanding that order.

A declaration, accordingly, was made that the churchwardens and overseers were entitled to distrain on the company's goods.

I am unable to distinguish the facts of *In re Marriage Neave & Co.* (1) from the material facts in the present case. Counsel for the appellant submitted, if I H understood him aright, that in the present case the amount due in respect of the period beginning with the appointment of the receiver which has not been paid is all that is in question, whereas in *In re Marriage Neave & Co.* (1) the amount due in respect of a similar period had been apportioned and the sum found due paid. But that is just what the Court of Appeal, by their declaration and their judgments, seem to me to have decided was wrong. The decision of the Court of Appeal was based upon the view, which was clearly stated by all the members of the court, that the company remained, in point of law, in occupation of the premises, and that the receivers were merely there as managers of the company's business. As Rigby, L.J., observed, at p. 676 :

> . . . they might have performed all their duties without even seeing this property.

It was further submitted by counsel for the appellant that the decision in that case, even if in point, could not be supported in view of the decision of the House of Lords in the case of the *Moss Steamship Co.* v. *Whinney* (2). In that case the respondent, a well-known accountant, had been appointed receiver and manager by a brewery company, and, in the course of carrying on the business of the company, he consigned a quantity of beer to the company at Malta under a bill of lading which provided that the appellants, who were the shipowners carrying the beer, should have a lien on the goods shipped not only for the freight due thereon but for any previously unsatisfied freight due either from shippers or consignees to the shipowners. The House of Lords held that the shipowners were not entitled to a lien because the receiver and not the company was both shipper and consignee and there was no previously unsatisfied freight due from him. Lord Loreburn, L.C., agreed with Fletcher Moulton, L.J., who had delivered a dissenting judgment in the Court of Appeal, that the company was still alive and that its business was still being carried on by one Whinney, but Lord Loreburn, disagreeing with Fletcher Moulton, L.J., said, at p. 259, that Whinney was not carrying on as the company's agent :

> He superseded the company, and the transactions upon which he entered in carrying on the old business were his transactions, upon which he was personally liable. He was really a trustee and the shipowners dealt with the trustee.

So far I find nothing in conflict with the decision in *In re Marriage Neave & Co.* (1). Lord Loreburn and the other noble Lords seem to me to have decided the question simply on the ground that the consignment of the beer was made by Whinney, not acting as the company's agent, but as a transaction upon which he was personally liable. Counsel for the appellant, however, relied very strongly upon a passage in Lord Atkinson's opinion on p. 263, which was as follows :

> This appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist ; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.

Counsel for the appellant laid great emphasis upon the statement by Lord Atkinson that a receiver and manager was put into the possession of the property of the company. I find it impossible to believe that Lord Atkinson could have thought that his words would be cited as bearing on the question of occupation for rating purposes. It is only by an extension of the meaning of the words " put into possession " that it can be said at all that, even if the receiver and manager is put into possession of the property, he is, therefore, in beneficial occupation. The nature of rateable occupation has been so frequently stated that it may seem unnecessary to repeat any of the statements which have been made. In the case, however, of *Westminster Council* v. *Southern Ry. Co.* (3), there is a passage in the opinion of Lord Russell which will bear repetition, at p. 529 ([1936] 2 All E.R. p. 326) :

> The occupier, not the land, is rateable ; but the occupier is rateable in respect of the land which he occupies. Occupation, however, is not synonymous with legal possession: the owner of an empty house has the legal possession, but he is not in rateable occupation. Rateable occupation, however, must include actual possession, and it must have some degree of permanence : a mere temporary holding of land will not constitute rateable occupation.

In the present case, whatever the nature of the possession into which the receiver and manager was put by the order of the court, it seems plain to me that it fell far short of the occupation which is necessary in order to constitute rateability. I may cite a short passage from the speech of Lord Herschell, L.C., in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (4), at p. 125 :

> The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title.

Upon the whole of this case I agree with the decision of the magistrate, that he was bound by the decision of the Court of Appeal in *In re Marriage Neave & Co.* (1), but, apart altogether from the judgments in that case, I think the contentions of the respondent in this case, that there had never been a change of occupation to justify the entry of the respondent as occupier of the said premises in the Council's rate books are right.

It remains for me to deal with a submission which counsel for the appellant made, I think rather faintly, that is was too late for the respondent to question A his liability in view of the fact that his name had been entered in the rate book as occupier of the premises and that he had not appealed against the entry. In support of this contention reliance was placed upon the case of *Dent* v. *Overseers of Commondale* (5). In that case it was proved that the premises mentioned in the entry were beneficially occupied by the appellant, that he was the only visible occupier and that he received everything and paid everything in connection with the premises. LORD COLERIDGE, L.C.J., said, at p. 520 : B

> Here is an appeal against a rate which is good on the face of it. It depends upon whether the liquidator's name was used merely as liquidator and nothing else. The Overseers gave evidence that he was an occupier of the premises in the ordinary sense.

Upon that LORD COLERIDGE held that, as the rate was good on its face, and as the person rated had not impeached the assessment, he must be taken to be the person against whom a distraint warrant must issue. I do not think that that C case is an authority for the proposition for which counsel for the appellant contended that an entry in the rate book of the name of the person who was ignorant of the entry was sufficient to create liability. It could not be contended that such an entry would give rise to liability in a case where a complete stranger had, by some mistake, been entered in the rate book without his knowledge, as was the case here. In the present case the whole question is whether, as from the date of the order of the court appointing the respondent receiver and manager D beneficial occupation was created by the mere order of the court appointing the respondent receiver and manager. I do not think it was.

For these reasons, I think, the appeal fails and must be dismissed.

HUMPHREYS, J. : So far as I am concerned, that judgment is the judgment of the court.

BIRKETT, J. : I agree.

E

Appeal dismissed with costs. Leave to appeal.

Solicitors : *Sharpe, Pritchard & Co.* (for the appellant) ; *Last, Sons & Fitton* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

F

BROUGHTON *v.* WHITTAKER.

[KING'S BENCH DIVISION (Lawrence, Lewis and Wrottesley, JJ.), **January 19, 1944.**]

Food and Drugs—Food not of nature, substance or quality demanded—"Cordial"—Character of article—No statutory or recognised standard—Certificate of public analyst—Evidence not contradicted—Article sold to the prejudice of purchaser—Food and Drugs Act, 1938 (c. 56), *s.* 3 (1). G

The respondent was charged with selling a sweetened lemon flavouring cordial which was not of the nature, substance or quality of the food demanded by the purchaser. The only evidence before the magistrates was that of the public analyst who had been called by the appellants. He stated that the article could not be termed a cordial, as it contained neither alcohol nor sugar, and he also relied on the fact that it was not H concentrated nor capable of being diluted. There was no recognised standard of quality for the article. The magistrates expressed the opinion that the evidence of the analyst though not contradicted was not proof that when an ordinary person purchases a beverage marked "cordial" he means to purchase a beverage which contains alcohol or sugar. Thereupon they dismissed the information against the respondent. It was contended that the magistrates on the evidence before them should have found the offence proved :—

Held : since there was no fixed standard of quality for the beverage sold, the magistrates must form their own standard of quality based on the evidence of the analyst. In the absence of any evidence qualifying or contradicting that statement of fact, it was the duty of the magistrates to find that the beverage had been sold to the prejudice of the purchaser.

Bowker v. *Woodroffe, Bowker* v. *Premier Drug Co.* (2) followed.

Collins Arden Products, Ltd. v. *Corporation of Barking* (1) distinguished.

[**EDITORIAL NOTE.** In *Collins Arden Products, Ltd.* (1), there was conflicting expert evidence as to the meaning of " cordial " but here the evidence of the analyst that the word implies to an ordinary person a beverage containing alcohol or sugar was uncontradicted. In *Bowker* v. *Woodroffe* (2), which was not cited to the magistrates, it was held that where there is no fixed standard of quality for an article of food, the justices must accept the statements of fact in the analyst's certificate, in the absence of evidence to the contrary, and the court here follow this decision, distinguishing *Collins Arden Products, Ltd.* (1), on account of the conflict of evidence in that case.

As to Prosecutions for Articles not of the Nature Demanded, see HALSBURY, Hailsham Edn., Vol. 15, pp. 151-156, paras. 242-249 ; and for Cases, see DIGEST, Vol. 25, pp. 88-91, Nos. 146-167.]

Cases referred to :

*(1) *Collins Arden Products, Ltd.* v. *Barking Corpn.* [1943] 1 K.B. 419 ; [1943] 2 All E.R. 249 ; 112 L.J.K.B. 406 ; 169 L.T. 12.

*(2) *Bowker* v. *Woodroffe, Bowker* v. *Premier Drug Co.*, [1928] 1 K.B. 217 ; Digest Supp. ; 96 L.J.K.B. 750 ; 137 L.T. 347.

(3) *Harrison* v. *Richards* (1881), 45 J.P. 552 ; 25 Digest 78, *76*.

(4) *Robinson* v. *Newman* (1917), 86 L.J.K.B. 814 ; 25 Digest 78, *78* ; 117 L.T. 96.

Appeal by way of case stated from a decision of the magistrates for the county borough of Sunderland, dismissing an information under the Food and Drugs Act, 1938, s. 3 (1). The facts and arguments are fully set out in the judgment of Lawrence, J.

Gilbert Beyfus, K.C., and *Vernon Gattie* for the appellants.

R. L. Parry for the respondent.

Lawrence, J. : This is a case stated by the magistrates for the county borough of Sunderland on a prosecution for selling a food alleged to be sweetened lemon flavouring cordial. The only evidence which was called before the magistrates was the evidence of the analyst, Carey, who had made the analysis which is provided for by the statute. Some criticism has been made upon the terms of his certificate, but no such point was taken in the court below and it is expressly stated in para. 4 of the case that all the required formalities under the Act were complied with, and it was admitted by counsel for the respondent that the point was not taken on the terms of the certificate and that it is not really open to him now. That certificate having been served in accordance with the statute and proved before the magistrates, Carey, the analyst, was called by the prosecutor apparently without being required to be called by the respondent, and Carey, whose certificate after dealing with the analysis showed that there was no sugar or alcohol in the cordial, gave it as his opinion in his observations : " I am of opinion that the said sample is not a cordial." In his evidence he repeated that opinion ; he said that the beverage could not be termed a cordial as it contained no sugar. Later on he said that the sample in this case contained neither alcohol nor sugar and was not a cordial, and he also relied upon the fact that it was not concentrated or capable of being diluted. In answer to that evidence the respondent elected to call no evidence, and the case was then adjourned for legal argument. Certain cases were cited including *Collins Arden Products, Ltd.* v. *The Corporation of Barking* (1), but unfortunately the case of *Bowker* v. *Woodroffe* (2), was not cited to the magistrates, and the magistrates, who had purposely stated the facts in the ordinary way by saying that they were proved or admitted and had then set out Carey's evidence, continued in this way :

> We were advised : (*a*) that the demand by the purchaser must be the determining factor in our decision as to what should have been sold to the purchaser, (*b*) to consider whether the opinion of Carey for the prosecution, unsupported by other evidence, was evidence that when an ordinary person purchases a beverage marked " Cordial " he means to purchase either a beverage which contains alcohol or a beverage which contains sugar. We being of opinion on the facts above stated that the evidence of Carey was not evidence that when an ordinary person purchases a beverage marked

> "Cordial" he means to purchase a beverage which contains alcohol or a beverage which contains sugar, and therefore that it had not been proved that the beverage sold was not of the nature, substance or quality demanded by the purchaser, dismissed the said information against the respondent.

I ought to have stated that the information was an information under the Food and Drugs Act, 1938, s. 3, in selling to the prejudice of the purchaser food which was not of the nature, substance and quality of the food demanded.

The appellant, who was the prosecutor, contends that the magistrates have been misled—not intentionally, of course—by the citation of the cases which were cited to them and by the fact that *Bowker* v. *Woodroffe* (2) was not cited, and that upon the evidence which was the only evidence before them—that of Carey—there was only one course open to them, which was to hold that an infringement of sect. 3 of the Act had been committed.

In *Bowker* v. *Woodroffe* (2), the headnote is in these terms:

> On a charge of selling to the prejudice of the purchaser an article of food not of the nature, substance, and quality demanded, under the Sale of Food and Drugs Act, 1875, s. 6, there being no fixed standard of quality for the article, the justices must form a standard of their own based upon the evidence before them, and, in the absence of evidence to the contrary should accept the statements of fact in the analyst's certificate, including (*per* SHEARMAN, J.) his expressions of opinion therein.

The judgment of LORD HEWART, L.C.J., bears out that headnote. He first said, at p. 222, that the analyst who had given the certificate in that case had given evidence that: "A genuine meat and malt wine should contain at least 5 per cent. of a mixture of equal parts of meat and malt extracts with a wine basis," and that the meat and malt wine did not contain that and was not a meat and malt wine, and the certificate also said in its final statement that it was not a meat and malt wine, which is exactly what is said in the present case by Carey, that this is not a cordial. LORD HEWART, L.C.J., referred to two cases which he said made the matter quite clear. He said, on p. 223:

> One is the case of *Harrison* v. *Richards* (3), where LINDLEY, J., as he then was, said, at p. 553: "The magistrate in this case seems to have treated the certificate as matter of opinion and not of fact. He sets out his own opinion against the certificate, but I think that cannot be done, for the certificate is *prima facie* evidence, and it could not be thrown over merely by an opinion not founded on the evidence. No evidence was given to contradict the certificate."

That was a case in which the certificate only had been put in evidence and the analyst had not given evidence himself, but the court held that the magistrates ought not to have convicted upon that certificate. LORD HEWART, L.C.J., goes on, at p. 223:

> That was a certificate in which the constituent elements having been set out, the analyst said: "I am of opinion the same is a sample of milk adulterated with 20 per cent. of water. That case was in the year 1881. In the much more recent case of *Robinson* v. *Newman* (4), it was said by this court (*per* LORD READING, L.C.J.), at p. 815: The magistrates have to act upon the certificate of the analyst, which appears to be in the form in the schedule to the Act. The observation inserted in the certificate is justified by the note in the form in the schedule, and I do not think it is necessary to say more than that the analyst was entitled to express his opinion, and in the absence of a request that he should be called as a witness or of evidence to the contrary the justices should have acted upon it. The case of *Harrison* v. *Richards* (3) is in point, and the appeal must be allowed."

Accordingly LORD HEWART, L.C.J., adopted the views expressed in those cases and came to the conclusion that the magistrates ought to have adopted the opinion of the analyst stated in his certificate in the absence of contradictory evidence. AVORY, J., in a very short judgment, in *Bowker* v. *Woodruffe* (2), arrived at the same conclusion. He said, at p. 225:

> This certificate, upon its face, states as a fact that this article, which has been analysed, is not a meat and malt wine. In the absence of any evidence qualifying or contradicting that statement of fact, I think it was the duty of the magistrate to find that the article which had been sold had been sold to the prejudice of the purchaser, and I agree that the case should be remitted to him to do so.

SHEARMAN, J., also came to the same conclusion. He referred to *Harrison* v. *Richards* (3) and *Robinson* v. *Newman* (4), and said, at p. 226:

> . . . it is quite clearly laid down in both those cases—I do not think it is possible

to discriminate—that the analyst is entitled to express his opinion as to what the standard should be, and if that is uncontradicted, the magistrates are bound to accept it.

That authority appears to me to be quite clear.

In the case of *Collins Arden Products, Ltd.* v. *Corporation of Barking* (1), the analyst who had made the analysis and put in his certificate was called and gave evidence. He was dealing there with a substance described as orange flavoured cordial, but his evidence was met by the seller of the cordial with the evidence of three other expert analysts who said that in their opinion the article was not improperly described. At the hearing before the Divisional Court, unfortunately, it does not appear that *Bowker's* case (2) was cited to the court; but in any event the facts of that case were entirely different from the facts in *Bowker's* case (2) or the facts of the present case because in that case there was the conflict of evidence.

It is argued, and strenuously argued, that the only basis upon which the Divisional Court in the *Collins Arden* case (1) could come to the conclusion that they ought to overrule the magistrates was upon the view that the evidence of Dr. Hammence, the analyst, was not satisfactory evidence and was not in fact evidence upon which a court could act, and it is said that that applies to the evidence of Carey in the present case. In my opinion, it is an unsatisfactory way of arguing from one authority to another to say that because certain evidence has been treated in one case as unsatisfactory other evidence given in another case, which cannot be identical, is also so unsatisfactory that it ought not to be acted upon, and particularly that is so where in the one case there is a strong conflict of evidence and in the other case there is no conflict of evidence at all. I do not find that Dr. Hammence's evidence is identical with Carey's evidence in the present case, and I think that *Collins Arden Products* (1), as CHARLES, J., said (in the first sentence of his judgment), was a case of an exception, and that it ought not to be held by this court as binding them to disregard the clear authority of a previous decision of the Divisional Court in *Bowker's* case (2), which followed the decisions to which I have already referred of LINDLEY, J., in one Divisional Court and of LORD READING in another Divisional Court.

For these reasons I think that the case ought to be remitted to the magistrates with a direction that upon the evidence they ought to find the offence proved and act accordingly.

LEWIS, J.: I agree with the judgment of my Lord and with the result.

WROTTESLEY, J.: I agree.

Appeal allowed with costs. Case remitted to the magistrates with a direction to find the offence proved.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *G. S. McIntire*, Town Clerk, Sunderland (for the appellants); *Maude & Tunnicliffe*, agents for *Morton & Morton*, Sunderland (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law*].

Distinguished. *Re* KEELE ESTATES.
[1952] 2 All E.R. 164.

Re SEBRIGHT, PUBLIC TRUSTEE *v.* SEBRIGHT.

[CHANCERY DIVISION (Vaisey, J.), **March 30, 1944.**]

Settlements—Jointure rent-charge—Annual sums in arrears—Income subsequently available for payment of arrears—Deduction of income tax—Rate of tax to be deducted—"Standard rate for the year in which the amount payable becomes due"—Payment of jointures "without any deduction"—Exoneration from succession and estate duties—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 19—*Finance Act,* 1927 (c. 10), *s.* 39 (1).

By a will of a testator, who died in 1897, real estates were settled in the form of a strict settlement. Power was given under the will to each male person being the legal or equitable tenant for life in possession by deed or will to appoint to any wife he might marry during the residue of her life, if surviving the appointor, any yearly rent charge on the estates by way of jointure, not exceeding £600. By deed two jointures, each of £600 per annum, had been created, the first in 1906, the second in 1922. It was provided in each case that the annual sums should be payable half-yearly without any deduction and should be considered as accruing from day to day. The first jointure only was payable at present, the second was suspended owing to the first having taken effect, but during its suspense the present tenant for life covenanted by deed, made in 1929, with the second jointress to pay her an annuity of £600, chargeable on his life estate. Nothing was said about his annuity being free from deduction. The payments of the first jointure and also of the covenanted annuity had fallen for several years into arrears, when a fund came into existence sufficient to discharge the arrears. Income tax upon it at the appropriate rate of 10*s.* in the pound had been paid by the trustees. It was contended for the first jointure and for the annuitant that the tax to be deducted from the amount representing each half-yearly payment should be at the standard rate for the financial year in which each respective payment first became due and payable according to the tenor of the relevant appointment or deed. It was further contended that the jointures were free from succession or estate duties and that, by giving that direction, the appointors had not gone beyond the permitted limit of £600 per annum :—

HELD : (i) on the proper construction of the Income Tax Act, 1918, All Schedules Rules, r. 19, as amended by the Finance Act, 1927, s. 39 (1) income tax ought to be deducted from the arrears payable at the standard rate in force for the year in which the jointure and the annuity in fact became due, and not at the rate existing at the date of actual payment.

(ii) by the appointment for payment " without any deduction " the jointures were effectively exonerated from any liability for succession and estate duties, and the appointors did not exceed the power conferred.

Re Smith-Bosanquet, Smith v. *Smith-Bosanquet* (12) applied.

[**EDITORIAL NOTE.** This is the first reported decision on the true operation of the Finance Act, 1927, s. 39, where an annual sum is paid in a year later than it is " payable " in the ordinary sense of the term. The problem is to determine the rate at which income tax is to be deducted, and it turns upon the meaning to be attributed to the words " becomes due " in that section. VAISEY, J., holds that they are to be construed in such a way that the person entitled to the annual payment should in regard to deduction of tax be placed in the same position as though the payment had been made on the very day on which it became due as a matter of right. On the second point involved, the exoneration of the jointures from death duties by reason of a direction in the deed of appointment for payment " without any deduction," the court holds with some hesitation, in view of earlier authorities, that the matter is covered by the principle of *Re Smith-Bosanquet* (12), and that the jointures are effectually exonerated.

AS TO YEARLY INTEREST PAID OUT OF PROFITS OR GAINS BROUGHT INTO CHARGE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 232-238, paras. 471-478 ; and FOR CASES, see DIGEST, Vol. 28, pp. 66-67, Nos. 340-350.

AS TO APPORTIONMENT OF ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 293-296, para. 309 ; and FOR CASES, see DIGEST, Vol. 21, pp. 40, 41, Nos. 255-260.)

Cases referred to :

(1) *Leigh* v. *Inland Revenue Comrs.*, [1928] 1 K.B. 73 ; Digest Supp. ; 96 L.J.K.B. 853 ; 137 L.T. 303 ; 11 Tax Cas. 590.

(2) *Lambe* v. *Inland Revenue Comrs.*, [1934] 1 K.B. 178 ; Digest Supp. ; 103 L.J.K.B. 69 ; 150 L.T. 190 ; 18 Tax Cas. 212.

(3) *Luipaard's Vlei Estate & Gold Mining Co., Ltd.* v. *Inland Revenue Comrs.*, [1930] 1 K.B. 593 ; Digest Supp. ; 99 L.J.K.B. 330 ; 142 L.T. 589 ; 15 Tax Cas. 573.

(4) *Champney's Executors* v. *Inland Revenue Comrs.*, (1934) 19 Tax Cas. 375 ; Digest Supp.

(5) *Allchin* v. *Coulthard*, [1942] 2 K.B. 228 ; [1942] 2 All E.R. 39 ; 111 L.J.K.B. 609 ; 167 L.T. 18 ; *on appeal* [1943] A.C. 607 ; [1943] 2 All E.R. 352 ; 169 L.T. 328.

(6) *Re Saunders, Saunders* v. *Gore*, [1898] 1 Ch. 17 ; 21 Digest 105, *775* ; 67 L.J.Ch. 55 ; 77 L.T. 450.

(7) *Re Egmont's* (*Earl*) *Settled Estates, Lefroy* v. *Egmont*, [1912] 1 Ch. 251 ; 21 Digest 105, *774* ; 81 L.J.Ch. 250 ; 106 L.T. 292.

(8) *Re Higgins, Day* v. *Turnell*, (1885) 31 Ch.D. 142 ; 21 Digest 112, *845* ; 55 L.J.Ch. 235 ; 54 L.T. 199.

(9) *Re Parker-Jervis, Salt* v. *Locker*, [1898] 2 Ch. 643 ; 21 Digest 41, *261* ; 67 L.J.Ch. 682 ; 79 L.T. 403.

(10) *Harvey* v. *Harvey* (1739) 9 Mod. Rep. 253 ; *sub nom. Hervey* v. *Hervey* (1739), 1 Atk. 561 ; 40 Digest 592, *1270*.

(11) *Londonderry* (*Lady*) v. *Wayne* (1763), Amb. 424 ; 40 Digest 593, *1286* ; 27 E.R. 284.

*(12) *Re Smith-Bosanquet, Smith* v. *Smith-Bosanquet*, [1940] Ch. 954; [1940] 3 All E.R. 519; Digest Supp.; 109 L.J.Ch. 440.

Summons taken out by the trustees of the will to determine the following questions: firstly, at what rate income tax should be deducted from the payments in discharge of the arrears out of a fund which had lately become available; whether at the rate in force when the payments should have been, but were not, made or whether at the rate current when income became available. Secondly, whether the two jointures were free from succession and estate duties, as directed by the appointors, or whether such direction exceeded their authority. The facts are sufficiently set out in the judgment of Vaisey, J.

G. D. Johnston for the Public Trustee.

H. Wynn-Parry, K.C., and *Donald Cohen* for the first jointress.

W. Hunt for the second jointress and annuitant.

Sir Norman Touche for the tenant for life.

A. C. Nesbitt for the infant entitled to remainder in tail male.

A. J. Belsham for the mortgagees.

Vaisey, J.: This case raises two questions of some difficulty. The following statement of the facts must precede my consideration of them. The Sebright family estates were settled by the will of Sir Egbert Cecil Saunders Sebright, who died on Apr. 1, 1897. Under that settlement the defendant, Sir Giles Edward Saunders Sebright, (to whom I will refer as "Sir Giles") is now the tenant for life in possession with an immediate remainder to his son, the infant defendant, Hugo Giles Edmund Sebright in tail male. There are two jointure rent-charges (I will call them "jointures") which rank in priority to Sir Giles' life estate; these were created by two appointments made in pursuance of a power for that purpose contained in the will. The amount in each case is £600 per annum. The first is in favour of the defendant Olive Emily Lady Sebright; the second in favour of the defendant Alice Marion Sebright. Only the first is at present payable, the second being in suspense until the first terminates. Sir Giles' life estate is charged, first with certain annual payments to the defendants, the Equity and Law Life Assurance Society, and secondly with an annual sum of £600 covenanted to be paid to the defendant Alice Marion Sebright during the period of the suspense of her jointure. The jointresses have postponed the payment of their respective jointures in favour of the Equity and Law Life Assurance Society. I will refer to the said annual sum as "the covenanted annuity."

Before proceeding further it will be convenient for me to state the general nature of the two questions which I have to decide. The first concerns the proper method of deduction in respect of income tax from payments which are now to be made in discharge of arrears of the first jointure (and also, I think, of arrears of the covenanted annuity) out of a sum which has lately become available for that purpose. The second of the questions is quite distinct; it asks whether by the force of the instruments creating them the jointures have been validly freed from succession and estate duties.

The terms of the power in the will under which the jointures were created is in a usual form as follows:

> It shall be lawful for each male person hereby made legal or equitable tenant for life of the said premises hereby demised either before or after he shall become entitled to the possession or receipt of the rents and profits of the same premises but subject and without prejudice to the limitations powers and charges having priority to the estate of the appointor at any time either before or after his marriage by any deed or deeds revocable or irrevocable or by will or codicil to appoint to any wife he may marry during the residue of the life of such wife if surviving the appointor or for any less period any yearly rent charge or rent charges by way of jointure not exceeding in the whole for the wife of any one appointor the yearly sum of £600 to be charged upon all or any of the hereditaments hereby devised and to be payable at such times and in such manner as the appointor shall direct with such powers and remedies for securing the same by distress and entry and receipt of the rents and profits of the same premises and by appointing or demising the premises so charged to any person or persons for any term of years upon trusts for securing the same rent charge or rent charges as the appointor shall think fit.

After providing that the power might be exercised as often as the person exercising it should marry and that any rent charge appointed under the power was not to be payable unless and until either the appointor should be or become entitled to the possession or to the receipt of the rents and profits of the premises or some issue of the appointor should or if in existence and of full age would be so entitled the will proceeds :

> Provided also that the said devised premises or any of them shall not under the power lastly hereinbefore contained be at any one time subject to the payment of yearly rent charges which in the whole shall be in excess of the annual sum of £600 but any rent charge or rent charges or any part of any rent charge which but for this proviso would have occasioned or formed such excess shall from time to time during the continuance of such excess not be raisable out of the premises and the several rent charges appointed are to have the like priority as the estates of the persons by whom they are appointed.

The first jointure was appointed by a Deed Poll dated July 13, 1906, under the hand and seal of Sir Guy Thomas Saunders Sebright (an uncle of Sir Giles, who died on Sept. 11, 1933) providing in effect that the defendant Olive Emily Lady Sebright should from and after such death receive during the residue of her life a yearly rent charge of £600 by way of jointure to be issuing out of all the hereditaments and premises subject to the limitations of the will and to be considered as accruing from day to day but to be paid without any deduction by equal half-yearly payments the first payment thereof to be made at the end of six calendar months after the time thereby appointed for the commencement of the said rent charge.

The second jointure was appointed by a Deed Poll dated Sept. 28, 1922, under the hand and seal of Arthur Edward Saunders Sebright (the father of Sir Giles) in similar and indeed identical terms so far as material but has up to the present time been in suspense owing to the fact that the first jointure amounts to the full maximum sum of £600 mentioned in the will.

The covenanted annuity arises under a deed dated May 15, 1929, and made between Sir Giles (whose life estate was then still in remainder) of the one part and the defendant Alice Marion Sebright of the other part whereby for certain considerations therein appearing Sir Giles covenanted that when his life estate fell into possession if for any reason the said defendant was not entitled to receive her jointure he would pay to her the sum of £600 per year by quarterly payments charged upon his life estate as therein mentioned. Nothing is said about these payments being free from deductions.

The payments of the first jointure and also of the covenanted annuity had for several years fallen considerably into arrears. There is now in hand a sum representing rents or other income of the settled estates. That sum is now available for discharging those arrears. Income tax upon it at the appropriate rate of 10*s.* in the pound has been paid or accounted for to the Revenue, which is, therefore, not interested in the present question, which is, as I have said, as to the proper rate or rates of tax to be deducted from the payments to be made in discharging the arrears. It is contended on behalf of Sir Giles that the proper rate must necessarily be the rate of the tax which has in fact been paid in respect of the sum out of which the discharge is to be effected, namely, 10*s.* in the pound. For the defendant Olive Emily Lady Sebright in relation to the first jointure and also (I think) for the defendant Alice Marion Sebright in relation to the covenanted annuity it is said that the tax to be deducted from the amount representing each half-yearly payment (or in the case of the covenanted annuity each quarterly payment) should be at the standard rate for the financial year in which that payment first became due and payable according to the tenor of the relevant appointment or deed ; in other words, that pre-war arrears ought to suffer deduction at the pre-war rates. The solution of this question, which to my mind is one of difficulty, appears to depend upon the proper interpretation of the Income Tax Act, 1918, All Schedules Rules, r. 19. That rule so far as material is as follows :

> Where any . . . annual payment . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such . . . annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the . . . annual payment, without distinguishing the same, and the person liable to make such payment . . . shall be entitled on making such payment to deduct and retain thereout a sum representing the amount of the tax thereon at [from this point the rule has been altered as I will presently mention] the rate or rates of tax in force during the period through which the said payment was accruing due.

The Finance Act, 1927, s. 39 (1) provided so far as material and in effect that for the words " the rate or rates of tax in force during the period through which the said payment was accruing due " in (among other provisions) r. 19 there must now be substituted the word " at the standard rate for the year in which the amount payable becomes due." The difference in tense between the expression " was accruing due " and " becomes due " is noticeable, but I am not now disposed to regard it as significant.

It is, however, upon the meaning to be attributed to those two words (" becomes due ") that the solution of this difficulty seems to me to depend. I cannot think that the words mean the same as " becomes payable," that is payable in fact as opposed to in right. I am disposed to think that either " became due " or " became or becomes due " would have been a more accurate expression than the one we have, but notwithstanding all the difficulties of so holding I have come to the conclusion that the effect of the rule in such a case as the present must be that the person entitled to the annual payment should in regard to deduction of tax be placed in the same position as though the payment had been made on the very day on which it became due. The person liable to make the payment may be in the position of having himself suffered a deduction at one rate while his own right of deduction and retention is at a different rate, that is to say the rate which ruled at the time when the belated payment ought to have been made. It seems to me that the alteration of the rule by the 1927 Act merely substituted for a rate arrived at by a day-to-day calculation, a fixed rate. For example, a half-yearly payment falling due on May 1 in a year in which the rate of tax had been raised as from the preceding Apr. 5 would under the revised rule be treated as wholly taxable at the new higher rate ; not at the lower rate to the Apr. 5, and at the higher rate only thereafter. The cases do not seem to be of much assistance, but that is probably my fault. I have been referred to *Leigh* v. *Inland Revenue Comrs.* (1) and *Lambe* v. *Inland Revenue Comrs.* (2). I have some difficulty in understanding the observations of LORD HANWORTH, M.R., at p. 609, in *Luipaard's Vlei Estate* v. *Inland Revenue Comrs.* (3). The point appears to be the one which was left open in *Champney's Executors* v. *Inland Revenue Comrs.* (4), in which ROMER, L.J., says, at p. 389 :

> We have not to determine what is the true operation of sect. 39 [that is of the 1927 Act] in cases where interest is paid in a year later than that in which it becomes payable in the ordinary sense of the word.

See also *Allchin* v. *Coulthard* (5).

If the rate of tax had been lowered instead of raised—if, for instance, the " available fund " had borne tax at 5*s.* while the "annual payment " would have been liable (had it been punctually paid) to tax at 10*s.*, it seems from the observation of the Lord Chancellor in *Allchin* v. *Coulthard* (5) that the payer's right of deduction would be limited to the lower rate of tax. Notwithstanding the various judicial expositions on the subject of r. 19, I confess that it remains to my mind not easy of comprehension. The view which I have formed appears to me to be more reasonable than any other and I propose to act upon it.

The other question is raised by para. 2 of the summons, and is whether the jointures are subject to or free from succession and estate duties. The direction contained in each deed of appointment for payment " without any deduction " would as a matter of construction exonerate the jointures from both these duties. As to succession duty, see *Re Saunders* (6), and *Re Egmont's Settled Estate* (7), *contra*, *Re Higgins* (8). As to estate duty see *Re Parker-Jervis* (9). There is, I think, no doubt at all of the intention of the appointors, but the question is whether they exceeded the power. Did they, that is to say, by reason of the direction, go beyond the permitted limit of £600 ? The contention that they did so is supported by some authorities of great weight : see *Hervey* v. *Hervey* (10), and *Londonderry* (*Lady*) v. *Wayne* (11), also DAVIDSON'S PRECEDENTS ON CONVEYANCING, Vol. 111, Pt. 2, p. 472 *et seq.* SUGDEN ON POWERS, 8th Edn., p. 704 *et seq.* I am, however, faced with a recent decision of BENNETT, J., namely, *Re Smith-Bosanquet* (12), which, after some hesitation, seems to me to cover the present case, and I shall follow it. It is true that there are differences between that case and this, and that the allocation of a particular part of an income is not the same thing as the creation of a jointure rent charge, but I cannot discover any difference between them in principle. At any rate as regards estate duty, the decision is one which I feel bound to follow. As regards succession duty, I thought at one time that this stood on a different footing as being a more direct imposition on the jointress as a "successor" and was, therefore, perhaps not so aptly described as a "deduction" as estate duty is, but on the whole I think I can make no distinction between the two. I will declare that the jointures have been effectually exonerated from both duties. That covers para. 2 of the summons.

This only leaves the question of costs. I agree with the argument that these questions really affect income rather than capital, but it would hardly be fair to impose them upon current income, and I cannot very well spread the burden over a number of years. On the whole I think it right to order that the costs of all parties as between solicitor and client shall be paid out of capital moneys.

Solicitors: *Fladgate & Co.* (for the Public Trustee); *J. N. Nabarro & Sons* (for the first jointress); *Burton, Yeates & Hart* (for the second jointress and annuitant); *Rooper & Whateley* (for the tenant for life, the infant entitled to remainder in tail male, and for the mortgagees).

[*Reported by* F. Guttmann, Esq., *Barrister-at-Law.*]

BRENTNALL & CLELAND, LTD. *v.* THE LONDON COUNTY COUNCIL.

[King's Bench Division (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **November 6, 1944.**]

Weights and Measures—Coal—Weight of sack—Carman delivering sacks of less weight than that represented—Delivery delegated by coal merchants to agents—Mens rea—Whether agents under control of coal merchants—Weights and Measures Act, 1889 (c. 21), *s.* 29 (2)*—Sale of Food* (*Weights and Measures*) *Act,* 1926 (*c.* 63), *s.* 12 (2).

Criminal Law—Quasi-criminal offences—Mens rea—Responsibility for act of agent—Weights and Measures Act, 1889 (*c.* 21), *s.* 29 (2)*—Sale of Food* (*Weights and Measures*) *Act,* 1926 (*c.* 63), *s.* 12 (2).

In accordance with a suggestion of the Ministry of Fuel and Power for the purpose of fuel economy, B. & C., Ltd., coal merchants, appointed another firm, H.C., Ltd., as their agents for delivering coal sold by themselves (B. & C., Ltd.) to some of their customers. They exercised no supervision over H.C., Ltd., either in loading the carts or delivery. A carman was found to be carrying for delivery sacks of less weight than that represented in the delivery note signed by B. & C., Ltd. B. & C., Ltd., were prosecuted and convicted under the Weights and Measures Act, 1889, s. 29 (2). It was contended on their behalf that (i) a finding of *mens rea* was necessary for conviction and (ii) they had a defence under the Sale of Food (Weights and Measures) Act, 1926, s. 12 (2), since the deficiency was due to the action of some person over whom they had no control:—

Held: (i) for a conviction under s. 29 (2) of the 1889 Act, no finding of *mens rea* was necessary.

(ii) B. & C., Ltd., were not entitled to the protection given by sect. 12 (2) of the 1926 Act, since H.C., Ltd., had been appointed by them as their agents and were, therefore under their control. Moreover, since the person responsible for the deficiency was not specified, it could not be said that that person was not under their control.

[**EDITORIAL NOTE.** It is here decided that a prosecution for delivery of short weight of coal under the Weights and Measures Act, 1889, belongs to that class of quasi-criminal proceedings in which no finding of *mens rea* is necessary, the intention of the legislature being to impose a penalty on the principal whether or not he is a party to the act of his agent. The defence based upon the Sale of Food (Weights and Measures) Act, 1926, s. 12 (2), fails, because under that section it is not necessary for physical control to be shown. There is sufficient control to deprive the party of the benefit of the section when, as here, the forbidden act is performed by agents duly appointed to carry the commodity which is deficient in weight.

As to Liability for Short Weight in Sale of Coal, see HALSBURY, Hailsham Edn., Vol. 33, pp. 689, 690, para. 1243; and for Cases, see DIGEST, Vol. 14, p. 41, Nos. 109, 110, and Vol. 44, p. 143, No. 110.

As to Responsibility of Principal for Acts of Agent in Quasi-criminal Offences, see HALSBURY, Hailsham Edn., Vol. 9, pp. 12, 13, para. 4; and for Cases, see DIGEST, Vol. 14, p. 40, No. 102, p. 41, Nos. 109, 110, and pp. 43-47, Nos. 124-151.]

Cases referred to:

*(1) *Mousell Brothers* v. *London and North Western Ry. Co.*, [1917] 2 K.B. 836; 14 Digest 44, *133*; 87 L.J.K.B. 82; 118 L.T. 25.

(2) *Pearks, Gunston & Tee, Ltd.* v. *Ward, Hennen* v. *Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 14 Digest 40, *102*; 71 L.J.K.B. 656; 87 L.T. 51.

(3) *R.* v. *Tyler & International Commercial Co., Ltd.*, [1891] 2 Q.B. 588; 14 Digest 30, *21*; 61 L.J.M.C. 38; 65 L.T. 662.

*(4) *Paul* v. *Hargreaves*, [1908] 2 K.B. 289; 14 Digest 35, *58*; 77 L.J.K.B. 535; 98 L.T. 751.

(5) *Twentyman* v. *John Hulbert, Ltd.* (1944), 170 L.T. 340.

Appeal by the respondent, the London County Council, by way of case stated from a decision of the County of London Quarter Sessions, allowing the appeal of the appellants, Brentnall & Cleland, Ltd., against a conviction under the Weights and Measures Act, 1889, s. 29 (2), on the ground that the appellants had a defence under the Sale of Food (Weights and Measures) Act, 1926, s. 12 (2). The facts are stated in the judgment of Viscount Caldecote, L.C.J.

The Sale of Food (Weights and Measures) Act, 1926, s. 12 (2) provides:

> In any proceedings under this Act in respect of an alleged deficiency of weight . . . if the defendant proves to the satisfaction of the court that such deficiency . . . was due to the action of some person over whom the defendant had no control, the defendant shall be discharged from the prosecution.

Sect. 15 (1) provides that this Act shall be construed as one with the Weights and Measures Acts, 1878-1926.

W. A. L. Raeburn for the appellants, the London County Council.

R. A. Robinson for the respondents, Brentnall & Cleland, Ltd.

Viscount Caldecote, L.C.J.: The appellants are a firm called Brentnall & Cleland, Ltd., who are coal factors and merchants. It appears from the case that in accordance with a suggestion made by the Ministry of Fuel and Power, the appellants, Brentnall & Cleland, entrusted the delivery of coal which they had sold to the firm of Herbert Clarke, Ltd. They might have adopted another method, i.e., instead of entrusting the delivery of coal to their own customers by another firm, they might have transferred that custom to that other firm wholly, so that Herbert Clarke, Ltd., would not be their agents to deliver their coal, but would be acting as principals to deliver their (i.e., Herbert Clarke's) own coal. The case goes on to find that the appellants never supervised or interfered with the process of loading the carts or of making delivery to their customers. It was found that a carman was carrying for delivery coal in sacks which were short in weight. He had, and he produced to the appropriate officer a consignment note signed by the appellants, containing a representation that one ton of anthracite was being delivered, whereas in fact the weight was deficient.

Two questions have been raised in this case upon the finding of the court of quarter sessions in allowing the appeal. One is as to what is said to be a necessary finding of *mens rea*—that is and was the contention of the appellants. Secondly, some question arises as to a finding by the court of quarter sessions which gave the appellants the protection, which is open to them in a case in which the facts justify the finding, afforded by the Sale of Food (Weights and Measures) Act, 1926, s. 12 (2).

We have had a great number of authorities cited to us. Some of them seem to me, with all respect to counsel, not to assist the court in the decision which we have to give upon this statute. I think it may be convenient to refer to what has been said by very high authority as to the duty of the court in cases such as this—I am dealing now with the question of *mens rea*. Viscount Reading, L.C.J., in *Mousell Brothers* v. *London and North Western Ry.* (1), quoted, at p. 843, a passage from the judgment of Channell, J., in *Pearks, Gunston & Tee* v. *Ward* (2), where he said, at p. 11:

> . . . there are exceptions to this rule in the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine . . .

Then towards the end of his judgment VISCOUNT READING, L.C.J., says, at p. 844:

> *Prima facie* . . . a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object.

Mousell Brothers v. *London and North Western Ry.* (1) is very often referred to for the purpose of a judgment given by ATKIN, J., in which he said, at p. 845:

> I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

ATKIN, J., then quotes a judgment of BOWEN, L.J., in *R.* v. *Tyler* (3). *Mousell Brothers* v. *London and North Western Ry.* (1) is, I think, a proper guide to the court in connection with this question as to whether *mens rea* is or is not a necessary element in the offence.

I turn to the Weights and Measures Act, 1889. Sect. 29 (1) does not say that any person who does a certain thing shall be guilty of an offence, but it gives power to an inspector of weights and measures to make proper tests of vehicles carrying coal for sale with a view to seeing what the weight of their load is. Then subsect. (2) provides:

> If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds.

A great many cases have been cited in connection with one point which does not arise in this case; that is the question as to what must be proved where the person in charge of the vehicle is prosecuted. It has been said in those cases that a person in that position ought not to be pursued and harried if he was nothing more than an innocent carter. *Paul* v. *Hargreaves* (4) is much relied upon. LORD ALVERSTONE, L.C.J., there said, at p. 292:

> . . . in my opinion it would be straining the meaning of the enactment to hold that an innocent carter, taking out sacks of coal for delivery in entire ignorance that the sacks contain less than the weight represented by his employer, is liable to be convicted and fined. That would make the mere fact of taking out the coal a criminal offence.

It is not necessary to say anything more about that case than to read that passage.

Sect. 29 (2) makes a person against whom the necessary facts are proved liable to a fine not exceeding £5. In this case the firm of Brentnall & Cleland, Ltd., having appointed agents to act for them, must, I think, be deemed to accept responsibility for the acts of their agents and, that being so, it seems to me almost beside the point to enquire whether or not Brentnall & Cleland, Ltd. (the appellants to the court of quarter sessions) had a guilty mind; in other words, whether *mens rea* has been shown. Messrs. Brentnall & Cleland, Ltd., appointed their agents in the circumstances which I have stated. Whether they themselves had a guilty mind or not seems to me irrelevant, because there is no suggestion made against them in this case, but I think that the court of quarter sessions came to a perfectly correct decision when they said that in their opinion *mens rea* was not a necessary element in the offence. The appellants might have taken another course, which I have mentioned. They did not take that course. If an offence is shown to have been committed under sect. 29, I think it is sufficient to show that there was a representation—which of course is clearly proved in this case—and that, as the coal which was being carried was deficient in weight, whether or not Messrs. Brentnall & Cleland, Ltd., the appellants, themselves were aware of the fact seems to me to have been an unnecessary matter for consideration. The form of the statute, looked at in the way in which ATKIN, J., as he then was, thought it ought to be looked at, satisfies me upon this point.

The other question is whether the appellants, Brentnall & Cleland, Ltd., have been rightly held to have the protection given by the Sale of Food (Weights and Measures) Act, 1926, s. 12 (2). I would like to say that the fact that this protection is given by the Weights and Measures Act, 1926, seems to confirm the view which I have formed on the *mens rea* point; but the question which arises on this subsection is as to whether the court of quarter sessions were correct in their finding that the appellants had established that the deficiency was due to the action of some person over whom they had no control. I do not propose to go at length into the authorities which have been cited on this question. I think it is sufficient to say that the appellants, Brentnall & Cleland, Ltd., having appointed their agents, had somebody who was under their control—their agents. It is not necessary to show that there must be something approaching a physical control, or even a control in reference to the performance of every single act in the course of delivering this coal. They have appointed their agents, and I think the appellants ought not to have been found by the court of quarter sessions to have been in the position to shelter under the provisions of sect. 12 (2) of the Act. The form in which the court of quarter sessions have recorded their opinion seems to me to be open to some doubt. They say that the deficiency was due to the action of some person over whom the appellants had no control, but they do not specify who the person is as to whom they found that there was no control. But I do not base my judgment in this matter on that point; I prefer to say that the agents, Herbert Clarke, Ltd., were persons over whom they had control as being their agents, and that on that ground the appellants should be held to be liable. I, therefore, think this appeal from the decision of the court of quarter sessions should succeed on the latter point.

HUMPHREYS, J.: I entirely agree with the decision of my Lord and the reasons given for that decision. I only want to add a word myself because a decision to which I was a party (*Twentyman* v. *John Hulbert, Ltd.* (5)) has been cited on behalf of the appellants, Brentnall & Cleland, Ltd., as a decision of this court that the proof of *mens rea* is a necessary matter in proving an offence under the Weights and Measures Act, 1889, s. 29. The first observation I would like to make is that in my opinion these short reports of decisions which have not, like the LAW REPORTS, been put before the judge who has given the decision, in order that he may say whether the report does correctly describe what he regards as his judgment, ought to be accepted with a good deal of care. That observation is fortified by the fact that I find that of this case there are two reports which are diametrically opposite in a not unimportant matter. If I am correctly reported as saying that on a charge under this section it is necessary that there should be some evidence to prove that the defendants knew that the representation as to the weight was false, I can only say, first of all, that that was an *obiter dictum*, and, secondly, that I think it was wrong. I have no recollection of saying anything of the sort, and I cannot conceive myself that I said it, for I was speaking of a section the language of which is as plain as plain can be, and that is the Weights and Measures Act, 1889, s. 29. But there is not a word to be found, there has not even been an argument addressed to the court to suggest that anything could be found in the terms of that Act, to justify the suggestion that no person can be guilty of an offence against sect. 29 unless he has what is called a *mens rea*, and I find that, according to the report of that case to which I have referred, the Sale of Food (Weights and Measures) Act, 1926, was not even referred to.

Dealing with the Weights and Measures Act, 1889, s. 29, the language is so plain that, as I say, I cannot think that I was guilty of the obvious mistake of saying that this offence requires proof of *mens rea*. The offence is this. Having stated that an inspector of weights and measures may stop a vehicle carrying coal for sale or delivery, and may test the weight, it then says that, if it appears that any sack so weighed is of less weight than that represented by the seller, the person selling shall be liable to a fine not exceeding £5. I cannot imagine that any judge, even myself, would be guilty of saying that that required that the seller should know and be proved to have known that the sack did not in fact weigh the amount which it was represented as weighing, that is to say, that the coalman's sack did not represent that amount. The whole of the argument in this court has been that it is not because of anything in that Act, but because of the later Act of 1926, that the appellants have got a defence here which they have established. I entirely agree with my Lord that the answer to that is that the appellants, upon whom clearly is the onus of showing that they have that defence, have not proved it. There are many defences to be found in sect. 12 of the 1926 Act, but the one which is said to apply to this case is, if the defendant proves that the deficiency was due to the action of some person over whom the defendant had no control, he shall be discharged from the prosecution. The appellants have not indicated any person as being the person to whose action the deficiency was due, and, therefore, they have necessarily failed to prove that that person was a person who was not under the control of the appellants; and if the argument is, as at times it has appeared to be, that because in this case the persons who were the employers of the actual carman who was in charge of the coal were not the appellants, but were a company who were the agents of the appellants, and, therefore, the appellants were not responsible for their actions, I think the short answer is that a person is responsible for the actions of his agent within the scope of his authority, just as much as he is responsible for the acts of his servants, and, indeed, a servant is merely a specific case of an agent of a particular sort. I agree that the appeal should be allowed.

Birkett, J.: I agree.

Appeal allowed and the original conviction restored, with costs.

Solicitors: *J. R. Howard Roberts* for the appellants, the London County Council; *Wilfred Firth & Co.*, for the respondents, Brentnall & Cleland, Ltd.

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. Banque des Marchands de Moscou *v.* Kindersley. [1950] 2 All E.R. 105.

Dictum of Cohen, J., at p. 560, *considered.* Banque des Marchands de Moscou *v.* Kindersley. [1950] 2 All E.R. 549.

Re TOVARISHESTVO MANUFACTUR LIUDVIG RABENEK.

[Chancery Division (Cohen, J.), **June 12, 1944.**]

Companies—Winding up—Unregistered foreign company—Company dissolved by Russian law—Business formerly carried on in England—No principal place of business—Periodic visits by directors—Assets in England—Jurisdiction to wind up—Companies Act, 1929 (*c.* 23), *ss.* 337, 338.

A textile company was incorporated under Russian law in 1879 and had its principal place of business in Moscow. From 1889 to 1914 the company obtained an increasing proportion of its supplies of machinery and raw materials in England, and from 1905 onwards until 1914 one of the directors came to England each year, in order to maintain contact with the company's suppliers, to place orders, to enter into contracts and generally to conduct the company's affairs here. It was the practice of the director on such visits to stay at a Manchester hotel which was used as the regular place of business for the company and to which correspondence was addressed. The company kept banking accounts in London. The visits of the directors discontinued after 1914, but it was the intention of the company to resume their business here immediately after the end of the war. The company was dissolved under Russian decrees in 1917, and ceased to exist as a legal entity in Russia. The petitioners were creditors of the company alleged to have certain assets in England, and by their petition sought an order for the winding up of the company as an unregistered company under the Companies Act, 1929, ss. 337, 338. It was contended that the company could not be wound up under sect. 338, since it never had an "established place of business" in the jurisdiction within the meaning of the Companies Act, 1929, s. 343, which refers to "companies incorporated outside Great Britain which . . . establish a place of business within Great Britain":—

Held: (i) it was sufficient for the purposes of the Companies Act, 1929, s. 338, for the company to have a place, not an "established" place of business in England.

(ii) there was jurisdiction of the court to wind up the company, since it had, through their directors, carried on business in England for a substantial period and at a fixed place.

Lord Advocate v. *Huron and Erie Loan and Savings Co.* (4) and *Dunlop Pneumatic Tyre Co.* v. *A.G. fur Motor und Motorfahrzeugbau* (5) *applied.*

Re Lloyd Generale Italiano (6) *explained and distinguished.*

[**EDITORIAL NOTE.** This case considers the question of when a company incorporated outside Great Britain can be said to "carry on business" within Great Britain for the purpose of the Companies Act, 1929, s. 338. It is argued that this is equivalent to "establishing a place of business" within sect. 343, but the court rejects this argument, adopting the comments of the LORD PRESIDENT in *Lord Advocate* v. *Huron & Erie Loan and Savings Co.* (4), where an attempt was made to construe "establishing a place of business" in sect. 343, in the light of decisions on carrying on business in other statutes. The objection to this applies *a fortiori* to a change of language in the same statute. The court holds that sect. 338 requires a place of business but not an "established" place of business, and finds this satisfied by regular visits of directors of the foreign company to the same hotel, where business of the company was transacted for substantial periods annually.

AS TO WINDING UP OF FOREIGN COMPANIES, see HALSBURY, Hailsham Edn., Vol. 5, pp. 870, 871, para. 1513-1515; and FOR CASES, see DIGEST, Vol. 10 pp. 1206-1208, Nos. 8535-8553.]

Cases referred to:

(1) *Re Russian and English Bank*, [1932] 1 Ch. 663; Digest Supp.; 101 L.J.Ch. 226; 147 L.T. 57.

(2) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; Digest Supp.; 102 L.J.Ch. 309; 149 L.T. 65.

(3) *Sirdar Gurdyal Singh* v. *Farikdote Rajah*, [1894] A.C. 670; 42 Digest 688, *1032*.

*(4) *Lord Advocate* v. *Huron and Erie Loan and Savings Co.*, [1911] S.C. 612; 10 Digest 1198, *m.*

*(5) *Dunlop Pneumatic Tyre Co.* v. *Act. fur Motor und Motorfahrzeugbau vorm Cudell & Co.*, [1902] 1 K.B. 342; 13 Digest 430, *1532*; 71 L.J.K.B. 284; 86 L.T. 472.

*(6) *Re Lloyd Generale Italiano* (1885), 29 Ch.D. 219; 13 Digest 1208, *8549*; 54 L.J.Ch. 748.

(7) *The Lalandia*, [1933] P. 56; Digest Supp.; 102 L.J.P. 11; 148 L.T. 97.

(8) *Russian and English Bank and Florance Montefiore Guedalla* v. *Baring Bros. & Co., Ltd.*, [1936] A.C. 405; [1936] 1 All E.R. 505; Digest Supp.; 105 L.J.Ch. 174; 154 L.T. 602.

(9) *Industrial and Commercial Co. Vladimir Alexeew*, not reported.

PETITION by the personal representatives of Liudvig Rabenek, a former director of the company, for the winding up of Tovarishestvo Manufactur Liudvig Rabenek, a Russian company, dissolved under Russian decrees in 1917. Rabenek was a creditor of the company. The petition was opposed by the Crown which claimed the assets of the company alleged to be held by a London bank as *bona vacantia*. The facts and arguments are fully set out in the judgment of COHEN, J.

John Pennycuick for the petitioners.

Hon. H. L. Parker for the Crown.

COHEN, J.: The company was established under the laws of Russia in the year 1879. Its principal objects were the spinning, weaving, dyeing, printing and finishing of cotton. Its principal place of business was Moscow. According to the allegations in the petition, para. 4:

> The company formerly carried on business in England as hereinafter mentioned. From the year 1889 until the year 1914 the company obtained an increasing proportion of its supplies of machinery and raw materials from England. In and after the year 1905 one or more of the directors of the company came to England for a period varying from a few weeks to 5 months in each year. The object of these visits was to maintain contact with the company's suppliers, to place orders and enter into contracts and generally to conduct the affairs of the company here. It was the practice of the directors upon such visits to stay at the Midland Hotel, Manchester which was used as the regular place of business for the company during their stay and at which interviews were held and to which correspondence was addressed. The company kept banking accounts in London, at William Brandt & Sons and Henry Schroeder & Co. The directors visiting England had full authority to enter into contracts on behalf of the company and to operate the said banking accounts. Numerous orders were in fact given and contracts entered into upon such visits.

These allegations are supported by an affidavit of the petitioner, Leo Rabenek, a former director of the company. He was the director who came to England on behalf of the company in the years 1910 and 1912 and had planned to come in 1914. On each occasion he brought with him supplies of the company's notepaper for use during his visit and he gives a list of the manufacturers and brokers with whom the company dealt. From this list I should gather that the contracts which the company made in England were for the purchase of machinery and cotton for use in their business in Russia and not contracts for sale of their manufactured goods, but even so the purchases were of a character essential to the conduct of the company's business. The visits of directors to England were perforce discontinued on the outbreak of war in 1914, but it is stated that it was the intention of the company that they should be resumed immediately after the end of the war.

The company became subject to the decrees enacted in Russia after the revolution. The effect of them on the company is stated in para. 8 of Mr. Wolff's affidavit as follows:

> Whilst the decrees referred to have not destroyed the legal entity of the Liudwig Rabenek Manufacturing Company and have not dissolved it the said decrees have annulled its shares in Russia, have deprived the shareholders there of any remedy in Soviet law and have deprived the company in Russia of all its properties and assets, the State having taken over all its enterprises so that the company has ceased to carry on business under Soviet law.

Wolff apparently suggests that the entity continues to exist in some theoretical form. I confess that this theory is too metaphysical for my comprehension. I should have thought that the effect was correctly stated in the petition, para. 6, where it is stated that at some date in or after the year 1917 the company became extinct and ceased to exist as a legal entity under the laws of Russia, but be that as it may it is common ground that the company ceased by Nov. 29, 1920, to carry on business and the case was argued on that footing.

The petitioners are the legal personal representatives of Liudwig Rabenek, who is alleged to be a creditor of the company for (*a*) a rouble debt consisting partly of salary and partly of loans the sterling equivalent of which is stated to be £1,562, and (*b*) a sum of £87 16*s.* 6*d.* alleged to be payable in sterling in London.

The company is alleged to have assets in England consisting of a claim to a sum of £34,257 6*s.* 11*d.* stated to be held by the Banque des Merchands de Moscou (Koupetschesky), now in liquidation as trustee for the company. I was told by counsel for the petitioners that the liquidator of that company is anxious that I should make an order for the winding up of the company in order that its claim against the assets of the bank may be decided as a test case.

The petition was originally presented against the company described by a translation of its Russian name. Pursuant to the direction of Uthwatt, J., the petition was amended by describing the company by its correct Russian name and re-served. Notice was given to the Treasury Solicitor as representing the Crown who, if the company has been dissolved, would or might be entitled to the assets of the company as *bona vacantia.* This direction was given in order that the court might have argument as to its jurisdiction to make the order for which the petitioners ask. As a result I have had the advantage of a full argument by counsel for the petitioners and counsel for the Treasury Solicitor.

The petitioners seek to wind up the company as an unregistered company under Part X of the Companies Act, 1929. There is no doubt that it is or was an "unregistered company" within the meaning of sect. 337. That being so the petitioners allege that I have jurisdiction to wind it up under sect. 338, which so far as material is as follows:

> (1) Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions: (*a*) If an unregistered company has a principal place of business situate in Northern Ireland, it shall not be wound up under this Part of this Act unless it has a principal place of business situate in England or Scotland or in both England and Scotland; (*b*) an unregistered company shall, for the purposes of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in England or Scotland, according as its principal place of business is situate in England or Scotland, or if it has a principal place of business situate in both countries, to be

> registered in both countries and the principal place of business situate in that part of Great Britain in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company.

Sub-para. (*d*) is :

> The circumstances in which an unregistered company may be wound up are as follows : (i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs . . .

A Subsect. (2) provides :

> Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

B I pause there just to mention that subsect. (2) is a new provision first introduced by the Companies Act, 1928, and is made obligatory under the Companies Act, 1929.

Counsel for the petitioners says, and I think correctly, that to bring the case within the section he has to establish (i) that the company formerly carried on business in England, (ii) it has been dissolved or ceased to carry on business in England (iii) that it has assets within the jurisdiction and (iv) that the petitioners C have a claim, not necessarily a valid claim, but a claim that is not on the face of the petition demurrable, against the company. I will dispose first of the last two points. The alleged asset is not admitted by the Russian Bank but I have no evidence to suggest that it is not a genuine claim, and if this were the only point, I should have no hesitation in making the order.

The petitioners' claim falls into two parts : the rouble debt has apparently been extinguished by the Russian decree of Mar. 4, 1939, but this would not, D I think, affect the sterling debt ; and although that may be a disputed debt and the evidence in support of it is rather shadowy, I do not think that the general rule that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by a company applies to the case of a petition against a Russian company which has been subjected to the decrees to which I have referred since an action in this country to establish E the debt would be impossible. In reaching this conclusion I am supported by the decisions of BENNETT, J., in the case of *Russian and English Bank* (1), and MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (2).

The second point of counsel for the petitioners can be readily disposed of as counsel are agreed that if the company ever carried on business in England it had ceased to do so long before the presentation of the petition.

The case then boils down to the single issue, did the company ever carry on F business in England ? I must, of course, approach this question from the standpoint that sect. 338 of the Act, in asserting jurisdiction to wind up a foreign company which has been dissolved or ceased to carry on business in England, is going beyond the general principle of jurisdiction which is, to quote the words of LORD SELBORNE in *Sirdar Gurdyal* v. *Rajah of Farikdote* (3), at p. 683 :

> . . . that the plaintiff must sue in the court to which the defendant is subject at the time of suit (*actor sequitur forum rei*) ; which is rightly stated by SIR ROBERT G PHILLIMORE (INTERNATIONAL LAW, Vol. 4, s. 891) to " lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur.* Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it ; but it does not follow them after they have withdrawn from it, and when they are living in another independent country.

H I must be careful, therefore, not to place a wider interpretation on the section than the context justifies.

Counsel for the respondent invites me to hold that upon its true construction the section requires that the company must have had an established place of business in the jurisdiction, that is that the company must have had an office of its own in this country of which it was either the tenant or which could, in the light of the surrounding circumstances, properly have been regarded as its permanent office. In other words, he says that a company which has been dissolved or ceased to carry on business in this country cannot be wound up under sect. 338 (1) unless it has established a place of business within Great Britain within the meaning of sect. 343. I am unable to accept this argument. I respectfully agree with the observations of the Lord President in *Lord Advocate* v. *Huron and Erie Loan and Savings Co.* (4), who said at p. 616, that :

> . . . when the legislature selected the phrase " establishes a place of business " it means something other than " carrying on business."

The Lord President was commenting on an attempt to induce him to construe the phrase " establishes a place of business " in the Companies Act, 1929, s. 343, in the light of the decisions on " carrying on business " in other statutes. His observations seem to me to apply with still greater force to a change of language in the same statute. Where the legislature intended to make the possession of an established place of business a condition of the application of any particular provision, it has said so ; for example, in Part XI where the possession of such a place of business is the essential condition of the application of that part of the Act to a company incorporated outside Great Britain and in sect. 145 defining which companies incorporated outside Great Britain must comply with the requirements of the Act as regards catalogues, etc. The legislature did not use this phrase in sect. 338. Had it been intended to confine the application of that section to companies with an established place of business it would have been easy so to provide by adding a subsection to the effect that " no unregistered company shall be wound up under this Act unless it has or has had an established place of business in Great Britain." The legislature did not think fit so to provide, and I do not think I should be justified in reading any such limitation into the section.

I think, however, that the language of sect. 338 (1) itself involves some limitation on the very general words " carrying on business." These words as pointed out by the Lord President in the case cited would cover such activities as touting for loans, and for this purpose employing agents in this country ; but the provisions of sect. 338 (1) in my opinion make it clear that an unregistered company cannot be wound up under Part X of the Act unless it has a place, not an established place, of business in Great Britain, for unless it has such a place of business, no question can arise as to whether the place of business in England or the place of business in Scotland is the principal place of business.

What then is the test whether the company has a place of business in this country ? This must, I think, vary according to the nature of the company's business, but I derive some assistance from cases which have been decided under Order 9, r. 8, where the question has been whether the company on which a writ was alleged to have been served was resident within the jurisdiction at the time of service. In cases of this class there is no question of the courts of this country seeking to enforce jurisdiction over persons not resident here ; the relevancy of the cases is that the test of residence has been held to be whether the company was carrying on business in this country at the time of service. It will be sufficient if I refer to *Dunlop Pneumatic Tyre Co.* v. *A.G. fur Motor und Motorfahrzeugbau vorm, Cudell & Co.* (5). It is said in the first paragraph of the headnote to this case, at p. 342 :

> The defendants, a foreign corporation, who were manufacturers of motor-cars abroad, hired a " stand " at the Crystal Palace for the exhibition of articles of their manufacture at a cycle show, and exhibited at the show, which lasted for nine days, among other articles, a motor-car fitted with tyres, which were alleged by the plaintiffs to be an infringement of their patent. The defendants' " stand " was in charge of a person employed by them as their representative, whose duty it was to explain the working of the articles exhibited, and to take orders for and press the sale of the defendants' goods.

The writ was served on that representative or his assistant and the Court of Appeal held that the service was valid, as the defendants were carrying on business so as to be resident within the jurisdiction. Romer, L.J., stated the law at p. 349, in these words :

> The result of the authorities appears to me to be that, if for a substantial period of time business is carried on by a foreign corporation at a fixed place of business in this country, through some person, who there carries on the corporation's business as their representative and not merely his own independent business, then for that period the company must be considered as resident within the jurisdiction for the purpose of service of a writ.

I think that is a reasonable test to apply under sect. 338 (1). It is not necessary for me to consider whether, applying it, I should have reached the same conclusion as the Court of Appeal reached on the facts of that case, but I feel no doubt that applying this test to the facts of the present case the company was carrying on business within the jurisdiction within sect. 338 (1). For 9 consecutive years directors of this company visited England and bought machinery and raw cotton the acquisition of which was essential to the transaction of their business; their visits each year extended over a period of anything from a few weeks to 5 months; they stayed on each occasion at the Midland Hotel, Manchester and transacted business therefrom. I think I should be defeating the object of the legislature if I were not to hold that the Midland Hotel was, during the periods in question, the place of business in England of the company and that they carried on business therefrom.

What was the object of the legislature? Clearly, I think, to ensure that if a company carried on business in this country, incurring, as it must do, liabilities to creditors in this country, its assets in this country should be available for its creditors even though it was dissolved in its country of origin or ceased to carry on business here. If this be the object, it would clearly be defeated if a company could send members of its board of directors regularly to this country who carry on a substantial volume of business and then escape the consequences of so doing on the ground that it had not leased premises but had transacted its business from an hotel.

It was argued that the conclusion at which I have arrived is inconsistent with the only reported decision on the subject *Re Lloyd Generale Italiano* (6). The headnote is in these terms:

> There is no jurisdiction under the Companies Act, 1862, to wind up a foreign company which has carried on business in England by means of agents, but which has no branch office of its own there.

This headnote certainly supports the argument but it does not follow or sufficiently state the facts. It appears that the company had carried on business in Italy and also in England, the business there being transacted by means of agents. The company had no branch office of its own in England. There were a number of creditors in England but the company had no assets there. On these facts PEARSON, J., dismissed the petition saying, at p. 220:

> In my opinion I have no jurisdiction to make a winding up order, however convenient it might be that such an order should be made. I should be making an order for which there is no precedent and no authority. This company is established at Genoa, and it carries on business there. It has agents in England, and nothing but agents, and it has carried on business here through those agents, in the same way as foreign merchants often carry on business in this country by means of agents. The jurisdiction to wind up a company is a purely statutory one under the Companies Acts. If I were to adopt the argument of counsel for the petitioners, I must come to the conclusion that, in every case in which a foreign company has had any dealings in this country—whether the company is established in China, or Japan, or Australia—there is jurisdiction to order it to be wound up. I am decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in England with, so to speak, a residence of their own—a branch office—in this country. In the cases which have been cited of orders made to wind up foreign companies, the companies had an office in England, but that is not so in the present case.

As to the correctness of the decision there can, I think, be no doubt, for the company had no assets here and there was nothing to administer. If and so far as it purports to suggest that an established place of business is a necessary ingredient in founding jurisdiction, I venture respectfully to differ; but I do not think this is the proper reading of the judgment. The statement of facts indicates that the company was transacting business, not by but through agents in this country. If so, there would clearly be no jurisdiction. See *Re Lalandia* (7). I do not think the observations of PEARSON, J., were intended to cover a case such as the present, where the company, instead of employing agents in England, sends members of its board of directors to England each year for 9 consecutive years to transact a substantial business by or through agents, and I cannot resist the conclusion that on the facts of the present case this company has carried on business in this country within sect. 338 (1).

I have so far considered only sect. 338 (1). I do not think subsect. (2) affects the position. I respectfully agree with the observations of BENNETT, J., in

Re Russian and English Bank, Ltd. (1), at p. 669, that this subsection was not intended to alter the law as it had been decided to be under the Acts of 1862 and 1908. I should add that this view is further supported by the observations of LORD ATKIN, in *Russian and English Bank* (8), at p. 424 ([1936] 1 All E.R. at p. 516), where his Lordship said:

> I for myself come to the conclusion that the 1928 Act, s. 91 was introduced as sect. 338 (2), into the 1929 Act for the removing of doubts and to make it clear that the words " if the company is dissolved " were meant to apply to an incorporated company dissolved according to the law of its constitution, and not intended to give a new enabling power only applicable to a company which should cease to carry on business after the passing of the Act.

In the result I must make the order for which the petitioners ask, but in case it should finally be held that the company was dissolved and that, as a result, its assets are vested in the Crown by way of *bona vacantia*, I must follow the precedent set by EVE, J., in the *Alexeew* case (9) and insert in the order words saving the rights (if any) of the Crown to the assets as *bona vacantia.*

Order accordingly.

Solicitors: *Denton, Hall & Burgin* (for the petitioners); *The Treasury Solicitor* (for the respondent).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

R. *v.* SIR BERTRAND WATSON, *Ex parte* BRETHERTON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ.), **November 7, 1944.**]

Magistrates—Summary jurisdiction—Application for case stated—Refusal—Point of law involved previously decided by judgment in Chancery Division—Judgment not final and binding—Duty to state a case—Mandamus—Summary Jurisdiction Act, 1879 (*c.* 49), *s.* 33 (1)—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (*c.* 63), *ss.* 8, 19.

The applicant laid an information against the respondents alleging that certain competitions known as Football Pools, organised and advertised by the respondents, the United Kingdom Totalisator Co., Ltd., constituted an offence under the Betting and Lotteries Act, 1934. The magistrate dismissed the charge and refused an application to state a special case on the ground that the point of law involved was already determined by a judgment in the Chancery Division, given in 1935, in an action against the respondent company on substantially the same facts, and that this judgment was binding upon him; there was, therefore, no point of law on which properly to state a case. The applicant, relying on the provisions of the Summary Jurisdiction Act, 1879, s. 33 (1) contended that the question whether or not the judgment in the Chancery Division was a right decision in the matter before the magistrate, constituted a point of law on which a special case should have been stated:—

HELD: since the judgment relied upon by the magistrate was not final in the sense that it could not be questioned by the Court of Appeal, the magistrate was wrong in holding that he was precluded thereby from stating a case on the point of law involved.

R. v. *Shiel* (2) *distinguished.*

[**EDITORIAL NOTE.** The effect of this decision is that a magistrate must state a case if required to do so, when he has decided against a party in accordance with a previous decision, if that decision was not final in the sense that it could not be the subject of an appeal. The correctness or otherwise of such a decision is itself a point of law upon which a case can be stated and the decision in *R.* v. *Shiel* (2) is to be distinguished on the ground that there the magistrate held himself bound by the decision of a final court of appeal in a criminal cause or matter, and properly refused to state a case.

AS TO THE DUTY OF JUSTICES TO STATE A CASE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 723-731, paras. 1253-1263; and FOR CASES, see DIGEST, Vol. 33, pp. 409, 410, Nos. 1186-1193.]

Cases referred to :

(1) *Elderton* v. *The United Kingdom Totalisator Company, Ltd.*, [1935] Ch. 373 ; Digest Supp. ; 104 L.J.Ch. 105 ; 152 L.T. 549.

*(2) *R.* v. *Shiel* (1900), 19 Cox C.C. 507 ; 33 Digest 409, *1193* ; 82 L.T. 587.

(3) *Carritt* v. *Godson*, [1899] 2 Q.B. 193 ; 34 Digest 589, *96* ; 68 L.J.Q.B. 799 ; 80 L.T. 771.

MOTION for order of *mandamus* directed to the Chief Magistrate at Bow Street police court to state a case. The facts and arguments are sufficiently set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

Valentine Holmes for the applicant.

Gilbert Beyfus, K.C., and *R. E. Manningham-Buller* for the respondent.

VISCOUNT CALDECOTE, L.C.J. : This is a case where an order of *mandamus* is asked for, directed to the Chief Magistrate to state a case. I think the order must go.

The appellant laid an information against the respondents for an offence against a provision contained in the Betting and Lotteries Act, 1934. The magistrate dismissed the case, holding that he was bound by a decision of EVE, J., in what is called a friendly action. That decision was given by EVE, J., in 1935. The party aggrieved by the decision to dismiss the charge, alleged, as he was entitled to do, that the decision was erroneous in point of law, and asked for a special case to be stated by the magistrate. The magistrate replied that the application was merely frivolous—frivolous, that is to say, in a statutory sense—and, therefore, refused to state a case ; and the reasons for his refusal were that the decision of EVE, J., in *Elderton* v. *The United Kingdom Totalisator Co., Ltd.* (1) (i.e., the friendly action) was a case which could not be materially distinguished from the case before him.

> I considered, therefore, [he says], that I was bound by the aforesaid decision of EVE, J. [He goes on to say], I considered also the case of *R.* v. *Shiel and Others* (2). Being of opinion that I was bound to follow the decision of EVE, J., and having regard to the decision of *R.* v. *Shiel* (2), aforesaid, I was further of opinion that the law on the matter was already decided as far as I was concerned, and that therefore there was no point of law on which I could properly state a case.

There can be no doubt, I think, that the magistrate was entitled to hold that the decision of EVE, J., was a decision which he ought to follow. That was the view which he took.

The headnote in the case of *R.* v. *Shiel* (2) is to this effect :

> A magistrate ought not to be ordered to state a case, upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the Queen's Bench Division upon the same point from which there was no right of appeal.

In my opinion, that headnote correctly reproduces the decision to be found in the judgment of SMITH, L.J., in the Court of Appeal. It is necessary to observe what the decision of the Court of Appeal in that case was. The London County Council had taken certain proceedings in a case called *Carritt* v. *Godson* (3), under a provision of the London Building Act, 1894, and that case had been decided adversely to the view suggested to be the right one by the London County Council. A little while afterwards, in the next year, the London County Council took the proceedings which were the subject matter of the case in *R.* v. *Shiel* (2). They based the charge in that case on a different section of the London Building Act, and the Court of Appeal (SMITH, L.J.), said, at p. 509 :

> The London County Council, with full knowledge of the law upon the point, as decided by the Queen's Bench Division in *Carritt* v. *Godson* (3), and well knowing that the decision of the Queen's Bench Division in that case was binding upon the magistrate, took proceedings before the magistrate.

And the Lord Justice said that that was an application the like of which he had never heard before. The final Court of Appeal in a criminal cause or matter had decided, on the particular facts of the case, that the law was what he held it to be, and the applicants in the second case, of *R.* v. *Shiel* (2) came along and said, " We wish to question that decision (the decision of the final court) and we want you to order the magistrate to state a case in order to see whether that decision was a right one or not." I am not surprised that SMITH, L.J., said that that was an application the like of which nobody in court had ever heard before.

The case of *R.* v. *Shiel* (2) seems to me to be quite different from the present case. Here the decision which has been held to be like the decision of *Carritt* v. *Godson* (3), was a decision by a judge of great authority in the Chancery Division, in a case in which he was not the final court of appeal. In this present case, if the magistrate states a case, there is an obvious point of law, as it seems to me which is open to the party aggrieved by the magistrate's decision, and that is whether or not the judgment of Eve, J., was a right decision in the matter before him ; and also, no doubt, the question is open as to whether that decision is binding upon this court or not. The party aggrieved by the magistrate's decision asks for an opportunity of bringing that decision before this court, which is the last and final court of appeal in a criminal cause or matter ; and I am bound to say that I cannot see how it can be said that a judgment of a judge who is not the final court of appeal, and which is alleged to be wrong, is, notwithstanding that allegation, so final that it cannot even be questioned in this court, which is the final court of appeal. On that ground I think that the magistrate was wrong in holding that the application was frivolous, and wrong in holding that on the basis of the decision in *R.* v. *Shiel* (2), he is precluded from stating a case on a point of law which was suggested by the party aggrieved.

I think that the order of *mandamus* should be made to the magistrate, directing him to state a case on the point of law on which the decision is alleged to be erroneous.

Humphreys, J. : I agree, and I have nothing to add.

Birkett, J. : I agree. The only thing I would like to add in this matter is this. Bretherton was the informant in this case, and after the summons had been taken out and the hearing had taken place, he was dissatisfied and aggrieved with the decision. In those circumstances the Act of Parliament says that :

> Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

That procedure has been followed by Bretherton in this case, because he was aggrieved ; and he is met, as I understand it, by an answer which is two-fold. It is said, you cannot follow that procedure, you are precluded altogether from following that procedure, because it so happens that some years ago there was a decision, not of the Court of Queen's Bench, but of a judge of the High Court, which purports to decide the facts which are at issue in this case ; and furthermore, reliance is placed upon the authority of *R.* v. *Shiel* (2) in the Court of Appeal.

I desire to add nothing to what my Lord has said about that authority. It is confined precisely to the decision which is there made, and which is recorded accurately in the headnote. But it must be observed that Smith, L.J., in giving judgment in the Court of Appeal, said this, at p. 510 :

> If the decision in *Carritt* v. *Godson* (3) is to be challenged by the London County Council, they must not commence proceedings, at any rate before a magistrate ; for if they do, they will be met by the difficulty with which they are met in the present case.

And that was that there was a decision of the Court of Queen's Bench which was decisive upon the point. There is no such authority in this case, and in my opinion Bretherton was perfectly entitled to come under the provisions of this section and to ask for this order of *mandamus*, in order that he should have his rights under the section. I agree, therefore, with the order which my Lord has made.

Appeal allowed with costs against the respondents.

Solicitors : *Pritchard, Englefield & Co.*, agents for *March, Pearson & Green*, Manchester (for the applicant) ; *Ashby, Rogers & Fournier* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

WOODWARD AND ANOTHER *v.* MAYOR OF HASTINGS AND OTHERS.

[COURT OF APPEAL (Scott, MacKinnon and du Parcq, L.JJ.), **November 27, 1944.**]

Public Authorities—Limitation of actions—What bodies protected—Governors of grammar school—Pupil slipping on worn step on snowy day—Infancy of plaintiff—Endowed Schools Act, 1869 (*c.* 56), *s.* 45—*Public Authorities Protection Act,* 1893 (*c.* 61), *s.* 1—*Limitation Act,* 1939 (*c.* 21), *s.* 21.

Education—Grammar school—Negligence of cleaner—Liability—Governors—Public authority—Limitation of time—Infancy—Endowed Schools Act, 1869 (*c.* 56), *s.* 45—*Public Authorities Protection Act,* 1893 (*c.* 61), *s.* 1—*Limitation Act,* 1939 (*c.* 21), *s.* 21.

The infant plaintiff was a pupil at the Hastings Grammar School. The school was an endowed secondary school under the terms of a scheme sealed by the Board of Education in 1910 under the Endowed Schools Acts, 1869-1889. The governing body consisted of 14 governors of whom eight were appointed by a public authority; the Mayor of Hastings and the chairman of the Education Committee of the borough were *ex-officio* governors. Owing to the war the school was removed in July, 1940, to St. Albans and accommodated on premises belonging to the Congregational Church. In January, 1942, the steps to the door of the school were covered with frozen snow over which was a layer of loose snow. The caretaker, who usually did the cleaning for the Congregational Church, swept the loose snow but did not remove the frozen snow. No ashes or sand were placed on the frozen snow and no warning of its danger given. The steps were also badly worn and sloped steeply down. While going out on the instructions of his teacher, the infant plaintiff slipped on the steps and sustained severe injuries. The plaintiff claimed damages against the defendants for negligence. The defendants pleaded that the claim was barred by the Limitation Act, 1939, s. 21:—

HELD: (i) although the governors of the school were administering a charitable trust in the public interest, that did not make them a public authority, or their work a "public duty" within the meaning of the Limitation Act, 1939, s. 21. The fact that grants might have been made to the school out of public funds could not convert the recipients into a public authority.

Greenwood v. *Atherton* (1) *distinguished.*

(ii) Even if the caretaker who did the cleaning of the school premises was not the servant of the defendants, or was an independent contractor, the defendants were liable for negligence on the ground that the caretaker had been entrusted with the performance of a duty incumbent upon the defendants.

Pickard v. *Smith* (5) *and Wilkinson* v. *Rea, Ltd.* (6) *applied.*

Decision of HALLETT, J. ([1944] 2 All E.R. 119) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal here reverses the court below on the limitation point. They hold that governors of an endowed secondary school are not a public authority, although they make grants out of public funds, and the argument from *Greenwood* v. *Atherton* (1) is distinguished on the ground that the managers of a non-provided voluntary school are a statutory body. The governors are held liable for the negligence of the caretaker, even if she was an independent contractor, since she was performing a duty incumbent on the governors in regard to work which was not of such a technical nature as would involve the considerations arising in *Haseldine* v. *C. A. Daw & Son* (7).

AS TO PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-300, paras. 609-621; and FOR CASES, see DIGEST, Vol. 38, pp. 101-112, Nos. 725-795.]

Cases referred to:

*(1) *Greenwood* v. *Atherton,* [1939] 1 K.B. 388; [1938] 4 All E.R. 686; Digest Supp.; 108 L.J.K.B. 165; 160 L.T. 37.

(2) *Griffiths* v. *Smith,* [1941] A.C. 170; [1941] 1 All E.R. 66; 110 L.J.K.B. 156; 164 L.T. 386.

(3) *Ching* v. *Surrey County Council,* [1910] 1 K.B. 736; 19 Digest 556, *17*; 79 L.J.K.B. 481; 102 L.T. 414.

(4) *Morris* v. *Carnarvon County Council*, [1910] 1 K.B. 840; 19 Digest 556, *18*; 79 L.J.K.B. 670; 102 L.T. 524.
*(5) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 36 Digest 51, *312*; 4 L.T. 470.
*(6) *Wilkinson* v. *Rea, Ltd.*, [1941] 1 K.B. 688; [1941] 2 All E.R. 50; 110 L.J.K.B. 389; 165 L.T. 156.
*(7) *Haseldine* v. *C. A. Daw & Son, Ltd.*, [1941] 2 K.B. 343; [1941] 3 All E.R. 156; 111 L.J.K.B. 45; 165 L.T. 185.

APPEAL by the plaintiffs from a decision of HALLETT, J., dated May 2, 1944, and reported [1944] 2 All E.R. 119, where the facts are fully set out. Notwithstanding that the defendants were negligent in their duty it was held that the plaintiff's claim for damages was barred under the Limitation Act, 1939, s. 21. The defendants cross-appealed against the finding of negligence.

J. P. Eddy, K.C., and *S. Lincoln* for the appellants.

F. W. Beney, K.C., and *Gilbert Dare* for the respondents.

DU PARCQ, L.J. [delivering the judgment of the court]: Without recapitulating the facts, we propose to state our reasons for deciding that this appeal should be allowed, and the cross-appeal dismissed. With great respect to the judge, we think that he was wrong in his opinion that the two decisions to which he referred, namely, *Greenwood* v. *Atherton* (1) in this court, and *Griffiths* v. *Smith* (2), in the House of Lords, supported his conclusion that the present action was barred by the Limitation Act. The managers of a non-provided voluntary school undoubtedly act "in pursuance of an Act of Parliament" and of "a public duty," in the course of carrying on the management of that school. The governors of the school with which we are here concerned were in a very different position. They were administering a charitable trust, and the fact that it is in the public interest that they should do so does not make them a public authority, or their work a "public duty" within the Limitation Act, 1939, s. 21. It is in our opinion irrelevant for this purpose that persons holding official positions are *ex-officio* governors, and the fact that grants may in certain circumstances be made to the school out of public funds cannot convert the recipients into a public authority. The judge has, we think, misunderstood the words used by GODDARD, L.J. (as he then was) in *Greenwood* v. *Atherton* (1) as to the receipt of a grant from public funds. GODDARD, L.J., was dealing with the argument that the managers were not compellable to continue the performance of their duty, and was pointing out that while they continued to receive public funds (and so to act as managers under the statute) it could not be said that they were still performing it. Read in their context the words do not support the judge's view.

If the judge had not held that the plaintiffs' claims were barred by the Limitation Act, he would have given judgment in their favour. The defendants have submitted that he would have been wrong so to decide. The judge held that it was the duty of the defendants "to make the premises as safe for use by the scholars, in the ordinary way in which scholars may be expected to use them, as reasonable care and skill can make them." If that was indeed their duty, there is no doubt, we think, that they failed in it. It was submitted, however, that such a liability is imposed only where there is a contractual obligation, and that the statement of claim alleged no contract. The cause of action, it was said, was laid in tort alone. The judge found authority for the view which he took of the defendants' duty in the two cases of *Ching* v. *Surrey County Council* (3) and *Morris* v. *Carnarvon County Council* (4). We did not hear counsel for the plaintiffs on this point, but we think that it might have been difficult for him to persuade us that those decisions were applicable to the present case. They both appear to us to have turned on the fact that the defendants then before the court were under a statutory duty to maintain the school premises in a proper condition, and there was no such statutory duty in the present case. It was rightly conceded, however, that the defendants were at least under the obligation which the law imposes on an invitor in respect of an invitee, and, notwithstanding the forcible presentation of the case by counsel for the defendants, we are of opinion that, even on this view of the defendants' duty, they ought to be held liable in the circumstances of this case. Their duty to the invitee was to use reasonable care to prevent damage which they knew or ought to have known.

Two questions of fact arise. Did they use the reasonable care required? Ought they to have known of the danger which in fact existed? These questions of fact must be answered in the light of certain legal principles, and of all the circumstances of the case. The defendants were governors of the school and it was inevitable that they should act through agents. They were bound to entrust to others the cleaning of the school premises, their upkeep from day to day, and the immediate supervision (so far as that was deemed necessary) of the work done in connection with that cleaning and upkeep. The careful performance of these delegated duties was necessary in order that the obligation to take reasonable care to prevent damage to invitees might be fulfilled. Cleaning must be done, and in some circumstances it has to be done carefully if danger is to be avoided. When a step, truly described by the judge as "potentially dangerous," is covered with snow, the person entrusted with the duty of cleaning it must be careful not to leave it in a dangerous condition. If anyone had been appointed to supervise the work of the cleaner it is his duty to see that the work is carefully done. If no one has been appointed to supervise that work, then the invitors must be taken to have left the performance of the duty, for good or ill, to the cleaner. On the facts of this case we have no doubt that the woman, who was admittedly negligent, had been entrusted by the defendants with the necessary work of cleaning the premises which they occupied. They had secured, by contract, the benefit of her services for that purpose. It may be, though we think it improbable, that the defendants expected the headmaster to supervise her work. If they did, he does not appear to have done what was expected of him. If they did not, then they left the care of the premises to the cleaner. It is idle to suggest that she was not authorised to brush snow from the step. It was clearly part of her duty to do so, and no one in her position would have been likely to omit that task. Negligence having been established against her, it follows that the defendants are responsible for their agent's failure to take reasonable care for the safety of their invitee. It does not avail them to say that they did not know of the danger. Of course the defendants, who were many miles away, did not and could not know of it. Their agent, however, knew or ought to have known of it, whether we regard the headmaster as their agent to supervise the operation of cleaning, or the cleaner as their sole agent in the matter.

It is said by counsel for the defendants that the cleaner was not the servant of the defendants but of the diaconate of the Congregational Church, whose premises were occupied by the defendants. We do not accept this as the true view of her position. On the contrary we think that it is a fair inference from the evidence that, at the material time, she was subject to the control of the defendants. We will, however, assume that the defendants are right on this point for the purpose of examining their argument. If, said junior counsel for the defendants, an occupier's servant negligently cleans his floor, so that an invitee slips on it, the occupier is liable. But if (he said) the occupier has borrowed, or obtained by contract the services of, another man's servant, and that servant is guilty of similar negligence with similar consequences, then the occupier is not liable, though the servant's master may be. In our opinion, this is not the law. Even if the cleaner was not temporarily under the control of the defendants, and thus for the time being their servant, they are liable on the ground that they delegated to her the performance of the duty which was incumbent on them. If she is to be treated as if she were an independent contractor, they are liable for her negligence on the ground stated by Williams, J., at p. 480, in *Pickard* v. *Smith* (5) and by Luxmoore, L.J., at p. 702, in *Wilkinson* v. *Rea, Ltd.* (6), namely that the "contractor" was entrusted with the performance of a duty incumbent upon her employers, and neglected its fulfilment.

On the assumption that the cleaner or the diaconate of the church were in the position of independent contractors, counsel for the defendants sought to rely on the decision of this court in *Haseldine* v. *C. A. Daw & Son, Ltd.* (7). He relied on that case as authority for the proposition that an occupier is always absolved from responsibility to his invitee if he has entrusted work, the careful performance of which is necessary to their safety, to some competent person. That decision is no authority for so sweeping a proposition. What was there held is summed up in the following passage from the judgment of Scott, L.J., at p. 356:

> The invitor is bound to take that kind of care which a reasonably prudent man in his place would take—neither more nor less. The landlord of a block of flats, as occupier of the lifts, does not profess as such to be either an electrical or, as in this case, a hydraulic engineer. Having no technical skill he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not do so, he would, indeed, be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift . . . In the present case the landlord was ignorant of the mechanics of his hydraulic lifts and it was his duty to choose a good expert, to trust him, and then to be guided by his advice. A

Such considerations as there influenced the court are not relevant to the present case. The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands.

For these reasons we are of opinion that the judge would have been right to give judgment for the plaintiffs, as he would have done had he not come to B an erroneous conclusion with regard to the plea of the statute. The appeal accordingly succeeds. The judgment for the defendants will be set aside, and a new trial ordered as to damages. The plaintiffs will have the costs of the hearing before HALLETT, J., and of the appeal.

Appeal allowed with costs. Cross-appeal dismissed. Order for new trial as to damages. Leave to appeal to the House of Lords refused. C

Solicitors: *F. Bernard Smith* (for the appellants); *Gardiner & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

D

HULLAND *v.* WILLIAM SAUNDERS & SON.

[COURT OF APPEAL (Lord Greene, M.R., MacKinnon and du Parcq, L.JJ.), **November 17, 1944.**]

Emergency Legislation—Conditions of employment—Building trade—Rates of wages settled by collective bargaining—Failure to pay recognised rate—Agreement to pay recognised rate in future—Right of workman to recover past wages at recognised rate—Matter not referred to National Arbitration Tribunal—No implied term in contract of service—Defence (General) Regulations, 1939 (*S.R. & O.,* 1939, *No.* 927 *as amended*), *reg.* 58AA—*Conditions of Employment and National Arbitration Order,* 1940 (*S.R. & O.,* 1940, *No.* 1305), *arts.* 1, 2, 5, 7. E

Statutes—Construction—Enforcement—Non-observance of "recognised terms and conditions"—Private remedies. F

By the Defence (General) Regulations, 1939, reg. 58AA the Minister of Labour and National Service was given power to make provisions by order for the prevention of trade disputes. The Conditions of Employment and National Arbitration Order, 1940, made in pursuance of the powers given, provided by Part III, art. 5 (1) that where in any trade or industry G in any district terms and conditions of employment had been settled by negotiation between associations of employers and of workmen, all employers in the district were bound to observe such recognised terms and conditions and were precluded from arranging less favourable terms and rates of wages. Disputes under the Order were to be referred by Part I, arts. 2 (5) and 5 (4) to the National Arbitration Tribunal, and from the date of its decision or award a term was to be implied in the contract of service H that the rates of wages were in accordance with the decision or award. From July, 1940, to August, 1942, the respondent was employed as a mason by the appellants who were builders at South Molton, Devonshire. He was paid wages according to the scale then being paid by the appellants to other employees of the same grade. His wages were, however, at a lower rate than that fixed by the regional joint committee of the National Joint Council for the Building Industry. As a result of steps taken by the National Federation of Building Trade Operatives, without, however, referring the matter to the National Arbitration Tribunal, the appellants were compelled as from September, 1942, to pay the recognised rates of wages. In these circumstances the respondents brought an action against the appellants to recover the balance of his past wages at the recognised rates as money due and owing, or, alternatively, as damages for breach of statutory duty. He contended that since the Order created a duty or obligation to pay money, an action would lie for its recovery, and he relied particularly on the wording of art. 5 (1), " all employers . . . shall observe the recognised terms and conditions " which created a statutory duty for the breach of which the appellants were liable to be sued by any workman affected by it. The appellants contended that, on the true construction of the Order, no action would lie under it for wages except where by its express provisions, a term was to be implied in the contract of service that a certain rate of wages was to be paid :—

HELD : (i) the employer's duty to " observe the recognised terms and conditions " could by the wording of the Order only be determined by the National Arbitration Tribunal, since it was the only tribunal on which jurisdiction to decide the question was expressly conferred.

(ii) on the true construction of the Order, the workman's right to sue for wages did not arise independently of any implied term which only a decision or an award by the National Arbitration Tribunal under art. 2 (5), or art. 5 (4) could bring into existence.

[**EDITORIAL NOTE.** This case is of considerable interest to the building trade. It is held here on the construction of the Conditions of Employment and National Arbitration Order, 1940, that there is no right to sue for wages apart from an implied term to pay a recognised rate, and this term can only arise in consequence of a decision or award of the National Arbitration Tribunal, which alone can determine the employer's duty to observe the recognised terms and conditions. The implied term is to be incorporated from the date of the award, or from an earlier date if fixed by the tribunal and there is no right to recover arrears for a period anterior to that date according to the quantum fixed by the award.

AS TO THE DEFENCE (GENERAL) REGULATIONS, 1939, REG. 58 AA, AND THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940, see HALSBURY'S STATUTES, Vol. 33, pp. 659, 734-738.

AS TO ENFORCEMENT OF STATUTES BY PRIVATE REMEDIES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 554, 555, paras. 745-747 ; and FOR CASES, see DIGEST, Vol. 42, pp. 757-760, Nos. 1833-1858.]

Cases referred to :

*(1) *Shepherd* v. *Hills* (1855), 11 Exch. 55 ; 42 Digest 758, *1846* ; 25 L.J.Ex. 6.

(2) *Gutsell* v. *Reeve*, [1936] 1 K.B. 272 ; Digest Supp. ; 105 L.J.K.B. 213 ; 154 L.T. 1.

APPEAL by the employers from a decision of Humphreys, J., at the Southampton Assizes, dated Dec. 15, 1943. The action was brought by the plaintiff workman for £103 15*s.* 0*d.*, as money due and owing as wages from July, 1940, to August, 1942, or, alternatively as damages for breach of statutory duty imposed on the defendant employers by the Conditions of Employment and National Arbitration Order, 1940, art. 5 (1). The relevant facts and arguments are set out in the judgment of the court, delivered by DU PARCQ, L.J.

F. A. Sellers, K.C., and *H. M. Pratt* for the appellants, defendants below.

J. W. Morris, K.C., and *N. R. Fox-Andrews* for the respondent, plaintiff below.

DU PARCQ, L.J. [delivering the judgment of the court] : The plaintiff's claim in this case was founded on the proposition that, if he could satisfy the court that his employer had failed to comply with the Conditions of Employment and National Arbitration Order, 1940, art. 5 (1), he would be entitled under the order to judgment for an amount representing the wages which his employer ought to have, and had not, paid to him. It was one of the defendants' contentions that, on the true construction of the Order, no action would lie under it for wages at the suit of a workman except where, by its express provisions, a term is to be implied in the contract of service that a certain rate of wages is to be paid.

The point was disposed of shortly by HUMPHREYS, J., in these words :

In my view this legislation, though in the form of a Defence Regulation, is so clearly intended to benefit the operative by ensuring to him a minimum wage per hour that a breach of it ought to be construed as giving him the right to sue for his unpaid wages as well as subjecting the erring employer to a penalty. I am of opinion, therefore, that whether the claim is for money due and owing, or for damages for breach of statutory duty, the plaintiff is entitled to recover in law if he succeeds upon the facts.

The plaintiff relies on the general proposition stated by PARKE, B., in *Shepherd* v. *Hills* (1), at p. 67 ;

> There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary.

This proposition is unquestionably correct, if its final words are understood as expressing the reservation that an action will not be held to lie for the recovery of such a sum when the enactment, read as a whole, manifests a contrary intention. It is thus necessary to look closely at the language of the Order, and to consider the words on which the plaintiff relies in association with their context.

The Order was made by the Minister in pursuance of Defence (General) Regulation, reg. 58AA, " with a view to preventing work being interrupted by trade disputes." Part I of the Order makes provision for establishing a tribunal for the settlement of trade disputes, Part II for prohibiting strikes and lock-outs, Part III :

> . . . for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions.

The power to deal with each of these matters is conferred on the Minister by the Regulation s. 1 (*a*) (*b*) and (*c*) respectively.

The plaintiff founds his claim on the words of the Order, Part III, art. 5 (1) : " all employers . . . shall observe the recognised terms and conditions." In our opinion, the argument put forward on his behalf, which the judge accepted, gave too little attention to the remaining provisions of art. 5, in particular paras. (3) and (4) of that article. The article must be read in the light of the words which we have quoted from reg. 58AA (1) (*c*), to which Part III of the Order is referable. The terms and conditions of employment are to be " determined in accordance with the Order." Part I of the Order which is referable to reg. 58AA (1) (*a*) has enacted (by art. 2 (5)) that it shall be an implied term of a contract of employment to which an agreement, decision or award, made under art. I, relates, that the rate of wages to be paid shall be in accordance with the agreement, decision or award. By Part III, art. 5, para. (4), provision is made for the determination of any question that may arise :

> . . . as to the nature, scope or effect of the recognised terms and conditions in any trade or industry in any district or as to whether an employer is observing the recognised terms and conditions or is observing terms and conditions which are not less favourable than the recognised terms and conditions.

This question (under art. 5 (3)) may be reported to the Minister by an organisation of employers or a trade union, and by him referred to the National Arbitration Tribunal. Here again, as in the case of an agreement, decision or award under Part I, a term is to be implied in contracts of employment governed by the award of the tribunal. The implication of such a term will necessarily give the workman a right under his contract to the wages fixed by the tribunal.

In spite of the persuasive argument addressed to us on behalf of the plaintiff, we are satisfied that to accept it would be to ignore, or to render in large part nugatory, the carefully framed provisions of these paragraphs of art. 5. When the Order is viewed as a whole, it is, we think, manifest that the provisions by which terms are to be implied in contracts of employment are essential to its scheme. Their principal, if not their only, object must be to give the workman a contractual right, and so a right to sue. If he had such a right, apart from these provisions, there would hardly be any need for them, and there would certainly be no need for the careful provision which in fact we find as to the date from which the implied term is to be incorporated in the contract. It must in all cases be so incorporated at least from the date of the award. So much is mandatory, but power is given to the tribunal to make it operative from an earlier date, subject to the limitation that this is not to be a date earlier than that on which the question to which the award relates first arose. It would appear that by the joint operation of art. 5 (3) and (2) (1) this latter date is one to be fixed by the Minister. All this is meaningless, unless the tribunal is being entrusted, and entrusted to the exclusion of all other tribunals, with what is in effect the power of deciding from what date (within the prescribed limits) the workman is to be entitled to sue his employers for wages at the rate which the award is ordering him to pay. It is said that the general words of art. 5 (1) create a statutory duty, and that from the moment when the employer is in breach of that duty he is liable to be sued by any workman affected by it. If the workman's right to sue arises in this way independently of any implied term which an award may bring into existence, it would seem that, in the event of a reference to the National Arbitration Tribunal under art. 5 (3), neither a direction given under art. 5 (4), nor the fact that the tribunal designedly abstained from giving any direction under that paragraph, would prevent the workman from successfully suing under art. 5 (1) for arrears of wages in respect of a period anterior to any date fixed by the tribunal, or to the date of the award if the tribunal fixed no date. On this view (for which counsel for the plaintiff did not hesitate to contend) any individual workman might await a reference to the National Arbitration Tribunal and then, if the award were given against the employer, lawfully demand payment from the employer of arrears of pay according to the quantum of wages fixed by the award, without regard to the date from which the implied term began to be operative, and subject only (as to time) to the Statutes of Limitation. The elaborate provisions introduced for the protection of the employer would thus be rendered nugatory. Although he might have acted in good faith, honestly believing that the terms and conditions which he observed were no less favourable than those in force, or, it may be, believing that, on the true construction of the Order, no terms and conditions could properly be held to be " in force " in his district, he might be exposed to a multitude of actions in which the court would be bound to order him to pay sums greatly exceeding any amount which, in the considered judgment of the National Arbitration Tribunal, he ought justly to be called upon to pay.

Other remarkable consequences would follow the adoption of the plaintiff's contention. If a workman is entitled to sue for his wages under art. 5 (1), although there has been no award by the National Arbitration Tribunal, then it must follow that the employer will be entitled to defend himself (as indeed the defendant in the present case has sought to defend himself) by showing that the terms and conditions which he observes are not less favourable than the recognised terms and conditions. This is a question partly of fact and partly of opinion, about which, in some cases, not all judges, whether of the High Court or of county courts, and certainly not all juries, could reasonably be expected to come to the same conclusion, so that many conflicting decisions might be given. Moreover it might easily happen, if the plaintiff is right, that while proceedings were on foot against an employer at the suit of a workman, the National Arbitration Tribunal was contemporaneously engaged in exercising its jurisdiction under paras. 3 and 4. If the court in which the employer was being sued, and the tribunal, arrived concurrently, as they well might, at different and irreconcilable decisions, the remarkable result might follow that the workman would obtain a judgment for an amount larger than that which a term now lawfully (and possibly retrospectively) to be implied in his contract entitled him to demand. The confusion to which the suggested construction would inevitably lead is in itself an argument against its adoption.

There is a further objection to the plaintiff's claim. When once a question has arisen (and, as we will assume, has been raised *bona fide*) under para. 3, the only tribunal on which jurisdiction to decide it is expressly conferred by the Order is the National Arbitration Tribunal. Until the question has been decided by that body, the employers and workmen concerned cannot be sure how it is to be answered, and until such a decision has been given it is difficult to see how the employer's duty to " observe the recognised terms and conditions " can arise. Were the Order to be read as meaning that an employer must be held to have failed in that duty if, on his being sued by an employee, a judge or jury decide this question adversely to him, the Order would seem to be inconsistent with the regulation which (as we have pointed out) empowers the Minister to make provisions :

> . . . for requiring employers to observe such terms and conditions of employment

as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions.

It would then appear that the Minister had exceeded his authority, and, if there be any ambiguity in the Order, we are bound to give to it that meaning which is consistent with its being a proper exercise of the Minister's powers.

We would add these further observations. The Order is contemplating, at least primarily, not separate agreements made between individuals, but terms arrived at after negotiations between associations of employers and of workmen. We apprehend that the National Arbitration Tribunal may properly regard such collective bargains (if we may so term them) as a whole when they compare their terms and conditions with the terms and conditions which a particular employer is observing. A purely hypothetical instance will illustrate this. Let it be supposed that the terms and conditions in force in a district provide for the payment of a certain sum per hour, and that an employer who does not observe those terms pays his workmen at piece work rates. If it were found that he was paying in the aggregate larger sums to his workpeople than he would pay under the recognised terms and conditions, we apprehend that it would be open to the tribunal to find that he was observing terms and conditions not less favourable than those "recognised," even though a few individuals among his workmen might be worse off than they would be under the "recognised terms and conditions." But let it be supposed that, in a given case of this character, the tribunal gave its decision against the employer. It may well be thought an unjust result, that the employer in such a case should be liable to an action for "arrears of wages" at the suit of one of the less successful of his workmen. Again, it may happen that an employer, though paying a lower rate of wages than the "recognised terms" provide for, is in a position to argue that in other respects the terms and conditions which he has observed are more favourable to the workmen than the recognised terms and conditions. In a doubtful case the National Arbitration Tribunal may eventually decide that the recognised terms and conditions are on the whole more favourable than those observed by the employer, but in such a case grave injustice might be done if a court were compelled to order, retrospectively, that the employer should pay the difference between the two rates over a long period during which the question had not even been raised.

It was said on the plaintiff's behalf that, if his contention were to be rejected, a workman would have no remedy against a contumacious employer who, without any colour of right, insisted on paying wages at a rate admittedly below the legal minimum. The argument is that no question would then arise under art. 5 (3), so that the National Arbitration Tribunal would never have jurisdiction. In our opinion this contention lacks substance. The hypothetical employer, if he did not even pretend to be observing the law, would be liable to prosecution under reg. 92, and if he persisted in wrong-doing he would have to look forward, since he would then be guilty of a continuing offence, either to paying a long series of heavy fines or to almost continuous imprisonment, or to both. The Minister may have thought that these penalties would sufficiently deter such a hypothetical (and, we suspect, wholly imaginary) employer of labour from continuing his defiance for any long period. It may be objected, however, that the punishment of the employer will give little satisfaction to the workman, who will naturally desire not retributive justice for his master but money for himself. The Minister may well have thought, however, that it was unnecessary to make any further provision than he has done for the enforcement of recognised terms and conditions. The workman may himself be rebellious, in the sense that, not being a trade unionist, he has been content to take wages about the sufficiency of which he and his employer were agreed. In such a case it is at least arguable that justice does not demand that he should be given the right for which the plaintiff contends. If, on the other hand, the rights of trade unionists are involved, either directly or indirectly, a trade dispute will almost certainly arise, and the Minister has ample power under Part I of the Order to see that it is properly disposed of, with the result that art. 2 (5) will come into play for the protection of workmen and employers alike. In most cases of the class which we are considering, there will almost certainly be some question at issue which can be referred under art. 5 (3), and when the whole structure and tenor of the Order are considered it is not, we think, surprising to find that it is left to associations of employers, on the one hand, and of workmen on the other, rather than to individuals, to invoke the interventions of the Minister.

We do not think that much help can be obtained by looking at other enactments regulating wages, though they may perhaps usefully be compared and contrasted with the one now in question. Those to which we were referred are different in material respects from the Order which we are considering. The Trade Boards Act, 1909, avoids any agreement for the payment of wages in contravention of the Act. So do the Coal Mines (Minimum Wage) Act, 1912, and the Agricultural Wages (Regulation) Act, 1924. The effect of this avoidance is that the contract must, as Lord Wright, M.R., observed in *Gutsell* v. *Reeve* (2), at p. 283:

> . . . be, as it were, reconstructed by striking out the rate of wages, where it is lower than it ought to be, and by inserting the proper rate of wages in accordance with the statute.

This Order is quite differently framed. It does not expressly avoid any contract. It provides for the insertion of an implied term in the contract of employment as does the Coal Mines (Minimum Wage) Act, 1912, but it does so, as we have shown, only *sub modo*, after the prescribed conditions precedent have been fulfilled. It is further to be remarked that the Order contains no provision giving power to justices to order payment of back wages, and has no words such as are found in the Trade Board Act, 1909, and the Agricultural Wages (Regulation) Act, 1924, saving the workman's right to recover wages by civil proceedings.

For these reasons we are of opinion that the plaintiff's claim fails. The appeal is allowed. The judgment and order of Humphreys, J., will be set aside, and the plaintiff's claim dismissed with costs. The plaintiff must pay the defendants' costs of the appeal.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Burges, Ware & Scammell*, Bristol (for the appellants, defendants below); *W. H. Thompson* (for the respondent, plaintiff below).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

BONHAM *v.* THE ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE CO., LTD.

[King's Bench Division (Atkinson, J.), **November 3, 1944.**]

Insurance—Motor insurance—Passenger in private car—Voluntary contribution towards expenses—Policy not covering use for hiring—Road Traffic Act, 1930 (*c.* 43), *ss.* 35, 36, 38.

The claimant owned a car insured by the respondents. By the terms of the policy the insurers agreed, *inter alia*, to indemnify the claimant, in the event of an accident, against all sums, including costs and expenses which the claimant should become legally liable to pay in respect of the death or bodily injury of any person, but excluding cover if the car was used for hiring. The claimant carried regularly three passengers to and from his work and two of them regularly paid him in return for their carriage amounts equivalent to the cost of railway fares between the two places. On Jan. 28, 1941, the claimant met with an accident as a result of which one of the passengers was killed. In a subsequent action brought by the administrator of the estate of the deceased, judgment was entered against the claimant for £2,015 15*s.* 6*d.* and costs. The claimant claimed indemnity in respect of that judgment. It was found as a fact that the passengers had voluntarily offered him the money and he had accepted it, and that, if the passengers had not paid him anything, the claimant would still have carried them. It was further found that all the expenses for and in respect of the car had been borne by the claimant and that he used his car to travel to and from his work independently of any question of carrying passengers. It was contended on behalf of the insurers that at the time of the accident the claimant was not insured, since he had used his car for hiring in the sense that passengers were carried for hire or reward :—

Held : (i) in the absence of an agreement between the parties and a legal obligation to pay, the character of the carriage was purely voluntary. The passengers were, therefore, not carried for hire or reward within the meaning of the Road Traffic Act.

(ii) the regular repetition of the payments did not change their voluntary A
character, and, on the facts as found, no implied promise to pay for the carriage could be extracted.

Newell v. *Cross* (4), *McCarthy* v. *British Oak Insurance Co.* (5), *and East Midland Traffic Area Traffic Comrs.* v. *Tyler* (6) *applied.*

[**EDITORIAL NOTE.** There is a line of cases under the Road Traffic Act which decide that a passenger is carried for " hire or reward " only if there is an antecedent
contract, express or implied, to make a payment. A subsequent voluntary payment B
does not constitute the carrying one for hire or reward, and the court here applies this principle to a warranty in a policy of insurance that a car will not be used for hire. The court holds that where the payments are on the evidence purely voluntary, frequent repetition will not change the nature of the act by raising the implication of a promise. The court further refuses to deal with a new point not raised on the pleadings or at the arbitration, holding that there is no power to do so at the hearing of the special case stated by the arbitrator. C

As to Insurance Company's Duty to Satisfy Judgments, see HALSBURY, Hailsham Edn., Vol. 18, pp. 563-566, paras. 913-917 ; and for Cases, see DIGEST, Supp., Insurance, Nos. 3217oo-3217xx.]

Cases referred to :

(1) *Wyatt* v. *Guildhall Insurance Co., Ltd.*, [1937] 1 K.B. 653 ; [1937] 1 All E.R. 792 ; Digest Supp. ; 106 L.J.K.B. 421 ; 156 L.T. 292.
(2) *Beauchamp* v. *National Mutual Indemnity Insurance Co., Ltd.*, [1937] 3 All E.R. D
19 ; Digest Supp.
(3) *Provincial Insurance Co.* v. *Morgan and Foxon*, [1933] A.C. 240 ; Digest Supp. ; 102 L.J.K.B. 164 ; *sub nom. Morgan* v. *Provincial Insurance Co.*, 148 L.T. 385.
*(4) *Newell* v. *Cross*, *Newell* v. *Cook*, *Newell* v. *Plume*, *Newell* v. *Chenery*, [1936] 2 K.B. 632 ; [1936] 2 All E.R. 203 ; Digest Supp. ; 105 L.J.K.B. 742 ; 155 L.T. 173.
*(5) *McCarthy* v. *British Oak Insurance Co., Ltd.*, [1938] 3 All E.R. 1 ; Digest Supp. ;
159 L.T. 215. E
*(6) *East Midland Traffic Area Traffic Comrs.* v. *Tyler*, [1938] 3 All E.R. 39 ; Digest Supp.
(7) *Passmore* v. *Vulcan Boiler & General Insurance Co., Ltd.* (1935), 154 L.T. 258 ; Digest Supp.

Award stated in the form of a special case by the arbitrator for the opinion of the court in an arbitration between the claimant Bonham and the insurers,
the Zurich General Accident and Liability Insurance Co., Ltd. Bonham claimed F
a declaration that he was entitled to be indemnified by the insurers under a policy issued by the insurers in respect of claims made against him for injuries sustained as a result of his negligent driving of a motor car. The facts and arguments are fully set out in the judgment.

F. W. Beney, K.C., and *Gilbert Dare* for the claimant.

Serjeant Sullivan, K.C., and *J. F. Bourke* for the respondents. G

Atkinson, J. : This is an award stated in the form of a special case by an arbitrator in an arbitration between Alfred Charles John Bonham, claimant, and the Zurich General Accident and Liability Insurance Co., Ltd., in which Bonham claimed a declaration that he was entitled to be indemnified by the company under a policy of insurance issued by the company in respect of claims
made against him for injuries sustained as a result of his negligent driving of a H
motor car. The company pleaded that at the time of the accident he was not insured ; and that is the point in issue.

Taking the facts from the case, by a proposal dated Apr. 8, 1939, the claimant applied for a policy in respect of an 8 h.p. saloon Ford car. The policy was issued and dated May 6, 1939. By that policy the respondents agreed to indemnify the claimant in the event of, among other things, accident, against all sums, including costs and expenses which the claimant should become legally liable to pay in respect of the death or bodily injury of any person and against damage to the car, but there is an exclusion of cover if the car was used for hiring. The policy was still in force on Jan. 28, 1941. On that date the claimant was driving the car from Northampton to Market Harborough with three passengers, Cunningham, Drage and Clement, in it. There was an accident, as the result of which Cunningham was killed. In a subsequent action by the executor or administrator of Cunningham against the claimant, it was ordered that judgment be entered against him for £2,015 15*s.* 6*d.* and costs; and it is in respect of that judgment that he is claiming indemnity. He was carrying the three passengers on Jan. 28 from Northampton to his place of work at Market Harborough, and he habitually and regularly carried them each day. His place of work was also the place of work of each and all the said passengers. Cunningham and Clement regularly and habitually paid the claimant, in return for their carriage, at the rate of 1*s.* 2*d.* or 1*s.* 3*d.* per return journey, which payments amounted to approximately 7*s.* 6*d.* a week. The rate was calculated upon the cost of railway fares between the two places.

Then come the most material findings:

> The claimant never asked the said Cunningham or Clement or Drage for the said or for any payment, but the said passengers [that must be limited to Cunningham and Clement, because Drage never did pay] voluntarily offered him the money which it would have cost them to travel by railway and he accepted it, and that if the said passengers had not paid him anything, the claimant would still have carried them.

The next finding is:

> That the claimant supplied and paid for all petrol, oil, tyres, insurance and other expenses for and in respect of the car; that he himself would have used and did use the car to travel to and from his said place of work apart from and independently of any question of carrying the said passengers.

Those are all the facts that are found.

It is contended that the car was being used for hiring and it is argued that the expression "use for hiring" includes the carriage of passengers for hire or reward. The proposal form, which is made part of the case, contains this question: "Will passengers be carried for hire or reward, or will the motor car be let on hire?" and the answer was "No."

The policy begins by making the proposal, or, rather, the answers in the proposal the basis of the contract and it is deemed to be incorporated therein in the usual way. The policy, after that incorporation, defines the liability thus:

> The company will indemnify the insured in the event of accident . . . against all sums . . . which the insured shall become legally liable to pay in respect of death of or bodily injury to any person.

Later on in the policy there is a heading:

> General exceptions. The company shall not be liable in respect of any accident, injury . . . happening while the car is being used otherwise than in accordance with the "Description of Use" endorsement hereon.

The endorsement is this:

> Description of Use. Use for social domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated in the schedule hereto, excluding use for hiring.

So that in terms the policy only excludes liability while the car is being used for hiring. It is said that these words "use for hiring" include the carriage of passengers for hire or reward. Those words appear several times in the Road Traffic Acts. In the Road Traffic Act, 1930, s. 36, which deals with the policy that is required to be held by a driver, he has got to insure against liability for injuries to other people, but there is this proviso: Provided that such a policy shall not be required to cover, except in the case of a vehicle in which passengers are carried for hire or reward, liability in respect of the death of or bodily injury to persons so carried. It is awkwardly phrased, but what it means is that, although a driver is not bound to be insured *qua* the people he carries with him, he is bound to be insured if they are being carried for hire or reward. Then in sect. 61 the same expression is used in the definition of "express carriages":

> (*b*) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling) . . . (*c*) Contract

carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum.

Sect. 67 forbids any person to use on the road an express carriage or a contract carriage unless he has got a public service vehicle licence; sect. 72 (10), provides for penalties. It seems, I think, fairly clear that in these sections "hire" and "reward" mean exactly the same thing. That was the view of Branson, J., in *Wyatt* v. *Guildhall Insurance Co.* (1); but carrying passengers for hire or reward is something quite different from the hiring of cars.

The proposal clearly recognises the difference between a carrying of passengers for payment and a letting on hire of the car. The two things are put side by side and obviously mean different things. The one, the carriage of passengers, is a contract to carry, whereas letting the motor car on hire means something is being done which amounts to a contract of bailment, where a car is placed at the disposal of the person hiring. Here is a policy which on the face of it accepts liability for everything except a user contrary to the description of use endorsed, and the only exception there is use for hiring only; and, as far as I am concerned, I have the greatest difficulty in seeing that the words "use for hiring" can in this policy have the same meaning as the words "carrying of passengers for hire or reward."

But it may be this is not very material, because the declaration is made the basis of the contract and it has now been settled for some time, that, if there is something in a document which in terms is promissory and that is made the basis of the contract, it becomes a warranty. It is put, I think, quite clearly by Finlay, J., in *Beauchamp* v. *National Mutual Indemnity Insurance Co.* (2). He said, at p. 24, that as the answer was in its nature promissory it was, therefore, a warranty, and he deals with the case in the House of Lords, *Provincial Insurance Co.* v. *Morgan* (3), where there is a general statement of the law. Therefore it seems to me that, although the endorsement is very misleading, it is on those cases clear that I must construe this policy as containing a warranty that the car will not be used for hire or reward, and that must, I think, cover the carrying of passengers for hire or reward. With that in mind, one comes to consider the rival contentions. The claimant contends that a man is not driving for hire or reward merely because after the driving he accepts a voluntary payment. In my view, great importance attaches to the word "for." It suggests that something is being done in order to obtain reward, something which but for the reward would not be done.

Take three cases. If A is asked to take B to a certain place and A says "I will do it if you will pay me 1*s.* 2*d.*" and B agrees, there is a typical case of carrying for reward. There is an express agreement. The second case: A is asked to take B and he says "Yes, I will do it," but nothing is said as to payment, but the circumstances are such that a promise to make reasonable payment ought to be inferred. Then there is an implied contract, and an implied contract is just as much a contract as an express contract. It creates a legal obligation. If one gets into a taxi, there is never any agreement about what is going to happen. It is understood that you agree to pay the legal fare. If A says to B "I am going into town. Can I give you a lift?" and B accepts, gets in, is taken into town, gets out, thanks A and gives him a shilling, it cannot be said that A was carrying for that shilling, for that reward. He got a reward, true. To my mind, that is not the same thing as stipulating for it and doing what he did in order to get it.

The results of any other view would really be startling. By accepting a voluntary payment or contribution towards driving expenses, or anything of that sort, the driver would at once (i) step outside the cover of this policy; (ii) he would be guilty of an offence under sect. 35 (1) for using a car while not insured in accordance with sect. 36; and (iii) he would be guilty of an offence in that he was using a motor vehicle on the road not being the holder of a public service vehicle licence, in breach of sect. 67—for example, as in *Tyler's* case (6). Those are startling results of accepting a voluntary payment for giving somebody a lift.

In my view, agreement, express or implied, is the essence of carrying for hire or reward. There are three cases which seem to me to go far towards establishing that proposition. The first is *Newell* v. *Cross* (4). There two ladies, a Miss

Cross and Mrs. Plume, separately hired taxicabs, neither of which had a road service licence as an express carriage, to drive themselves and friends to a certain destination and back for 14*s.* in each case. Miss Cross had made an antecedent arrangement with her friends that each of them should pay her share of the fare. Mrs. Plume had made no such arrangement, though some of her friends in fact subsequently offered to pay and did pay their shares. On the journey the taxicabs were stopped by a police officer who questioned the passengers as to the arrangement for payment. He did not caution them. The result was that the hirers were charged with causing and the drivers with permitting the taxicabs to be used as express carriages when there were not in force licences authorising them to be so used. The justices dismissed all the summonses and expressly found that the drivers did not know, and had no reason to know, that the passengers were sharing the fares : the Divisional Court held, at p. 632 :

> . . . that since there was in Miss C.'s case an antecedent contract for payment by the other passengers of their shares they were "carried in a motor vehicle in consideration of separate payments made by them," and therefore . . . the vehicle was to be "deemed to be a vehicle carrying passengers for hire or reward at separate fares," and was brought within the definition of "express carriage" . . . and Miss C. was therefore guilty of the offence charged. In the absence of an antecedent contract by Mrs. P. the justices were right in dismissing the charge against her. Nor could it be said that they had erred in law in dismissing the charges against the drivers.

I only want to read two or three quite short passages. The first one is in the judgment of LORD HEWART, L.C.J., dealing with Miss Cross's case, at p. 639 ([1936] 2 All E.R. at p. 205) :

> Clearly, therefore, it was in her mind that she was to collect, and apparently was entitled to collect, a rateable contribution from each one of her fellow passengers. So far as she was concerned that case seems to me, as the law stands, clear.

Then on pp. 641, 642 ([1936] 2 All E.R. at p. 206), he contrasts the position of Mrs. Plume :

> On the other hand, by way of contrast to the case of Miss Cross, there is nothing satisfactory to indicate that contributory payments were contemplated at the outset or formed any part of a contract or bargain. *Non constat* with regard to each of those payments that it was not both subsequent and voluntary . . .

and he approves the dismissal of the summons against her.

DU PARCQ, J., put the point extremely clearly at p. 644 :

> In Mrs. Plume's case, which is the only one presenting any difficulty, I am of opinion, looking at the findings of fact as a whole, that the justices were not satisfied that there was any agreement between Mrs. Plume and her fellow passengers before the journey started. If there was no such agreement, express or implied, and she was herself solely responsible for the payment of the fare, none of her fellow passengers being bound by contract to contribute a share, then she would not be guilty of unlawfully causing a vehicle to be used as an express carriage.

I have some diffidence in referring to *McCarthy* v. *British Oak Insurance Co.* (5), because it was a decision of my own, but it is some six years ago and so far as I know has not been called in question. There I was dealing with a similar type of case, where a certain contribution had been made to the driver of a car. I need only refer to these words, at p. 4 :

> I think that what is intended to be excluded by this policy [the same words] is something which is a genuine business contract for hiring, something which is a real hiring, a doing something for a stipulated reward, a stipulated *quid pro quo*. I do not think that there was any hiring here. I think that one must look at all the circumstances.

My view was that there was only a hiring or carriage for reward if there was an agreement.

A few days after that there was a case in the Divisional Court, *Tyler's* case (6). The headnote states, at p. 39 :

> T., the owner of a motor car, took three friends of his, who were employed with him at an aerodrome, to their work each morning and returned with them in the evening. T. drove the car, and by agreement the expenses of oil and petrol were shared, each of the four paying 5*s.* per week. It was contended that the payments made were payments for oil and petrol, and not separate fares in respect of the journeys. Held : T.'s friends were persons carried in consideration of separate payments, and the vehicle was therefore a public service vehicle and required to be licensed as such.

The judgment was given by BRANSON, J., who emphasised, on p. 40 :

> An agreement had been made between them that they should share in the running-expenses of petrol and oil used in the car.

Then lower down :

> At first, each of the four paid as his share 3*s*., but subsequently by arrangement that was increased to 5*s*.

The whole point of that case was that they were contributing by agreement to pay and, therefore, there was a carriage for hire or reward.

Was there, in the case with which I have to deal, a carriage for hire, or were these people being carried for hire or reward ? I have got these findings that they were never asked for payment, that two of them voluntarily offered money, and that the claimant would have carried them, as he did Drage, even if they had paid nothing ; and the car would have been going on the particular journey in any event. Those findings negative agreement. They negative a carrying with the object of getting any payment. They affirm the voluntary nature of the payment throughout and exclude agreement, express or implied. On that particular day, what was the legal position between the parties during the driving ? First, there was no agreement. That is clear. Secondly, there was no legal obligation to pay. Thirdly, the claimant was not taking either Clement or Cunningham with the object of getting any payment. The findings establish all those three propositions. The mere fact that Cunningham and Clement may have intended to make a voluntary payment when they got home at night or when they got to the works does not affect the voluntary character of the carriage. That is *Newell* v. *Cross* (4). There is a plain decision about that. What is the relevance of that having happened many times before ? None, in my judgment, unless you can extract an implied promise to pay on this particular occasion ; but any implied promise to pay is excluded by the findings that the payments were purely voluntary. How can the doing many times over of something which you are entitled to do turn that which you are doing into something which you are not entitled to do ? My answer to that question is this : Only if the frequent repetition changes the nature of the act by raising an implication of a promise. Does the mere knowledge that two of your passengers will almost certainly give you a tip or payment of 1*s*. 2*d*. or 1*s*. 3*d*. turn the carriage into a hiring for reward ? It seems to me impossible to say that it does. It seems to me that the last journey was on precisely the same footing as the first journey.

The findings refer to the whole course of conduct. From first to last, the findings are that these payments were purely voluntary. I can see no difference between the carriage on the first or second day and the one on the last day. If the arbitrator had said "I am going to imply from what had been done a promise to pay, what had started on a voluntary basis had become something different and there was an obligation created by what had passed," well and good, but he negatives all that by his express finding that these payments were purely voluntary. It seems it is just as if, when they got home on the day before and these two men, Cunningham and Clement, handed over 1*s*. 2*d*. to the claimant, they had said to him "Don't forget this is only a voluntary payment ; there is no obligation at all about it" ; and he said "That is all right ; you know I am willing to take you, anyhow." That was the position when this drive started ; and, in my judgment, it is impossible to say that these people were being carried for hire or reward within the meaning of the declaration or the Road Traffic Acts. view.

The view the arbitrator has taken is different. He only expresses his opinion on the facts which he has found ; and, rightly or wrongly, I dissent from it.

There is just another matter I must mention. Another point was taken by counsel for the respondents, not a very easy point to follow. He said "On this day the insured was using the car in connection with his business and the fact that he was carrying two or three other persons in connection with their business was a breach of this endorsement, because he was not solely using the car in connection with his own business," and he referred to *Passmore's* case (7). I do not think that this point is open to him or that I have any power to deal with it. I am merely dealing with a special case which raises a particular question for me to answer :

> The question for the opinion of the court is : Am I correct in holding upon these

facts that the claimant was on Jan. 28, 1941, using the car for hiring and that such use was in violation of the terms and conditions of the policy ?

It is perfectly clear that this point was not raised on the pleadings or raised at the arbitration. It is a new point, but it is not one with which I can deal. I have only power to deal with the point which is submitted to me by the arbitrator. He says if I think he is wrong on this point submitted to me, then the A award has got to be in favour of the claimant. I have never yet heard it suggested on the hearing of a special case raising a particular question that it is open to either party to raise some new point which has never been raised before. Therefore, I do not deal with it. I have merely to answer a question put to me, and I answer it in favour of the claimant.

Judgment for claimant with costs.

Solicitors : *Gardiner & Co.* (for the claimant) ; *A. E. Wyeth & Co.*, agents for B *Sharpe & Millichip*, West Bromwich (for the respondents).

[*Reported by* P. J. JOHNSON, ESQ., *Barrister-at-Law.*]

C BOWMAKERS, LTD. *v.* BARNET INSTRUMENTS, LTD.

[COURT OF APPEAL (Scott and du Parcq, L.JJ., and Uthwatt, J.), **November 3, 1944.**]

Sale of Goods—Machine tools—Hire-purchase agreement—Conversion of goods by hirers—Claim by owners for damages—Owners' property in goods originally D *obtained in contravention of controlled price Order—Whether illegality vitiated hire-purchase agreement—Public policy—Defence (General) Regulations, regs.* 55 *and* 98*—Control of Machine Tools (No.* 3*) Order,* 1940 *(S.R. & O.,* 1940, *No.* 1374*)—Control of Machine Tools (No.* 5*) Order,* 1940 *(S.R. & O.,* 1940, *No.* 1784).

The appellants hired machine tools from the respondents under three written agreements. The tools were the property of one Smith, who sold E them to the respondents in order that the appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the respondents. After making some only of the agreed payments, the appellants converted the tools to their own use by selling them. The respondents, thereupon, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion. For the appellants it was contended : (i) that the sale between Smith and the F respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the appellants and the respondents being affected by the illegality arising from the original sale ; (ii) that the respondents' claim, therefore, should not be entertained on the ground of public policy. The respondents, whilst not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of the conversion :—

G HELD : (i) whether or not the agreements for sale were illegal, the respondents' right to their own property was unaffected.

(ii) no question of public policy therefore arose.

[**EDITORIAL NOTE.** The point of this decision is that the plaintiffs' claim was wholly independent of the alleged illegal contracts, and therefore no question of applying the maxim *ex turpi causa non oritur actio* arose. *Prima facie* a man is entitled to his H own property and his right will be enforced against a party who is detaining it, or has converted it, even if it came into the possession of that party as a consequence of an illegal contract. There may be exceptions to the rule, as for example, where it is illegal to deal in the particular property at all, but the rule is clear.

AS TO INCIDENTS OF ILLEGAL CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 172-177, paras. 245-250 ; and FOR CASES, see DIGEST, Vol. 12, pp. 277-281, Nos. 2275-2306.]

Cases referred to :

(1) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270 ; 32 Digest 233, *180.*

(2) *Holman* v. *Johnson* (1775), 1 Cowp. 341 ; 12 Digest 279, *2288.*

(3) *Pearce* v. *Brooks* (1866), L.R. 1 Exch. 213 ; 12 Digest 264, *2156* ; 4 H. & C. 358 ; 35 L.J.Ex. 134 ; 14 L.T. 288.

(4) *Scott* v. *Brown, Doering, McNab & Co., Slaughter & May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 ; 12 Digest 238, *1959* ; 61 L.J.Q.B. 738 ; 67 L.T. 782.

(5) *Alexander* v. *Rayson*, [1936] 1 K.B. 169 ; Digest Supp. ; 105 L.J.K.B. 148 ; 154 L.T. 205.

*(6) *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309 ; 12 Digest 279, *2285* ; 10 B. & S. 237 ; 38 L.J.Q.B. 225 ; 21 L.T. 359.

Appeal by the defendant company from the judgment of Croom-Johnson, J., dated May 17, 1944. The facts and arguments are set out in the judgment of the court delivered by du Parcq, L.J.

C. Gallop and *R. T. Paget* for the appellants.

B. B. Stenham for the respondents.

du Parcq, L.J. [delivering the judgment of the court] : In this case the plaintiffs have obtained a judgment against the defendants for damages for conversion of certain machine tools, the property of the plaintiffs. But for the defence of illegality which has been raised, there is no answer to the plaintiffs' claim. It is said, however, that the claim is one which the court, having regard to the circumstances, ought not to enforce.

The machine tools in question were the subject of three hiring agreements, each containing an option to purchase, dated Mar. 18, Apr. 15, and June 16, 1944. They are described in the statement of claim as agreements Nos. 1, 2 and 3. Of these 1 and 2 dealt with new machine tools, 3 with a used machine tool. In each case the machines were originally the property of a man named Smith, who was prepared to sell them to the defendants at prices which they were willing to pay, though not at once. The goods comprised in the first agreement were originally the subject of a contract of sale between Smith and the defendants, but this contract was rescinded. Eventually it was arranged in every case, for the convenience of the defendants, that the defendants should obtain possession of the machines, not by a direct purchase from Smith, but under a hire-purchase agreement from the plaintiffs. In pursuance of this arrangement Smith sold the goods to the plaintiffs, and the plaintiffs entered into the three agreements with the defendants. The contracts between the plaintiffs and the defendants are in a familiar form. Each of them contains a provision for the monthly payment of hire and further provides that " if the hirer shall duly make the said payments and strictly observe and perform all the terms and conditions on his part herein contained then the hirer shall thereupon have the option of purchasing the said chattels for the sum of ten shillings." The defendants after making some, but by no means all, the agreed payments, sold for their own advantage, and so converted to their use, all the machines except that one which was the subject of agreement 2, and this latter they also converted to their own use by refusing to deliver it up to the plaintiffs on demand. They say, however, that the plaintiffs have no remedy against them. Their reasons for this contention must now be stated.

The goods comprised in agreements 1 and 2 were, as we have said, new machine tools. On Oct. 4, 1940, the Minister of Supply in exercise of powers conferred on him by the Defence (General) Regulations, 1939, regs. 55 and 98, made an Order (S.R. & O. 1940, No. 1784), which admittedly applied to them. The material clause of the order is as follows :

> No person shall pay or receive any price (except a provisional price subject to any adjustment that may be required upon determination of the maximum price) for any machine tool produced in the United Kingdom and delivered or to be delivered in the United Kingdom after the coming into force of this order under a contract of sale whenever made (*a*) until a maximum price for that machine tool shall have been provided by a special or general direction issued by the Minister of Supply, or (*b*) in excess of the maximum price so provided.

By an amendment introduced by a later Order the application of this prohibition was limited to new machine tools.

It was a matter of dispute at the trial whether a maximum price for new machine tools such as were included in agreements 1 and 2 had in fact been " provided." It was said by the defendants that none had been provided ; by the plaintiffs that there had been special directions " providing " maximum prices. In this court it was not thought necessary to examine the evidence on the point, since (as will appear) the argument put forward by the defendants can be based equally well on either view of the facts. That argument is as follows: First, with regard to agreements 1 and 2, it is said that the sales by Smith to the plaintiffs were not made at a "provisional" price, and it was neither agreed nor intended that the purchase price which was fixed should be subject to adjustment. This was an infringement of the Order quoted. If no maximum price was ever fixed, it still remained an infringement. If certain directions which were proved to have been given to some manufacturers were to be considered as "special directions" by which a maximum price was provided, then admittedly the price paid to Smith in every case greatly exceeded the maximum price. On either view, therefore, there was an infringement of the Order. It had to be conceded that the hiring agreements did not in themselves transgress this Order. But it was contended, and with much force, that any illegality which attached to the anterior contract of sale must in the circumstances of this case affect the hiring agreements, since these latter agreements were negotiated by the plaintiffs, the defendants and Smith, acting in concert, with a view to ensuring the payment to Smith of a price which could not legally be paid. It is right to add that neither the plaintiffs nor the defendants had any knowledge of the Order, so that if they erred their error was involuntary, but this, the defendants say, is immaterial. The defendants obtained possession of the machinery as the result of a bargain to procure the commission of a criminal offence; and hence, it was said, they and the plaintiffs, however venial their offence, had been engaged in nothing less than a criminal conspiracy. The plaintiffs, therefore, should be driven from the judgment seat, with the result, fortunate or unfortunate according to the point of view, that the defendants would escape from the transaction without loss, and without even suffering the reproaches of an uneasy conscience.

So much for the argument with regard to agreements 1 and 2. The third stands on a different footing, since it dealt solely with a machine tool which was "used." As to that agreement, the defendants relied upon another Order of the Minister of Supply (S.R. & O., 1940, No. 1374). This Order provided that no person should:

> . . . in the United Kingdom at any time after Aug. 17, 1940, dispose of or agree or offer to dispose of any used machine tool, except under the authority of a licence granted to him by the Minister of Supply.

It further provided that the expression "dispose of" should include any disposal of (*a*) ownership or any proprietary interest, or (*b*) the right to possession, or (*c*) possession, whether or not accompanied by any disposal or acquisition, of ownership or of any proprietary interest or of the right to possession. Neither Smith nor the plaintiffs had the authority of such a licence to dispose of the machine tool in question. The plaintiffs had, therefore, infringed the Order, if not by buying from Smith, then certainly by themselves hiring out the chattel to the defendants. The result of this illegality, it was contended, must have the same satisfactory consequences for the defendants as the offence committed in respect of the new machines.

CROOM-JOHNSON, J., who tried the case, came to the conclusion that no illegality had been proved in respect of any of the hiring agreements. As to the new machine tools, he held that no harm had been done by fixing a price for the sale from Smith to the plaintiffs. As we understand his judgment, his view was that if parties to a contract fix a price the Order is not transgressed, since the price upon which they have agreed can subsequently be treated as a provisional price and suitably adjusted. With regard to the used machine, the judge was of opinion that Smith, and Smith alone, had broken the law, since, in his view, the plaintiffs were under no obligation to satisfy themselves that Smith had been licensed by the Minister. With great respect to the judge, we confess that his reasoning does not appear to us to be convincing. If, as we think, it is plain that Smith and the plaintiffs agreed a price for the new machines which was not intended by either of them to be a "provisional" price, we find it difficult to escape the conclusion that they both infringed the Order when that price was paid and received. As to the used machine tool, the judge would appear to have overlooked the fact that the plaintiffs themselves disposed of it by their agreement with the defendants, so that their ignorance of the fact that Smith was selling without " the authority of a licence " could not avail them. The view which we take of the case makes it unnecessary to pass a final judgment on the question whether, on the true construction of the Orders, the suggested offences have been proved, but we will assume in favour of the defendants that the three hiring agreements were all, as they allege, and for the reasons which they give, affected by illegality.

The question then is whether in the circumstances the plaintiffs are without a remedy. So far as their claim in conversion is concerned, they are not relying on the hiring agreements at all. On the contrary they are willing to admit for this purpose that they cannot rely on them. They simply say that the machines were their property, and this, we think, cannot be denied. We understood counsel for the appellants to concede that the property had passed from Smith to the plaintiffs, and still remained in the plaintiffs at the date of the conversion. At any rate we have no doubt that this is the legal result of the transaction and we find support for this view in the *dicta* of Parke, B., in *Scarfe* v. *Morgan* (1). Why then should not the plaintiffs have what is their own ?

No question of the defendants' rights arises. They do not, and cannot, pretend to have had any legal right to possession of the goods at the date of the conversion. Their counsel has to rely, not on any alleged right of theirs, but on the requirements of public policy. He was entitled, and bound, to do so, although, as in *Holman* v. *Johnson* (2), Lord Mansfield, at p. 343, long ago observed :

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.

This principle, long firmly established, has probably even been extended since Lord Mansfield's day. Counsel for the appellants is, we think, right in his submission that, if the sale by Smith to the plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being in order to make that illegal sale possible. But, as we have said, the plaintiffs are not now relying on these agreements, or on the third hiring agreement. *Prima facie*, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would indeed be astonishing if (to take one instance) a person in the position of the defendant in *Pearce* v. *Brooks* (3), supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is in truth followed by the courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words " illegal contract " must now be understood in the wide sense which we have already indicated, and no technical meaning must be ascribed to the words " founded on an illegal contract " ; the form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the courts act are *Scott* v. *Brown, Doering, McNab & Co.* (4), and *Alexander* v. *Rayson* (5). But, as Lindley, L.J., said, at p. 729, in the former of the cases just cited :

> Any rights which he [plaintiff] may have irrespective of his illegal contract will, of course, be recognised and enforced.

In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.

Counsel for the appellants sought to derive assistance from the decision in *Taylor* v. *Chester* (6), which was, however, entirely consonant with the view which we have expressed. It differed from the present case in one essential respect, since in that case the defendant had *prima facie* a right to possession of the half-note which the plaintiff claimed. She was holding it as a pledge to secure the payment of money which remained due. The plaintiff could only defeat her plea by showing that the money due had been lent for an immoral purpose, and this could not avail him since he was *in pari delicto* with her. The judgment of the court makes it plain that this was the ratio of the decision. Mellor, J., at p. 314, said:

> The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "*in pari delicto potior est conditio possidentis*," clearly applies, and is decisive of the case.

The Latin maxim which Mellor, J., cited must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the circumstances are such that the court will refuse to assist either party, the consequence must in fact follow that the party in possession will not be disturbed. As Lord Mansfield said in the case already cited, the defendant then obtains an advantage "contrary to the real justice" and, so to say, "by accident."

It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise. We are satisfied that no rule of law and no considerations of public policy compel the court to dismiss the plaintiffs' claim in the case before us, and to do so would be, in our opinion, a manifest injustice. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *L. A. Hart* (for the appellants); *Field, Roscoe & Co.*, agents for *W. Parkinson Curtis*, Bournemouth (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

EGERTON AND OTHERS *v.* SHIRLEY.

[Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.), **October 25, 30, November 10, 1944.**]

Practice—Time for appeal—Leave to appeal—Interlocutory or final order—Order granting leave to proceed under the Courts (Emergency Powers) Act, 1943—*Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *ss.* 31 (1) (*i*), (2), 68 (2)—*Courts (Emergency Powers) Act,* 1943 (*c.* 19), *s.* 1—*R.S.C., Ord.* 58, *r.* 15.

In an action by the respondents against the appellant to recover possession of lands for non-payment of rent, the writ was specially indorsed under R.S.C., Ord. 3, r. 6. Upon the application of the respondents an order was made by a master granting (i) leave to sign judgment under R.S.C., Ord. 14, and (ii) leave under the Courts (Emergency Powers) Act, 1943, s. 1, to proceed to the enforcement of the judgment. The appellants appealed against the second part of the order. On May 5, 1944, the appeal was dismissed by a judge in chambers, and on June 8, 1944, the appellant gave notice of appeal from the judge's order without having obtained leave to appeal either from the judge or from the Court of Appeal. It was contended by the respondents that the order appealed from was an interlocutory order and, therefore, under R.S.C., Ord. 58, r. 15, the appeal was brought out of time, and, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*i*), no appeal lay without leave. On behalf of the appellant it was contended that the order was final since its effect was finally to deprive him of possession :—

Held : since the rights of the parties were finally disposed of when leave to sign judgment was given, the order giving leave to proceed under the Courts (Emergency Powers) Act, 1943, merely removed a stay imposed by the 1943 Act in the absence of such an order. Being, therefore, an order for working out rights already disposed of, it was interlocutory within the meaning of the rules. It followed, therefore, that the appeal had been brought out of time and without the necessary leave.

Blakey v. *Latham* (4) *and Norton* v. *Norton* (5) *followed.*

[**EDITORIAL NOTE.** This is a practice point involving a consideration of what is an "interlocutory" order. It is held that an order giving leave to proceed under the Courts (Emergency Powers) Act, 1943, is interlocutory, since it deals with the machinery for the working out of rights already given, within the rule laid down by Cotton, L.J., in *Blakey* v. *Latham* (4).

As to Interlocutory and Final Orders, see HALSBURY, Hailsham Edn., Vol. 19, pp. 206-210, para. 508 ; and for Cases, see DIGEST, Vol. 30, pp. 128-134, Nos. 61-129. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1287-1291 ; and SUPPLEMENT, 1944, p. 108.]

Cases referred to :

(1) *Shubrook* v. *Tufnell* (1882), 9 Q.B.D. 621 ; 30 Digest 129, *71* ; 46 L.T. 749.
*(2) *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K.B. 547 ; 30 Digest 135, *137* ; 72 L.J.K.B. 271.
(3) *Salaman* v. *Warner*, [1891] 1 Q.B. 734 ; 30 Digest 135, *136* ; 60 L.J.Q.B. 624.
*(4) *Blakey* v. *Latham* (1889), 43 Ch.D. 23 ; 30 Digest 131, *94*.
*(5) *Norton* v. *Norton* (1908), 99 L.T. 709 ; 30 Digest 132, *95*.

Appeal by the defendant from an order of Cassels, J., made in chambers on May 6, 1944. The notice of appeal was dated June 8, 1944. The defendant had not obtained leave to appeal either from the judge or from the Court of Appeal. The facts are fully stated in the judgment of the court delivered by du Parcq, L.J.

Marcus Grantham for the appellant.
Harry Lester for the respondents.

du Parcq, L.J. [delivering the judgment of the court] : It was contended on behalf of the respondents to the appeal that the order appealed from was an interlocutory order, and they accordingly objected that the appeal was brought out of time : (R.S.C., Ord. 58, r. 15). Further, that by reason of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*i*), no appeal lay against an order without leave. If the order is an interlocutory order within the meaning of the rule and the section, there is no doubt that the respondents' objection must prevail.

Neither the R.S.C., nor the statute contains any definition of the terms "final" and "interlocutory". The Supreme Court of Judicature (Consolidation) Act, 1925, s. 68 (2) provides :

> Any doubt which may arise as to what orders or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

It thus becomes necessary for the court once again to consider the cases dealing with the distinction between final and interlocutory orders, and we are indebted to both counsel for calling our attention to the relevant authorities. Before referring to these it is necessary to explain the nature of the order which is the subject of appeal. The appellant was the defendant in an action brought by the trustees of the Paddington Estate to recover possession of land by reason of non-payment of rent and for arrears of rent and mesne profits, and also for damages for breach of covenants to repair. The ecclesiastical commissioners were also plaintiffs, but their claim has been dismissed without any order as to costs and need not be considered for the present purpose. The writ in the action was especially indorsed under R.S.C., Ord. 3, r. 6, and the plaintiffs applied for judgment under Ord. 14. The application was heard by a master, who gave leave to the plaintiff trustees to sign final judgment for possession of the lands, for arrears of rent and mesne profits, damages to be assessed and costs to be taxed. An application having been made to the master in accordance with the Courts (Emergency Powers) Rules, 1943, for leave to proceed under the Courts (Emergency Powers) Act, 1943, it was further ordered that the plaintiff A trustees should be at liberty under sect. 1 of that Act :

> . . . to issue execution on or otherwise proceed to the enforcement of the judgment against the defendant.

It will be seen that the order made by the master was in two distinct parts, namely (i) an order under Ord. 14, giving leave to sign judgment, and (ii) an order giving leave to proceed under the Courts (Emergency Powers) Act, 1943. B The defendant appealed to the judge against the second part only of the master's order. The judge dismissed the appeal and it is against the order dismissing the appeal that the present appeal is brought to this court.

It is, of course, plain that if the appeal to this court had been against an order refusing unconditional leave to defend, and giving leave to sign judgment it would have lain without leave, since such an order is not to be deemed to be an interlocutory order : (see the Supreme Court of Judicature (Consolidation) C Act, 1925, s. 31 (2)). It was contended on behalf of the appellant that the order giving leave to proceed was final, since its effect was finally to deprive him of possession of the lands in question and to render him liable to pay sums of money, and we were invited to follow *Shubrook* v. *Tufnell* (1), and *Bozson* v. *Altrincham U.D.C.* (2), rather than *Salaman* v. *Warner* (3). The interpretation given to the words " final order " in the last mentioned case was that an order is final only if it is made on an appeal of such a character that whatever D order had been made thereon must finally have disposed of the matter in dispute. The test which was preferred in *Bozson* v. *Altrincham U.D.C.* (2) was stated by LORD ALVERSTONE, C.J., at p. 548, as follows :

> Does the judgment or order, as made, finally dispose of the rights of the parties ? If it does, then I think it ought to be treated as a final order ; but if it does not, it is then, in my opinion, an interlocutory order.

E We do not find it necessary to decide between these unfortunately conflicting views, even if we assume in favour of the appellants' contention the correctness of the test proposed by LORD ALVERSTONE, C.J. The question remains whether the present order " finally disposed of the rights of the parties." This phrase must be read in the light of two decisions to which counsel for the respondents referred us. In those two cases a clear distinction is drawn between the determination of rights, and the subsequent working out of those rights. In *Blakey* F v. *Latham* (4), COTTON, L.J., said at p. 25 :

> Any order, in my opinion, which does not deal with the final rights of the parties, but merely directs how the declarations of right already given . . . are to be worked out is interlocutory . . .

In *Norton* v. *Norton* (5), COZENS-HARDY, M.R., referred to this as a satisfactory rule and was content to follow it. In our opinion, the rights of the parties in G this case were finally disposed of when leave to sign judgment was given by the master. All that remained was to set in motion, or to retard, the machinery for enforcing, and in that sense " working out," those rights. The order made by CASSELS, J., merely removed a stay which the statute imposed in the absence of such an order. It no more finally disposed of the rights of the parties than does, for instance, the issue of a writ of possession to a plaintiff whose right to possession has already been determined. On this ground we are satisfied that H the order was an interlocutory order within the meaning of the rules. The respondents' objection therefore succeeds. The appeal has been brought out of time and without the necessary leave, and must, accordingly, be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Aukin, Courts & Co.* (for the appellant) ; *Trower, Still & Keeling* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

SOPERS OF HARROW, LTD. v. JOHNSTON & SON (LONDON), LTD., AND HENDERSON & LIDDELL, LTD., AND COLLINS ARDEN PRODUCTS, LTD.

[Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), **November 16, 1944.**]

Food and Drugs—Express warranty—Nature substance or quality demanded—"Cordial"—Whether cordial must contain substantial percentage of sugar—Implied warranty on sale by description—Sale of Goods Act, 1893 (*c.* 71), *s.* 13—*Food and Drugs Act,* 1938 (*c.* 56), *s.* 3.

The defendants entered into a verbal agreement with the plaintiffs to supply the plaintiffs with quantities of bottles of various drinks known as "cordials." During the transaction, which took place by telephone, the defendants stated that the goods conformed with the Food and Drugs Acts, and read out labels which contained the word "cordial." In their invoice they stated that the goods were of the "nature, substance and quality therein described" and complied with the Food and Drugs Act, 1938, s. 3, and the Sale of Goods Act, 1893, s. 13. It was found as a fact that the beverages supplied, though labelled "cordials," contained no sugar. The plaintiffs contended that, as a result, there had been a breach of warranties:—

Held: (i) the word "cordial" implied that the beverage contained a substantial percentage of sugar.

(ii) In the circumstances, there had been a breach of the warranty implied by the Sale of Goods Act, 1893, s. 13, on sale by description, and of express warranty under the Food and Drugs Act, 1938, s. 3.

Decision of Tucker, J. ([1944] 2 All E.R. 42) *affirmed.*

[**EDITORIAL NOTE.** It was held on the facts by Tucker, J., that the word "cordial" has acquired a commercial significance as a drink containing a substantial percentage of sugar. The Court of Appeal hold, therefore, affirming the court below, that a sale of liquid in bottles described on the labels as "cordial," but which contained no sugar, is a breach of the implied warranty under the Sale of Goods Act, s. 13, on sale by description. The sale of liquid labelled cordial, which contains no sugar, is also a matter which could be the subject of a successful prosecution under the Food and Drugs Act, 1938, s. 3, and as the vendors had here stated that the sale conformed with the Food and Drugs Acts it is also held that there is a breach of express warranty.

As to Sale to Prejudice of Purchaser, see HALSBURY, Hailsham Edn., Vol. 15, pp. 152-155, paras. 244-248; and for Cases, see DIGEST, Vol. 25, pp. 83-91, Nos. 110-169.]

Appeal by the defendants from a decision of Tucker, J., dated May 25, 1944, and reported [1944] 2 All E.R. 42, where the facts are fully set out. Although four different parties are involved, the decision given is as between two of them by arrangement with the other parties.

C. Gallop for the appellants.

John W. Morris, K.C., and *P. B. Morle* for the respondents.

Scott, L.J.: In 1942 Messrs. Collins Arden & Co., Ltd., who are manufacturers of soft drinks, that is non-alcoholic drinks, sold to Messrs. Henderson certain quantities of bottles of various drinks known as cordials, with various flavourings, lime-citric flavoured, lemon-citric flavoured and orange-citric flavoured. Messrs. Henderson resold to Messrs. Johnston; Messrs. Johnston resold to Messrs. Sopers of Harrow, Ltd.; and the question in the case is one about warranties on those sales.

As between Messrs. Sopers, Ltd., the last buyers, and Messrs. Johnston & Sons (London), Ltd., their sellers, the case is one in which the contract of sale was made partly orally and partly in the terms of certain labels contained upon the various bottles which were read out by the agent of Messrs. Johnston to the purchasing agent of Messrs. Sopers of Harrow, Ltd. In every one of the labels the drink is called a "cordial" in large capital letters in a square label in which the lettering runs diagonally across from corner to corner. It was alleged that in the course of the history of the matter after delivery of the bottles that were the subject of the contract of sale there were breaches of two warranties given at the time of the contract of sale.

The substantial question in the case is what was meant in the trade and generally by the word "cordials." The dictionary meaning of that word, according to the OXFORD DICTIONARY, and I believe in other dictionaries also, is that it is something that is invigorating or refreshing to the heart; generally stimulating. Before the war it was said that the word "cordial" had come to mean a liquid which acquired those qualities through the presence in it of a large percentage in volume of sugar, 30 to 50 per cent., and that the sweetening which was characteristic of the attraction of it to the people who drink it, or part of the attraction, must be supplied by sugar, because, of the various alternative sweetening matters, it is only sugar that has the valuable effect of invigoration, if that be the correct word, upon the heart.

The transaction in question took place in May, 1942, on the telephone between a lady representative on behalf of Messrs. Johnston and Mears on behalf of Messrs. Sopers, and I think it necessary to read the evidence of that conversation:

> *Q.*—Did the lady representative on the telephone read to you the labels? *A.*—Yes. *Q.*—Amongst others, did she read to you the little strip label that we know has subsequently been placed upon the bottles? *A.*—Yes. *Q.*—Is this what she said: "Pure (Collard's) Cordial, Formula approved City and Borough Analysts"? *A.*—Yes. *Q.*—"Citric"? *A.*—Yes. *Q.*—"Saccharin, essence, benzoic"? *A.*—Yes. *Q.*—So you knew, did you not, that the contents of these bottles were citric acid, saccharin, essence—that is flavouring essence, of course—and benzoic acid? *A.*—Yes. *Q.*—When she read that to you, she said nothing about sugar, did she? *A.*—No. *Q.*—Or syrup. So you knew perfectly well when you bought these bottles that that was the content of it? *A.*—Yes. *Q.*—You asked if the goods conformed with the provisions of the Food and Drugs Acts, and she told you that she understood they did? *A.*—Yes.

There was, in fact, no sugar in any of the bottles, and the first question in the case is whether the implied warranty of the Sale of Goods Act, s. 13, that the goods complied with the description contained in the label, by reason of the word "cordial" was broken. The second question is whether a further warranty that the goods were in conformity with the provisions of the Food and Drugs Acts was also broken. That warranty referred primarily to sect. 3 of the 1938 Act, which provides this:

> If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality, of the food or drug demanded by the purchaser, he shall, subject to the provisions of the next succeeding section, be guilty of an offence.

The substitution of saccharin as a sweetening is irrelevant if the sweetening material had to be sugar, which was necessary in order to constitute the drink a cordial within the meaning of that word. I will read the other words on the labels, although they are not material; they are "A delicious flavouring specially blended to make a wholesome refreshing drink when added to water or aerated water. A gin and lime-citric is nice." Then Collins' full name, "Collins Arden Products, Ltd.," with their address.

The issues in the case tried before the judge were first as to the meaning of the word "cordial" as understood in the trade, that is to say, a meaning given to it by usage in the trade, and added to or possibly altering the ordinary dictionary meaning; and secondly as to whether the oral statement by the lady representative on the telephone, reading out the named ingredients on the labels, prevented Sopers, Ltd., as plaintiffs from complaining that there was a breach by reason of the omission of all sugar from the drink. On the first issue at first I was inclined to doubt, on some of the evidence being read, whether the judge had sufficiently applied the rule that a word must be treated as having its ordinary dictionary meaning unless a definite trade meaning is proved by witnesses with knowledge of the trade competent to give that evidence. But I am satisfied after the many passages of the evidence to which our attention has been called that the question was quite sufficiently before him, particularly in view of the fact that there was no objection to the form that the evidence took, analysts and others being called to say what was understood by "cordial," most of whom said that "cordial" meant a large proportion of sugar.

I am further satisfied that there was evidence upon which the judge could decide. I am prepared to assume that, some evidence having been given that three named firms before the war had sold these soft drinks without any sugar in them under the name of "cordial," it was open to him to hold that there was no such necessary meaning of the word in the trade. But there was much evidence called; he certainly heard it with great care; and after describing the evidence and the contentions on each side very fully in his judgment, and referring to the dictionary definitions of "cordial" he first said this at p. 45 ([1944] 2 All E.R. 42):

> . . . I think that I am right in saying that all of them [that is the dictionary definitions] contain words which indicate that it is one of the qualities of a cordial that it should be either exhilarating, stimulating or comforting. Murray's Dictionary describes a cordial as a "medicine, food or beverage which invigorates the heart and stimulates the circulation; a comforting or exhilarating drink."; and there are similar definitions in the other well known dictionaries.

Then a little further on in his judgment he says:

> The conclusion that I have come to is that on this point the plaintiffs are right; that by the outbreak of war the word "cordial" had acquired a commercial significance and that it necessarily meant a drink, to be used in dilution, which contained a substantial percentage of sugar. I am not attempting to give a comprehensive definition of "cordial"; I am only dealing with it in so far as it affects the issues in this case and on that question of fact I prefer the evidence for the plaintiffs.

That is a finding of fact with which on the evidence it would be wrong for this court to interfere, and I accept it. I see no reason at all for doubting the propriety of the inference he drew.

On the other question raised as to whether the notice given to Mears, the buyer, of the actual contents of the bottles as stated upon the label affected the existence of such a warranty as was alleged by the plaintiffs, the judge said, at p. 49 ([1944] 2 All E.R. 42):

> I do not think that that affects the real issues in this case, at any rate so far as the warranty that these goods complied with the provisions of the Food and Drugs Act, 1938, is concerned, because the essence of that warranty was that this liquid was a cordial and that warranty is in no way impaired by reciting certain ingredients which are to be found in this bottle. It is common ground that Mears was not bothering his head about whether there was or was not sugar in this; what he did want to get was something which he could safely sell according to law as a cordial and it was warranted to him that this was a cordial. I think that that warranty has been broken, notwithstanding the fact that he was given notice in those terms of what the contents of the bottles were.

Again, I see no reason for interfering with the conclusion of fact of the judge. The warranty that the goods complied with the Act I think means that they were goods which if sold on their description as a cordial would not infringe sect. 3 of the Act, so that these goods could still be sold without fear of any such infringement in fact, meaning that no successful prosecution could or would result. Counsel for the appellants has contended that Mears was told in terms by the lady representative or practically in terms, that there was no sugar in the liquid. I do not accept that construction of the conversation. One reason why I do not is that the oral sale was carried out and an invoice sent thereupon containing at the bottom of it these written or possibly printed words:

> The goods included in this invoice are guaranteed to be of the nature substance and quality therein described, that is to say by the Sale of Goods Act, and to comply with the Food and Drugs Act and other regulations relating to the sale of food.

After receiving the invoice no protest was made at any time by Mears that the goods ought to have contained sugar; it does not appear what he thought about it; and consequently, in my view, both warranties were broken, because there was no sugar in these bottles. That being so, the judge's judgment must be affirmed and the appeal dismissed as between the plaintiffs and defendants.

When the cases were called on, counsel representing the third party, Messrs. Henderson, and the fourth party, Messrs. Collins Arden & Co., the manufacturers, were present in court and by arrangement between counsel the decision as between the two immediate parties, Johnstons and Sopers, it is agreed, shall govern their cases also. The appeal must be dismissed with costs.

MacKinnon, L.J.: I agree.

du Parcq, L.J.: I agree. There are two warranties alleged in this case, the implied warranty by description and the express warranty that the article complied with the Sale of Food and Drugs Act. As to the first, the goods were described as cordials. That description means, in my judgment, that each bottle contains what according to the understanding of the word in the trade is a cordial, and also that it contains what the public generally are entitled to demand under the name of cordial. I think that the judge was fully entitled to hold that the warranty was broken. There is no sugar in this drink, and there was strong evidence that at the time of the sale the trade understood by the word "cordial," at any rate when used in relation to a beverage made of or flavoured with fruit, something containing sugar as a sweetening agent. The judge accepted this evidence and I am not prepared to say that he was wrong. It was argued that the plaintiffs could not have relied on the implied warranty because they were expressly told that the beverage was flavoured, not with sugar but with saccharin. Taking the description as a whole, it is suggested that it amounted to this: These are cordials sweetened with saccharin and not with sugar. I do not think that this is a conclusive answer. It amounts to saying that the description of the goods was a contradiction in terms, "a cordial which has not the requisites of a cordial." I think that if there is such an apparent contradiction the court is entitled in considering the description to consider the effect it would have on the mind of a buyer who is not necessarily a specialist in non-alcoholic drinks. I think that such a buyer would understand that he was buying something which undoubtedly could be sold as a cordial whatever its constituents. On this ground alone the judgment should be supported, but I think it is also right on the other ground on which the judge relied. The only difficulty about the warranty that the goods complied with the Sale of Food and Drugs Act is that there was some doubt at the time when the warranty was given, and I think there still is some doubt, whether in any particular case a vendor of the beverage as a cordial would have been convicted. (The precise point cannot now arise in criminal proceedings because of the Soft Drinks Order, 1943, to which we were referred). In effect the judge has held that on the evidence called before him a bench of justices could properly have convicted a vendor for an infringement of sect. 13 of the Act. I certainly cannot say that he was wrong in so holding, and I agree that the express warranty also was broken, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Lieberman, Leigh & Co.* (for the appellants); *Boyce, Evans & Sheppard* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

JAMES MACARA, LTD. *v.* BARCLAY.

[Court of Appeal (Scott and du Parcq, L.JJ., and Uthwatt, J.), **November 17, 1944.**]

Sale of Land—Recovery of deposit—Statement by vendor to requisitioning authority that he was prepared to accept requisition notice and that he intended to reside on the property—Whether requisition notice effective for the purpose of exercising power to enter into possession of property—Repudiation of contract by purchaser—Whether purchaser entitled to recover deposit—Law of Property Act, 1925 (*c.* 20), *s.* 49 (2)—*Defence* (*General*) *Regulations* 1939, *reg.* 51.

By a contract, dated Apr. 16, 1943, the defendant agreed to sell certain property to the plaintiffs. £1,550 was handed to the defendant as a deposit and part payment of the purchase price. The time for completion was on or before June 24, 1943, vacant possession to be given on completion. The agreement further provided that, if the plaintiffs should neglect or fail to complete the purchase, the deposit was thereupon to be forfeited unless the court should otherwise direct, to the defendant. On June 10, a government department, as the competent authority under the Defence (General) Regulations, 1939, served the defendant with a notice requisitioning the property. Accompanying the notice was a covering letter which stated that the defendant had promised to accept "the requisition notice " as the owner of the property and that no notice was being sent to the plaintiffs in accordance with the wishes of the defendant. On June 18, the defendant wrote to the requisitioning authority urging them not to requisition the property and stating that he wished to live on the property himself. On June 18, the defendant's solicitors sent a copy of the requisition notice to the plaintiffs; and, on June 21, the plaintiffs gave notice to the defendant that they rescinded the contract on the ground of the defendant's inability to grant vacant possession. The defendant replied that vacant possession could be given and that, by reason of the plaintiffs' repudiation of their obligation, the plaintiffs forfeited their deposit. The plaintiffs sought to recover the £1,550 deposit, under the Law of Property Act, 1925, s. 49 (2). For the defendant it was contended that the requisition notice did not upon its true construction, amount to an exercise of the power to enter into possession under the Defence (General) Regulations, and, in fact, no actual entry had been made. Even if vacant possession could not be granted on the date fixed for completion, the stipulation as to the date of completion was not of the essence of the contract, and, accordingly, the plaintiffs were not entitled to repudiate the contract:—

Held: (i) since actual entry was not necessary to exercise the power given by the Defence (General) Regulations, 1939, the serving of the requisition notice on the defendant was sufficient to show a present intention to enter into possession of the property.

(ii) the vendor, therefore, was not at the date of completion able to give vacant possession of the property.

(iii) the defendant having at all material times offered vacant possession, completion on the day agreed, though not of the essence of the contract, could not be disregarded; and the plaintiffs were entitled to repudiate the contract and recover their deposit.

Decision of Vaisey, J. ([1944] 2 All E.R. 31) *affirmed on other grounds.*

[**EDITORIAL NOTE.** Regulation 51 of the Defence (General) Regulations, 1939, enables the Crown to acquire an interest in possession in land, where the national interests require it. Actual entry is here held unnecessary but the power may be effectively exercised by notice of requisition. The service of a notice of requisition is, therefore, sufficient to prevent a vendor of land from giving vacant possession in accordance with the conditions of sale. On this view the purchaser was entitled to recover his deposit and the exercise of discretion under the Law of Property Act, 1925, s. 49 (2) did not arise.

As to Recovery of Deposit by Purchaser, see HALSBURY, Hailsham Edn., Vol. 29, pp. 379-381, paras. 520, 521; and for Cases, see DIGEST, Vol. 40, pp. 230-241, Nos. 2003-2099.]

Case referred to:

*(1) *Stickney* v. *Keeble*, [1915] A.C. 386; 40 Digest 237, *2061*; 84 L.J.Ch. 259; 112 L.T. 664.

Appeal by the defendant from a decision of Vaisey, J., dated May 19, 1944, and reported [1944] 2 All E.R. 31. The facts are fully set out in the judgment of the court delivered by Uthwatt, J.

Pascoe Hayward for the appellant.

Patrick A. Devlin for the respondents.

Uthwatt, J. [delivering the judgment of the court]: By an agreement, dated Apr. 16, 1943, the plaintiffs, James Macara, Ltd., agreed to buy from the defendant, J. D. Barclay, for the sum of £15,500 certain property at Shillingford, consisting of a parcel of land comprising some 11 acres together with the messuage known as Ferry House situate thereon, and other lands held therewith comprising some 38 acres. Under the agreement a deposit of 10 per cent. of the purchase money was payable and was paid to the vendor's agent. The conditions of sale provided that completion was to take place on or before June 24, 1943, and that vacant possession of the property was to be given on completion. By General Condition 20 it was provided as follows:

> If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the court otherwise direct) to the vendor.

An abstract of title was duly delivered and the title was accepted, and, by

May 5, 1943, the form of the instruments of transfer necessary to complete the transaction had been agreed. On June 10, 1943, the competent authority for the purpose of the Defence (General) Regulations served upon the vendor, who was in occupation of the property agreed to be sold, a notice under reg. 51. The notice headed " Emergency Powers (Defence) Act, 1939, Defence (General) Regulations 1939," runs as follows :

> Dear Sir [Address of Premises : The whole of Ferry House, Shillingford, and part of the surrounding grounds and outbuildings to be indicated later.] I have to inform you that the department have come to the conclusion that it is essential, in the national interest, to take possession of the above premises occupied by you. I must, therefore, ask you to take this letter as formal notice that the Commissioner of Works are taking possession of the premises, and you are directed to arrange for the removal of such chattels as are not requisitioned as soon as the Commissioners have indicated the chattels which are requisitioned. An inventory of the requisitioned chattels will be drawn up. If you desire to remove any of the contents of the premises immediately you should communicate with this department. They regret any inconvenience that this may cause you and ask for your co-operation.

The letter is marked with the serial number of the requisition, R.D.G. 494, and except as to the address given to the premises and the serial number and signature, is a printed notice. With the notice there was sent a form of claim for compensation which *inter alia* required the claimant to fill in the date when possession was taken by the competent authority. Upon the back of the notice information was given as to various matters. Instructions were given as to the proper method of filling in the form of claim and as to the address at which communications " with regard to the requisition " might be sent and a statement was made to the effect that the department would be prepared to consider the payment of an advance on account of compensation pending determination of its amount.

The addressee of the notice was asked to sign an acknowledgment of its receipt. It may be stated as a matter of history that the receipt was not formally acknowledged. The notice was accompanied by a covering letter addressed to the vendor which stated that the vendor had promised to accept " the requisition notice " as owner of the property and that in deference to the vendor's wishes a copy was not being sent to the purchaser's solicitors in view of the fact that the vendor accepted the responsibility. It was regretted that it was necessary to " take this action "—i.e., requisition the property—and the vendor was invited to find consolation in the circumstances that the premises were being taken for use by the Women's Land Army.

The vendor informed the purchasers of the receipt of the notice. But thereafter in the correspondence with the department the purchasers were ignored by the vendor. An official of the department concerned was interviewed by the vendor and his agent. This interview was followed up by a letter dated June 17, from the vendor's agent urging the prior claims of other properties for use by the department. The letter asks :

> Whether it is unreasonable to suggest that other premises, already requisitioned but not being used, could be used rather then allowed to remain vacant and then if later Ferry House is also required, it, too, will have to go.

The letter proceeds to point out that the vendor " will suffer unduly in regard to the requisition within a few days of completion." The next day, June 18, the vendor wrote to Major Broad, another officer of the department. In that letter the vendor indeed shows no especial gift for accuracy. The general burden of the letter is that the vendor for reasons stated wants Ferry House for personal occupation. Despite the efforts of the vendor and his agent the notice was not then withdrawn. The purchaser's solicitors wrote to the vendor's solicitors on June 21, 1943, and again to the vendor direct on June 24, stating that as the vendor would be unable to give vacant possession of the property, they rescinded the contract and desired the deposit returned. On June 24 the vendor's solicitors wrote to the purchaser's solicitors taking the view that the vendor could give vacant possession and stating that their client intended to forfeit the deposit and treat the contract at an end by reason of the purchaser's repudiation of his obligations.

No actual entry was ever made on the land pursuant to the notice and the land was ultimately " de-requisitioned " some three months later. The first of these matters is relevant ; the second is not.

In these circumstances the purchaser brought an action for the return of his deposit. The case was tried by VAISEY, J., who, in exercise of the discretion vested in him under the Law of Property Act, 1925, s. 49 (2), for reasons based on the conduct of the vendor, ordered a return of the deposit, although he also expressed the view that the purchaser was justified in law in treating the contract as at an end. It appears to us preferable first to decide in this appeal by the vendor against the decision of VAISEY, J., what was the legal position at the date of completion and then so far as necessary, to consider the construction and effect of the Law of Property Act, 1925, s. 49 (2).

The first question is whether the power to enter into possession conferred by reg. 51 was effectively exercised by the letter of June 10, 1943. The formal question, be it observed, is not whether possession was taken but whether the power to take possession was exercised. It is contended by the vendor first that the power is not effectively exercised unless and until there has been an actual entry upon the land by a competent authority, or, put in another way, that it cannot be exercised by a notice given to the person in occupation. Second, that if this be wrong, the letter of June 10, 1943, upon its true construction, did not amount to a notice that the power was thereby being exercised. If the power was exercised, it cannot be disputed that although actual entry upon the lands was never made the vendor was unable to give vacant possession within the meaning of the contract. Disposition of possession would in that event have passed out of the vendor's control.

Upon the construction of the regulation we are of the opinion that actual entry upon the land is not necessary for the due exercise of the power. The regulations contain no provision determining the manner in which the power to take possession is to be exercised. That is left at large. The method of exercise is, therefore, to be determined by considering the terms of the regulation in light of the object sought to be achieved by it as gathered from its terms. Reading the regulation as a whole, its point and substance appear to be to enable the Crown, where national interests so demand, through the action of the competent authority, to acquire an interest in possession in land—that is to say an immediate interest as distinct from a future interest—carrying with it the rights of user and of authorising user specified in the regulation. Actual occupation by the Crown is not demanded by all the purposes set out in the regulation. What is required is that the immediate interest—an interest in possession—entitling the Crown to control of the land should be at the disposition of the Crown. Actual entry upon the selected land is no doubt one method of exercising the power given by the regulation. But it is not, we think, the only method, for the regulation itself proceeds upon the footing that actual entry is not necessary for the due exercise of the power. The competent authority is authorised by reg. 51 (1), to take possession of any land and to give such directions as appear to them "expedient in connection with the taking of possession of that land." Para. 1 (A) provides that any constable may take steps and use force for securing compliance with directions given to any person requiring him to give up possession of the land. It is, therefore, assumed by the regulation that the power to take possession has been effectively exercised although *de facto* possession has not been obtained. Para. 6 of the regulation goes upon the same basis as para. 1 (A). If actual entry be not necessary, there can, we think, be no doubt that the power is effectively exercised by notice which brings fairly to the notice of persons affected that the power is being exercised. A present intention stated to be exercised and communicated to the persons concerned is sufficient.

Upon the second point taken—namely, whether the notice was a valid notice—stress is laid upon the phrase "we are taking possession of the above premises," and the fact that the description given to the premises is "the whole of Ferry House and Shillingford and part of the surrounding grounds and outbuildings to be specified later," and it is argued, therefore, that the letter as a whole merely discloses an intention to exercise the power *in futuro* and not an exercise of the power presently made. We do not accept this contention. In our view, the letter of June 10, 1943, is directed to setting forth the state of affairs, which the competent authority intends should result from its service, and not to indicating what may happen in the future, and we think the letter would be so read by any ordinary recipient. The requisition number on the letter and the sending of a claim for compensation calling upon the recipient to state *inter alia* the date when possession was taken made the intention clear. Nor is this conclusion displaced by the circumstance that in the notice a portion of the premises to which the letter relates is referred to as a part to be hereafter specified. The notice was necessarily ineffective except as regards Ferry House, but the inclusion of premises not attempted to be defined in the description does not invalidate the notice as respects Ferry House. And we may add that the distinction drawn between Ferry House and the rest of the premises in the description can be relied upon as marking something which is being done from that which it is suggested will hereafter be done. No valid objection can, therefore, be taken to the form of the notice.

In our opinion, therefore, the vendor was not at the date of completion able to give vacant possession of the property pursuant to his bargain.

The second point taken on behalf of the vendor is that assuming that the vendor was unable to give vacant possession on the date fixed for completion, the stipulation as to the date of completion was not of the essence of the contract: that accordingly the purchaser was not entitled forthwith to repudiate the contract; that his proper course in law was to make time the essence of the contract by giving notice to the vendor calling upon him to complete and give vacant possession within a reasonable time and that it was only upon such failure that any right to repudiate could arise. We cannot accept this contention. The position of the parties at all material times was that the vendor was asserting, not that he wanted time in order to enable him to give vacant possession, but that he could then give vacant possession; and that the purchaser was asserting that the vendor could not give vacant possession. Time did not enter in the picture. Why should the purchaser be bound to offer a concession as to the time for completion when the vendor was denying the need for it?

Considerate dealing between the vendor and purchaser in the matter of the contract did not in these circumstances require that any such offer should be made. One may assume that purely as a matter of construction of the contract, completion on the day agreed was not of the essence of the contract. But that does not mean that the agreed date may be disregarded for all purposes. One way of testing whether or not the purchaser, before taking the stand that by reason of the vendor's breach he is discharged from the contract, is bound first to give a notice calling on the vendor to complete within a reasonable time, is by posing the question whether or not under the old practice of a Court of Equity, the court would in the circumstances of the case and in the absence of any such notice grant an injunction restraining the purchaser from taking proceedings at law to recover his deposit. (See *Stickney* v. *Keeble* (1)). In *Stickney* v. *Keeble* (1) it was obvious that no such injunction would have been granted. There was therefore no necessity to serve the suggested notice.

Taking this view of the case, the purchaser was entitled at law to recover the deposit. That concludes the matter, for, whatever be the true construction of the Law of Property Act, 1925, s. 49 (2)—a matter upon which we express no opinion—the jurisdiction of the court under that section cannot in the circumstances of this particular case be invoked to negative the legal right of the purchaser. The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Simmonds, Church Rackham & Co* (for the appellants); *Clifford-Turner & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re VISCOUNT ROTHERMERE. MELLORS BASDEN & CO. *v.* COUTTS & CO.

[CHANCERY DIVISION (Vaisey, J.), **November 13, 1944.**]

Executors—Administration—Protective trust—Annuity free of income tax—Death of covenantor—Estate actuarially insolvent—Valuation of annuity—Bankruptcy Act, 1914 (*c.* 59), *s.* 30 (3), (4)—*Administration of Estates Act,* 1925 (*c.* 23), *First Sched., Part I, para.* 2—*Trustees Act,* 1925 (*c.* 19), *s.* 33 (1) (i) —*Finance Act,* 1941 (*c.* 30), *ss.* 25, 26.

By a deed, dated Mar. 14, 1934, Viscount Rothermere covenanted to pay to the Midland Bank Executor and Trustee Company as trustees such a sum as after deduction of income tax at the rate from time to time current should amount to £62 10*s.* per month and directed the trustees to hold such sums on protective trusts for the benefit of the annuitant. The covenantor died on Nov. 26, 1940. At that date the monthly payments under the annuity were not in arrears. Since that date three payments had been made amounting to £187 10*s.* On June 13, 1941, a decree was made in common form for the administration of the estate of the deceased. It was admitted that the estate was insolvent in the sense that the creditors could not be paid in full, and that the defendant executors had not sufficient capital left to pay by its interest the annuity in full. The annuitant seeking to prove her rights under the deed contended that the proper method to ascertain the value of the annuity was to determine what it would cost to purchase an annuity of corresponding amount, payable during her life, from the Government or from a reputable insurance company :—

Held : (i) since there was no forfeiture of the life interest to which the annuitant was entitled, the annuitant could claim on the same footing as if the life interest had been given to her unconditionally.

(ii) the value of the annuity was to be ascertained actuarially.

(iii) the sum for which the annuitant was entitled to prove was the sum required on Nov. 26, 1940, to purchase an amount of consols sufficient by means of the dividends and by recourse from time to time to capital to provide during the life of a person born in 1903 (the date of birth of the annuitant), the following sums payable on the last day of each calendar month : namely, from Nov. 30, 1940, to Mar. 31, 1941, the sum of £108 13*s.* 11*d.*, and on Apr. 30, 1941, and the last day of each succeeding month the sum of £86 4*s.* 2*d.*, assuming normal expectation of life and no exceptional war risks, and no subsequent variation in the price of consols.

[**EDITORIAL NOTE.** This case considers the proper method of proof in the administration of the deficient estate of a deceased person in respect of a tax-free annuity secured by his covenant. The value is to be ascertained actuarially, and is to be taken at the date of the death, regard being had to all material events which have happened since, such as the provision in the Finance Act, 1941, s. 25, relating to the payment of tax-free annuities.

As to Valuation of Annuities, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669, and Vol. 2, p. 270, para. 351 ; and for Cases, see DIGEST, Vol. 23, pp. 420, 421, Nos. 4913-4926, and Vol. 4, pp. 295-300, Nos. 2762-2808.]

Cases referred to :

(1) *Re Sinclair, Allen* v. *Sinclair, Hodgkins* v. *Sinclair*, [1897] 1 Ch. 921 ; 23 Digest 420, *4917* ; 66 L.J.Ch. 514 ; 76 L.T. 452.

(2) *Re Beecham's Settlement, Johnson* v. *Beecham*, [1934] Ch. 183 ; Digest Supp. ; 103 L.J.Ch. 33 ; 150 L.T. 351.

(3) *Re Blakemore, ex parte Blakemore* (1877), 5 Ch.D. 372 ; 4 Digest 297, *2782* ; 46 L.J.Bcy. 118 ; 36 L.T. 783.

(4) *Re Batey, ex parte Neale* (1880) 14 Ch.D. 579 ; 4 Digest 297, *2778* ; 43 L.T. 264.

(5) *Re Dodds, ex parte Vaughan's Executors* (1890), 25 Q.B. 529 ; *sub nom. Re Dodds, ex parte Pritchard*, 59 L.J.Q.B. 403 ; 4 Digest 299, *2807*.

(6) *Williamson* v. *Thornycroft (John I.) & Co., Ltd.*, [1940] 2 K.B. 658 ; [1940] 4 All E.R. 61 ; Digest Supp.

(7) *Re Hollins, Hollins* v. *Hollins*, [1918] 1 Ch. 503 ; 43 Digest 777, *2175* ; 87 L.J.Ch. 326 ; 118 L.T. 672.

Adjourned Summons taken out by the annuitant raising the following questions : (1) whether the annuity should be valued as at the date of the covenantor's death or at the date of the decree for the administration of his estate ; (2) whether in estimating the value of the annuity, the rate of income tax prevailing at the death of the covenantor should be applied, or the rate prevailing at the date of the decree ; (3) whether the Finance Act, 1941, s. 25, applied. The estate of the deceased was actuarially insolvent. The respondent was a creditor of the estate and a plaintiff in the administration action. The defendant executors were not represented. The facts and arguments are sufficiently set out in the judgment.

Raymond Jennings for the annuitant.

Wilfrid Hunt for the respondent, a creditor of the estate and a plaintiff in the action.

VAISEY, J.: It is surprising that the point which it now falls to me to decide has not, so far as I am aware, been decided before. Put shortly, the question is as to the proper method of proof in the administration of the deficient estate of a deceased person in respect of a tax-free annuity secured by his covenant.

By a deed, dated Mar. 14, 1934, and made between the late Lord Rothermere (hereinafter called "the deceased") of the first part, Midland Bank Executor and Trustee Co., Ltd., of the second part and Mala Rhoda Brand (hereinafter called "the annuitant") of the third part, the deceased obliged himself and his personal representatives to pay to the party of the second part on the last day of every calendar month during the life of the annuitant commencing with Feb. 28, 1934, such a sum as after deduction of income tax at the rate from time to time current should amount to the sum of £62 10*s.* 0*d.*, and he thereby directed the said party of the second part to hold such monthly sums on protective trusts as mentioned in the Trustee Act, 1925, s. 33, for the benefit of the annuitant.

The deceased died on Nov. 26, 1940. At that date there were no arrears of the said monthly sums. Since that date three payments and no more have been made, each of £62 10*s.* 0*d.*, being in respect of the sums due on the last days of the months of Nov., and Dec., 1940, and Jan., 1941, making together £187 10*s.* 0*d.* On June 13, 1941, a decree was made in common form for the administration of the estate of the deceased. Under the enquiry as to the deceased's debts and liabilities the annuitant is entitled to come in and prove in respect of her rights under the deed of Mar. 14, 1934, and has issued this summons in the proceedings for the purpose of ascertaining what is the proper basis of such proof, it being assumed, though I understand that the assumption may possibly be incorrect, that the estate is insolvent in the sense that the creditors will not be paid in full, so that their claims will have to suffer abatement. I deal with the matter, as I am asked to do, upon that assumption. The point has been argued by counsel for the annuitant, and by counsel for the plaintiff, who is another creditor of the estate and is, as such, interested in having the amount of the annuitant's claim reduced to as low a figure as possible. Various methods of computing the claim were suggested to me during the hearing and the results of applying these differ so widely that while the annuitant seeks to prove for as much as £28,516, the plaintiff contends that the proper sum is no more than £12,400. I do not know what sum will be arrived at by that method of computation to be presently explained which seems to me to be the right one.

The annuitant was born on Nov. 29, 1903. It is not suggested that there has been any forfeiture of the life interest to which she is entitled under the Trustee Act, 1925, s. 33 (1) (i), and she is, in my judgment, entitled to claim on the same footing as if the life interest had been given to her unconditionally, that is, without any liability to forfeiture; see *In re Sinclair* (1), and see and distinguish *In re Beecham's Settlement* (2). In other words no abatement in respect of the risk of a possible forfeiture is to be made, which is perhaps surprising when one finds that such apparently imponderable risks as forfeiture by an annuitant contracting a second marriage or ceasing to lead a chaste life have been subjected to pecuniary assessment; see *Ex parte Blakemore* (3), and *Ex parte Neal* (4). Nor, as I understand it, in a case such as the present, is any regard paid to any possible or probable rise or fall in the rate of income tax, which is an imposition annually imposed as it were *de novo* but yet has to be treated for the purpose of such a computation as that which has here to be made as an imposition which is both permanent and static. On the other hand, the court will not treat as an unknown factor anything which has become known or can be ascertained at the time when such a problem as the present receives its solution, that is to say, it will not act on hypotheses when it is able to act on realities. This principle is laid down in such cases as *In re Dodds* (5), and *Williamson* v. *John I. Thorneycroft* (6).

I need only mention by reference the relevant statutory provisions; they are the Bankruptcy Act, 1914, s. 30 (3), (4), and the Administration of Estates Act, 1925, Sched. I, Part I, para. 2.

I feel bound to reject both of the two main suggestions put forward by counsel for my acceptance. On the one hand, I was asked to have regard to what it would cost to purchase an annuity of corresponding amount, payable unconditionally during the life of the annuitant, either from the Government, or from some well-established insurance company, or as a further alternative I was asked to take some average figure based on the various rates of purchase-money charged by an unspecified number of such companies. On the other hand, I was invited to say that the proper figure was what such an annuity would probably fetch if it were sold in the open market, if indeed there can be said to be such a market for such a property. In my judgment, the value must for the present purpose be ascertained actuarially; having said which, I must, of course, go on to lay down, as best I can, the proper process of such ascertainment.

A good deal of argument was addressed to me on the question as to whether the value ought to be fixed at the death of the deceased, or at the date of the administration decree, or at some other and what time. In the view which I take of the matter, the question in the form in which it was argued is hardly relevant, but, as will be seen, I think that while the value should be taken as at the date of the death, regard must none the less be had to all the material events which have since happened or become known, though such events were at that date entirely unpredictable. I propose to make a comprehensive declaration upon the lines which I will now proceed to indicate.

The materials out of which I am about to formulate what I believe to be the proper method of computation are these: (i) the lady's age is known. (ii) In the absence of contrary evidence I shall assume that her expectation of life is normal. (iii) The rate of income tax current at the death of the deceased and thereafter until Apr. 5, 1941, was 8*s.* 6*d.* in the pound. (iv) During that period the sum required to produce the prescribed monthly net sum of £62 10*s.* 0*d.* was a gross monthly sum of £108 13*s.* 11*d.* (v) Since Apr. 5, 1941, the rate of the tax has been 10*s.* in the pound. (vi) That rate would, in the present case, by virtue of the Finance Act, 1941, ss. 25, 27, be reduced to an effective rate of 5*s.* 6*d.* in the pound, and (vii) with the tax at such reduced rate the prescribed monthly net sum of £62 10*s.* 0*d.* would have resulted from a gross monthly payment of £86 4*s.* 2*d.* These figures will, I hope, be checked; if they are the result of inaccurate arithmetic the necessary corrections must be made. Assuming them to be accurate, I have come to the conclusion that the sum for which the annuitant is entitled to prove is the sum arrived at by ascertaining by an actuarial calculation:

> What sum of money would have been required on Nov. 26, 1940, to purchase an amount of consols sufficient by means of the dividends and by recourse from time to time to capital to provide during the residue of the life of a lady born on Nov. 29, 1903, the following sums payable on the last day of every calendar month namely from the last day of November, 1940, to the last day of March, 1941, both dates inclusive the sum of £108 13*s.* 11*d.*, and on the last day of April, 1941, and the last day of every succeeding month during the residue of such life the sum of £86 4*s.* 2*d.*, it being assumed that the lady has a normal expectation of life no regard being had to exceptional war risks and no allowance being made either (*a*) for any variation in the price of consols subsequent to Nov. 26, 1940, or (*b*) for brokerage or other expenses incident to realisations of capital?

The authority for taking consols as the basis of investment is *In re Hollins* (7). The purchase of consols is, of course, purely notional, so that allowances for brokerages and so forth would appear to be out of place. I hope that the basis of calculation which I have tried to indicate will be clear to those by whom the computation will have to be made, and that I have supplied all the necessary data. If there is any difficulty the matter can be mentioned to me again before the order is drawn up, and the order itself had better reserve liberty to apply. I should have said that though the sum of £187 10*s.* 0*d.* referred to at the beginning of this judgment does not come into the proposed calculation at all, it must be treated as a prepayment on account of whatever amount the annuitant is entitled to receive in respect of her claim in accordance with this judgment; or, to put the matter in another way, she must bring that sum back into the estate before she is entitled to take anything out of it.

Order accordingly.

Solicitors: *Gordon, Dadds & Co.* (for the annuitant); *Roney & Co.* (for the respondent, a creditor of the estate, and a plaintiff in the action).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

Re BAYNES, PUBLIC TRUSTEE *v.* PROVOST, MAGISTRATES AND COUNCILLORS OF THE BURGH OF LEVEN AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), **November 22, 1944.**]

Charities—Validity—Bequest to the "Common Good Fund of the Leven Town Council"—Meaning of the "Common Good Fund"—Asset held under control of borough authorities for the benefit of borough and its inhabitants—Freedom of town council to spend income and capital—Perpetuity—Benefit of particular class and specified public purpose—Valid gift.

By his will, dated Oct. 7, 1938, the testator appointed the Public Trustee to be the executor and trustee thereof, and, after leaving various legacies, he devised and bequeathed his residuary estate to the trustee, with a trust to divide it in equal shares among ten named beneficiaries, nine of which were indubitably charities. As to the remaining one-tenth share the direction was to hold it for "the Common Good Fund of the Leven Town Council, Leven, Fife." It was contended that the gift, since it constituted an endowment fund, was void for perpetuity; and it was further contended that the gift was void for uncertainty since the town council was bound neither to devote the funds to charitable objects nor to an ascertainable class of persons:—

HELD: (i) since it was not of the essence of the Common Good Fund that it should continue indefinitely in being and its capital was available for expenditure, the conditions on which the fund was held did not involve an illegal perpetuity.

(ii) the Common Good Fund was an asset held under the control of the borough authorities for the benefit of the borough or its inhabitants, and a gift to the fund was, accordingly, for the benefit of a particular class, and, therefore, for a charitable purpose.

Re Smith, Public Trustee v. *Smith* (3) *followed.*

[**EDITORIAL NOTE.** This case involves consideration of the ancient Scottish institution known as the "Common Good" of a borough. VAISEY, J., holds, with some hesitation, that the conditions on which the fund are held do not constitute an illegal perpetuity in the sense of English law, but he reaches his decision in favour of the validity of the bequest by applying the principle of *Re Smith* (3) where a gift was held to be valid inasmuch as it was for the benefit of a particular class and, therefore, for a specified public purpose. The class in the case under consideration consists of the inhabitants of the borough.

AS TO GIFTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168; and FOR CASES, see DIGEST, Vol. 8, pp. 255-257, Nos. 161-185.]

Cases referred to:

(1) *Houston* v. *Burns*, [1918] A.C. 337; 8 Digest 297, *739*; 87 L.J.P.C. 99; 118 L.T. 462.
(2) *Blair* v. *Duncan*, [1902] A.C. 37; 8 Digest 295, *721*; 71 L.J.P.C. 22; 86 L.T. 157.
(3) *Re Smith, Public Trustee* v. *Smith*, [1932] 1 Ch. 153; Digest Supp.; 100 L.J.Ch. 409; 146 L.T. 145.
(4) *Nightingale* v. *Goulburn* (1847), 5 Hare 484; *on appeal* (1848), 2 Ch. 594; 8 Digest 259, *210*; 17 L.J.Ch. 296.
(5) *Mitford* v. *Reynolds* (1842), 1 Ph. 185; 8 Digest 256, *179*; 12 L.J.Ch. 40; *subsequent proceedings* (1846) 1 Ph. 706; (1848) 16 Sim. 105.
(6) *West* v. *Knight* (1669), 1 Cas. in Ch. 134; 8 Digest 255, *163*.
(7) *A.-G.* v. *Lonsdale* (*Earl*) (1827), 1 Sim. 105; 8 Digest 312, *932*.
(8) *Goodman* v. *Saltash Corpn.* (1882), 7 App.Cas. 633; 8 Digest 327, *1099*; 52 L.J.Q.B. 193; 48 L.T. 239.
(9) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 8 Digest 241, *1*; 61 L.J.Q.B. 265; 65 L.T. 621.

ADJOURNED SUMMONS to determine, *inter alia*, whether upon the true construction of the will of Clive Douglas Baynes, who died on Dec. 28, 1940, a devise and bequest of an equal one-tenth share of the testator's residuary estate to the Common Good Fund of the Leven Town Council, Leven, Fife, constituted a valid gift. The facts and arguments are fully set out in the judgment.

Pascoe Hayward for the plaintiff.

R. F. Roxburgh, K.C., and *Wilfrid Hunt* for the first defendants

C. L. Fawell for the second defendants, the next-of-kin.
H. O. Danckwerts for the Attorney-General.

Vaisey, J.: The testator in this case, Clive Douglas Baynes, who lived and died at Brockenhurst in the county of Southampton, made his will on Oct. 7, 1938. He appointed the Public Trustee to be the executor and trustee of such will, and after leaving various legacies he gave devised and bequeathed all his real and personal estate whatsoever and wheresoever to his trustee, with a trust to divide the same in equal shares among what he describes as "the following beneficiaries," in each case in memory of his late wife, whom he names. The beneficiaries in question are, I think, ten in number, and every one of them is indubitably a charity with the exception of the one to which this present summons relates; that one is described in the will as "the Common Good Fund of the Leven Town Council, Leven, Fife."

The testator died on Dec. 28, 1940, and his will was duly proved on Apr. 18, 1941. The value of his residuary estate is said to be something over £12,000, so that the share as to which this question arises, is of the amount or value of some £1,200. In order to ascertain the validity of the gift, it is, of course, necessary to know something about that which the will describes as the Common Good Fund of a named town council in Scotland, and a good deal of evidence was filed upon this application, including in particular an affidavit of Robert Henry Sherwood Calver, who is a member of the Faculty of Advocates in Scotland and an Advocate-Deputy, has practised as an advocate in the Scottish courts for a considerable number of years, and is able to depose to his own sufficient acquaintance with Scots law. In addition to his evidence, we have an affidavit by George McIntosh, who is the town clerk of the borough of Leven.

The Common Good Fund or the Common Good of a Borough in Scotland, is an institution of great antiquity, and a complete knowledge of what it is can only be acquired by some historical research into what it was, and by a consideration of certain statutes, of which the principal one is the Town Councils (Scotland) Act, 1900. Mr. Calver has attended here to give oral evidence in the matter under a direction which I felt constrained to give owing to the difficulty of understanding the position from the evidence on the file alone; and there is no doubt in my mind that the very curious and, in many respects, anomalous condition of our law in regard to such matters as perpetuity, more especially charity, is responsible for a confusion which I believe to be inevitable when lawyers who are conversant with the judicial system of the northern kingdom attempt to bring their minds to the considerations which, on those subjects, are so familiar in these courts.

I have considered the evidence, both that which is contained in the affidavits and the supplementary information which Mr. Calver has given, and I think I have a reasonably clear apprehension of what the Common Good means in Scotland. I am satisfied that it is a fund, or possibly a collection of properties, or perhaps to put it in another way, it is an asset which is held under the control of the municipal authorities of the borough in question for the benefit of that borough or of its inhabitants. I think that we have here the counterpart of a trust for the benefit of the inhabitants of a defined area within the kingdom of Scotland. I was not sure whether or not the trust in question involves a perpetuity, but I incline to think that the fact is as stated in a letter from Mr. McIntosh, the town clerk, dated May 22, 1943, that:

> . . . payments can be made from the corpus of a Common Good Fund, but as a matter of fact they very seldom are . . .

It seems to me that much of the confusion which appeared from Mr. Calver's oral evidence and from the questions which he was endeavouring to answer, is due to the fact that the Common Good Fund is normally kept intact. But I am very far from being satisfied that it is necessarily kept intact, and that, just as it is perfectly open to an ordinary individual to spend his capital as income, so in the case of a Common Good Fund, it is normally not depleted in regard to its capital content, and indeed that under ordinary circumstances it would be unreasonable if it were so depleted; but I am not convinced that it is of the essence of a Common Good Fund that it should continue indefinitely in being. I am rather disposed to the view that in theory, at any rate, in contra-distinction to practice, it is as much available for expenditure, which would destroy its existence, as are the savings of an ordinary citizen, who would probably describe them as his capital, but without, of course, there being any legal obligation upon him not to spend them as income. I, therefore, think on the whole, taking this evidence as a whole, and coming to a conclusion as best I can, that the conditions on which a Common Good Fund are held are not such as to involve what in English law would be an illegal perpetuity.

But, however that may be, I think that this case may really fall to be decided upon the other branch of the arguments which were addressed to me, which were directed to the question of whether or no a Common Good Fund is charitable in character. On this particular point, the law which has to be administered in this court is, I think, admitted to be in a state of very great confusion, and the particular obscurity in which it lies is set out conveniently in Tudor on Charities, 5th Edn., pp. 44-46. That text-book points out that :

> . . . trusts for the benefit of a particular class of the inhabitants of a place are charitable, a bequest for the native inhabitants of a town in India is a charity so, too is a trust for the freeman of a borough, or for the free inhabitants of certain tenements in a borough.

The writer then observes that "it is hard to avoid the conclusion that the foregoing cases," that is to say, the cases upon which the propositions which I have just mentioned are based, "are anomalous." Attention is then drawn in the text book to the case of *Houston* v. *Burns* (1), where the House of Lords decided that "a gift for such public, benevolent, or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood," was void, following, I think, the previous case of *Blair* v. *Duncan* (2), where a bequest "for such charitable purposes as my trustee thinks proper" was void for uncertainty, "since the trustee was bound neither to devote the funds to charitable objects nor to an ascertainable class of persons." It is then pointed out, at p. 46, that in the view of the writer of the text book :

> . . . it is very regrettable that in *Houston* v. *Burns* (1) these cases [which relate to the benefit of the inhabitants of a particular place] were not noticed, and the larger question of how the doctrine that gifts for purposes other than charitable in specified places were invalid could be reconciled with the authorities which establish that gifts for the general benefit of particular places are charitable was not dealt with, so that far from simplifying this complicated and unsatisfactory part of the law of charities the decision has only served to make it more difficult to understand.

That text book from which I have quoted was published in the year 1929, and by a process of subtle reasoning, for which I can only express my humble admiration, the Court of Appeal, in the case of *In re Smith* (3), contrived to reconcile the two lines of authority. The court there followed a case of *Nightingale* v. *Goulburn* (4), where the court had to consider the validity of a bequest to the :

> . . . Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain.

In that case Wigram, V.-C., after reviewing the authorities, says, at p. 491 :

> This is not simply a bequest to trustees for purposes of a general and wholly unrestricted nature, but for the benefit and advantage, that is, for the good of a particular class—a large class, it is true, but still a class coming within some defined limits, and which is within the decision in *Mitford* v. *Reynolds* (5). If a bequest were made to a trustee to be appropriated, at his discretion, for the benefit and advantage of A.B., that would in equity be a bequest to A.B. The British public, in this case, stand in the situation of A.B. in the case I have supposed ; but it has not been argued that that difference alone was fatal to the bequest.

It was certainly a large class of persons, being the whole of the inhabitants of Great Britain, but Lawrence, L.J., in the case of *In re Smith* (3), says this, at p. 171 :

> The judgments, both of Wigram, V.-C., and of Lord Cottenham, were expressly based upon the earlier cases [that is, the judgments in *Nightingale* v. *Goulburn* (4)] in which bequest to parishes, towns, counties and provinces had been held good charitable bequests, and particularly upon the decisions in *West* v. *Knight* (6), *A.-G.* v. *Lord Lonsdale* (7), and *Mitford* v. *Reynolds* (5), none of which in any way depended upon the particular office occupied by the person selected by the testator as his trustee. To this line of cases can now be added *Goodman* v. *Mayor of Saltash* (8) [a decision of the House of Lords]. The effect of the decision in *Nightingale* v. *Goulburn* (4) is that a bequest to a trustee for the benefit of Great Britain is not simply a bequest to the trustee for public purposes generally, which would be void for uncertainty,

> but is a bequest for the benefit of a particular class, albeit a large class, coming within some definite limits and is, therefore, a bequest for a specified public purpose and, as such, a valid charitable bequest. The decision in *Nightingale* v. *Goulburn* (4), so far as I know, has never been questioned, and in *Pemsel's* case (9) Lord Halsbury refers to it without suggesting any doubt as to its correctness.

At the end of his judgment the Lord Justice says this, at p. 173:

> The conclusion I have arrived at, after considering all the authorities to which our attention has been drawn, is that the present case [which was the case in which the testator gave his property unto my country England for—own use and benefit absolutely]—falls within the principle of the cases in which the gift is for the benefit of a particular class and, therefore, for a specified public purpose, and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature.

Romer, L.J., gave judgment to the same effect, and the Lord Justice referred with approval to *Nightingale* v. *Goulburn* (4), and all the other cases down to *Goodman* v. *Mayor of Saltash* (8), to which I have already made allusion. I suppose I must now say that *Houston* v. *Burns* (1) not only can be reconciled but has been reconciled with those authorities, and I have come to the conclusion that this case is a case in which this Common Good Fund exists for the benefit of the inhabitants of the Police Burgh of Leven. Therefore, even assuming that there is a perpetuity involved here, as to which I am by no means sure, I have come to the conclusion on the authority in particular of *In re Smith* (3) that the beneficiary in question as to which this question arises partakes of the nature of a charity within the specialised meaning of that word as it is used in these courts.

I shall, therefore, declare, in answer to the first question in the summons: that upon the true construction of the said will the devise and bequest of an equal one-tenth share of the testator's residuary estate to the Common Good Fund of the Leven Town Council, Leven, Fife, is a valid gift. I prefer not to say a valid charitable gift, I say a valid gift.

In answer to the second question, which asks to whom the plaintiff may properly pay the share, I think, having regard to Mr. Calver's evidence, that it should be paid to such officer or officers of the Burgh as may appear to have been duly authorised to receive and give a discharge for the same by a resolution of the Town Council. I shall not direct a scheme. I shall direct that the costs of all parties to this application as between solicitor and client shall be raised and paid out of the estate in due course of administration.

Order accordingly.

Solicitors: *Coward, Chance & Co.* (for the plaintiff, and the second defendants, the next of kin); *Jacques & Co.* (for the first defendants); *The Treasury Solicitor* (for the Attorney-General).

[*Reported by* A. E. Black, Esq., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF WILLESDEN AND MUNICIPAL MUTUAL INSURANCE, LTD.

[King's Bench Division (Atkinson, J.), **October 27, 1944.**]

Insurance—Fire insurance—Insurance against damage by explosion of boilers used for domestic purposes only—Boiler used for heating building—Certain rooms in building used for business purposes—"Domestic purposes only."

The claimants in an arbitration were the owners of a building used for the purposes of their business, the supply of electricity. The building consisted of offices, showrooms, canteen and a store-room, and was centrally heated by a boiler in the basement, the heat to the boiler being supplied by electricity: a large cylinder contained the water for the heating and was connected with a small cylinder in which the water was electrically heated, the heated water passing to the large cylinder and cold water from the large cylinder passing at the same time into the small cylinder. An explosion occurred in the large cylinder causing damage to the building. The claimants were the holders of an insurance policy issued by the respondents against damage by fire and damage by explosion of boilers used for domestic purposes only. It was contended by the respondents that (i) the large cylinder was not part of the boiler and (ii) that the boiler was not used for domestic purposes only, since some of the rooms heated were used for business purposes :—

HELD : (i) the question being one of fact, the court must accept the finding by the arbitrator, on the evidence before him, that the large cylinder was part of the boiler.

(ii) since the boiler was only used for heating water to heat the building, it was used for domestic purposes only. The fact that a business was carried on in the building was immaterial, the material consideration being what the boiler was used for and not what the premises were used for.

[**EDITORIAL NOTE.** This case contains a useful definition of "domestic purposes" in relation to the use of water. The case arose on a policy of insurance, but the principle of the decided case on water supply is applied. The court holds that if the purpose for which the water is being used is one for which according to the ordinary habits of domestic life people require water in their houses, it is a domestic purpose. Whether a business is carried on, and of what nature, is therefore held to be immaterial ; it is a question of what the boiler is used for, not what the premises are used for.

AS TO "DOMESTIC PURPOSES," see HALSBURY, Hailsham Edn., Vol. 33, Water Supply, pp. 451-453, para. 742 ; and FOR CASES, see DIGEST, Vol. 24, p. 905, No. 50, and Vol. 43, pp. 1080-1082, Nos. 147-164.

Cases referred to :

(1) *Barnard Castle Urban Council* v. *Wilson*, [1902] 2 Ch. 746 ; 43 Digest 1080, *147* ; 71 L.J.Ch. 825 ; 87 L.T. 279.

(2) *South-West Suburban Water Co.* v. *St. Marylebone Guardians*, [1904] 2 K.B. 174 ; 43 Digest 1078, *139* ; 73 L.J.K.B. 347.

(3) *Metropolitan Water Board* v. *Avery*, [1914] A.C. 118 ; 43 Digest 1080, *150* ; 83 L.J.K.B. 178 ; 109 L.T. 762 ; *affg.*, [1914] 1 K.B. 221 ; *affg.*, [1913] 2 K.B. 257.

(4) *Smith* v. *Muller*, [1894] 1 Q.B. 192 ; 24 Digest 905, *50* ; 70 L.T. 170.

(5) *Rolls* v. *Miller* (1884), 27 Ch.D. 71 ; 43 Digest 6, *10* ; 53 L.J.Ch. 682 ; 50 L.T. 597.

(6) *South Suburban Gas Co.* v. *Metropolitan Water Board*, [1909] 2 Ch. 666 ; 43 Digest 1080, *149* ; 79 L.J.Ch. 27 ; 101 L.T. 560.

SPECIAL CASE stated for the opinion of the King's Bench Division of the High Court of Justice by the official referee sitting as arbitrator in a claim on a policy of insurance. The facts are fully stated in the judgment.

F. W. Beney, K.C., and *R. T. Monier-Williams* for the claimants.

H. D. Samuels, K.C., and *John H. Bassett* for the respondents.

ATKINSON, J. : This case raises two questions concerning the meaning of a policy of insurance against damage by fire and damage by explosion of boilers used for domestic purposes only. The claimants, who are the Willesden local authority, the Mayor, Aldermen and Burgesses of the Borough of Willesden, own Electric House. It is a building of some distinction ; there are, I think, three floors, the ground floor, the first floor, and a small second floor. On the ground floor there are the offices, a very big show-room and what is called a lighting demonstration room. On the second floor there is a very large general office and small rooms around, a canteen, chief clerk's room, commercial assistant's room, chief engineer's room, and so on. One of the rooms on the ground floor, the one which has led to so much debate, was used as a store-room. There are many purposes for which the various rooms are used. The building is heated by a system of radiators through which hot water is circulated and the water is heated by a boiler in the basement. The heat is supplied to the boiler by electricity.

Of the two questions raised the first is whether that part of this installation, in which there was in fact an explosion which did considerable damage and in respect of which a claim under the policy was made, was or was not part of the boiler. It is said by the claimants that it was, it is said by the respondents that it was not. The arbitrator regarded it as a question of fact and on the evidence decided that it was part of the boiler. The other question is this : was the boiler used for domestic purposes only ? It has to be remembered that the mere fact that the boiler may be used for domestic purposes is not enough ; it has to be used for domestic purposes only. Here the arbitrator has taken the view that in so far as the store-room was used as a store, and I think in the case of the demonstration room, part of the use of the heating of these two rooms cannot be regarded as a domestic use and, therefore, he has found for the respondents on that issue, subject to the opinion of the court.

To deal with the boiler point first, it is rather difficult to give a scientific description of the plant, and I do not think it is necessary, but I think I can state enough to raise the point. There is a small chamber, as I will call it, to use a neutral word, holding 27 gallons of water which is heated by electricity; the power is switched on and by electrodes, just as in an electric kettle, the heat is communicated to this small volume of water. Of course, that would be A perfectly useless in itself when the amount of water which is required to be heated is 4,000 gallons, but close to it there is a very large container, again to use a neutral term, which is capable of holding and which did hold the 4,000 gallons of water which were required. The position as far as I can see it is this: everybody knows that hot water tends to rise and here the water that is heated passes up a pipe from the heating chamber to the cylinder, the colder water falls to the bottom, and then to the small chamber. The two chambers work B hand in hand, the actual heating of this very small quantity taking place in the small chamber and the big chamber constantly receiving the heated water and sending back cold water to take its place, so that between the two (the heating was done at night time) they get their 4,000 gallons of heated water contained almost entirely by the larger of the two containers. The explosion was in the large cylinder and the question is whether that is part of the boiler. There C was evidence given about it by two experts on each side. The arbitrator accepted the evidence of the witnesses called by the claimants and said:

> In so far as it is a question of fact, I find it is part of the boiler.

It seems to me that it is a question of fact and that I must answer that question in the same way as the arbitrator did. He has treated it as a fact and has accepted the claimant's evidence and I cannot interfere with his view about it. D

The other question, as to whether this boiler was being used for domestic purposes only is not a question of fact. It depends on a set of facts, but once the facts have been ascertained then it quite clearly becomes a question of law whether the facts so ascertained show that this boiler was being used for domestic purposes only or not. As I have said, the various rooms were used for a multitude of purposes, all of which were incidental to the trade or industry carried on by the applicants, i.e., to supply electricity to people who require it, and that E necessitates the employing of clerks, storekeepers and all sorts of people. They had a room where demonstrations and lectures were given; they had clerks there entering up their books, and people would come to the demonstration room to explain the working of cookers and the like. These are all purposes which are incidental to the business carried on by the claimants. The only purpose for which this boiler was used was for heating water which was to travel F into and circulate through the radiators. The only purpose for which that water was used was the heating of the building. There is a finding in the case that it was used for no other purpose. No water was drawn off at any point for any other purpose whatever. A number of cases have been referred to—I shall have to refer to them shortly a little later—but there are one or two propositions which seem to me to be firmly established, and the first is that the material consideration is what the boiler is used for, not what the premises G are used for. The nature of the business carried on, or whether there is a business carried on or not, is immaterial; you have to consider what the boiler is used for, and having ascertained what the boiler is used for, you have to consider what was the purpose for which the water was used. If the purpose is one for which, according to the ordinary habits of domestic life, people require water in their houses, the purpose is a domestic purpose. The authority for that will be found in *Barnard Castle Urban Council* v. *Wilson* (1), at p. 756, H in *South-West Suburban Water Co.* v. *St. Marylebone Guardians* (2), at p. 180, and in the judgment of the Divisional Court in *Metropolitan Water Board* v. *Avery* (3), at pp. 264, 265. The definition that I extract from these cases is that, if the purpose for which the water is being used is one for which according to the ordinary habits of domestic life people require water in their houses, it is a domestic purpose.

In this case the boiler was used to provide hot water to a system of central heating, that is for heating a series of radiators in the building. Indisputably such a purpose is one for which according to the ordinary habits of domestic life people require water in their houses. Such a purpose is, therefore, a domestic purpose. As I understand the law, it does not make the slightest difference to what use the rooms are put which are heated in this way. It does not add to the risk; no more water is used or has to be heated because clerks sit in a room instead of the owner of a private residence. If water is drawn off for industrial purposes I concede that might be so, but here in this case it is perfectly plain that it ~~does not make the slightest difference to the boiler, to the water~~ or to the insurers what use is made of the rooms which are being heated. Now if that is the law, if the cases support those propositions, it seems to me that this case answers itself. It is conceded that in the offices where the clerks are working the boiler is being used for a domestic purpose. Apparently there is only a little heating given to the show-room but there is some. It is then said that there is some difference between the demonstration room and the store-room on the one hand and the office on the other. For my part I cannot see any difference. The clerks doing their work in the offices are carrying on a business; their rooms are being used for a business purpose. If that is conceded, then I think it is conceded that the fact that the rooms are used for a business purpose makes no difference. Why should the store-room be treated differently? It is being used for a business purpose; the electric stores and other articles are kept in the store-room and there is an employee there all the time to make entries as the things come in and go out. That is a business purpose but not a business purpose in any way different from that for which the other rooms are used; they are all part and parcel of the carrying on of the business. If the purpose to which those rooms are put is immaterial, it seems to me that one is driven back to the position that the boiler is used simply and solely for producing hot water to heat rooms and that is a domestic use. Now is that the law? *Smith* v. *Muller* (4) is almost conclusive upon the point. The headnote there is:

> A boiler used to heat offices or business premises upon which the owner does not reside, and also to supply warm water for the purpose of cleaning the offices and for the household purposes of a resident caretaker, is within the exception in the Boiler Explosions Act, 1882, s. 4, and the Boiler Explosions Act, 1890, s. 2, which except from the operation of those Acts boilers "used exclusively for domestic purposes."

The court took the view that the whole of that user was for domestic purposes. There are only a few lines in the judgment of CHARLES, J., with which WRIGHT, J., agreed, to which I want to refer. He said, at p. 195:

> The test made applicable by the statute is not the character of the persons using the boiler, nor whether they occupy or reside upon the premises, but the use made of the boiler.

That means that the test is what the boiler is doing, not what the people are doing in the rooms or the premises. The boiler was simply heating water for a domestic purpose.

Another case where the same principle is laid down is *South-West Suburban Water Co.* v. *St. Marylebone Guardians* (2). I only want to refer to two passages in the judgment of BUCKLEY, J. At p. 180, he said:

> I agree that these premises are used to carry on a buisness. If I were to define the business carried on I should say that it is the business of providing for, maintaining, and training pauper children, and that this is none the less a business because it is carried on, not for profit, but, on the contrary, at a large expense. It was held in *Rolls* v. *Miller* (5) that a home for working girls is a business. This, no doubt, was upon a covenant which involved some considerations not relevant here, but the reasoning in that case is, I think, applicable to the present case. But, although that which is carried on upon the premises is a business, it is, in my opinion, perfectly consistent that in business premises water may be wanted for domestic purposes. The question is what is the character of the purpose, not what is the character of the place of user.

I cannot see that one could have anything very much clearer than that. At p. 182 he went through the various users in that case and said:

> The next head (*e*) relates to three large Lancashire boilers, which are used for three purposes. First for heating water for warming the buildings by circulation. This seems to me to be a domestic purpose.

Similarly, in *South Suburban Gas Co.* v. *Metropolitan Water Board* (6), NEVILLE, J., said, at p. 674:

> It seems to me that those decisions show that the inquiry is, not whether the premises

are used for business purposes, but whether the water is used for business purposes or for domestic purposes, and that the uses in the present case are domestic.

You have to confine your attention to what the water is used for, and if it is used for domestic purposes there is an end of the case.

Again, in *Metropolitan Water Board* v. *Avery* (3), Buckley, L.J. (in the Court of Appeal) referring to the earlier cases said, at p. 239:

> Similarly the test is not whether the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic.

That was a very strong case; it was a public-house case where water was used in large quantities, but those words are very clear: it is not whether the water is used or consumed in the course of the trade, but whether the user of the water is in its nature domestic. The only user of this water, whether in the store-room or anywhere else, was domestic. Then Buckley, L.J., continues:

> The contention of the plaintiffs really seeks to establish that every trade purpose, even though it is domestic in its nature, is a non-domestic purpose. In my opinion that is erroneous. It must first be ascertained whether the user of the water is or is not domestic, and if it is found that it is domestic, the result is not altered by the fact that an increased demand for water is created by reason of the existence of a trade.

This case is *a fortiori*. There, there was an increased use of the water because a trade was carried on. It made no difference here, there was no increase in the use of the water or the amount of heat required because a business was carried on on the premises. That case went to the House of Lords and everything that had been said on this point was approved in the opinions of their Lordships. The Earl of Halsbury's opinion was very short, then came Lord Dunedin and he said, at p. 124:

> Either the criterion is to see whether the purpose in connection with the trade is domestic or non-domestic in itself, the criterion adopted by the courts below and very clearly expressed in the judgments of Bray, J., and Buckley, L.J., or to say, as the appellants contend, that every use of water, however domestic in its nature, that appears as a step, however insignificant, in a trade operation is use of water for a trade and therefore non-domestic.

Now that is exactly the contention of counsel for the respondents here. He cannot deny that the purpose for which the water is used is primarily domestic and is heating a building, but he contends that this heating, however domestic in its nature, is part of a trade operation. Again at p. 125, Lord Dunedin quotes with approval what Bray, J., had said:

> If the water is used for a purpose which is common to all domestic establishments it is none the less used for domestic purposes because it is ancillary to a trade, manufacture, or business.

These cases establish beyond all question what the test is. It is that the use or purpose to which the water is put, the heating of the building, is clearly a domestic use and it does not cease to be a domestic use merely because a business is carried on on the premises. In this case the business that was carried on did not affect the water one iota and I should have thought it was a very clear case. The official referee sitting as arbitrator took a different view, but his view is not consistent because if he was right as to the demonstration room or the store-room he would be wrong in the views he expressed as to all the rest. If the fact that a business is carried on takes it out of the policy, then it is clear that all the building is taken out of it. As I say, he had not quite appreciated how far the cases go. At any rate, it is my duty to express my own view, although I always disagree with an arbitrator, particularly this arbitrator, with considerable diffidence, but, in my view, that question must be answered in favour of the claimants. I think that this boiler was used for domestic purposes only and, therefore, their claim succeeds.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. T. Pirie*, Town Clerk, Willesden (for the claimants); *William Charles Crocker* (for the respondents).

[*Reported by* P. J. Johnson, Esq., *Barrister-at-Law.*]

END OF VOLUME 2.